1-07

OAL DKT. NO. EDU 10964-06
AGENCY DKT. NO. 396-10/06

C.S. AND W.S., ON BEHALF OF MINOR CHILD, D.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/03/07

Date of Mailing: 1/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10964-06

AGENCY REF. NO.396-10/06

C.S., AND W.S. ON BEHALF OF MINOR CHILD D.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN, COUNTY,

Respondent.

George Holland, Esq., for petitioner (Lentz and Gengaro, attorneys)

Toni Belford Damiano, Esq., for respondent

Record Closed: December 5, 2006 Decided: December 7, 2006

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

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on November 3, 2006 for determination as a contested case. A hearing was scheduled for November 16, 2006.

Just prior to the date of the hearing, the parties were able to resolve the matter and submitted the attached Settlement Agreement and Mutual Release. On December 5, 2006, the undersigned received the attached Board Resolution approving the Settlement Agreement and Mutual Release. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

December 7, 2006
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

12-12-06
DATE

M. Kathleen Duncan/ok
DEPARTMENT OF EDUCATION

DEC 14 2006
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

LENTZ & GENGARO
443 Northfield Avenue
West Orange, New Jersey 07052
(973) 669-8900
By: George M. Holland, Esq.
Attorneys for Petitioners, C.S. and W.S., on behalf of their minor child, D.S.

RECEIVED
2006 DEC -5 A 10:00
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

C.S. and W.S., on behalf of their minor child, D.S.,

Petitioners,

v.

GARFIELD BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

BUREAU OF CONTROVERSIES AND DISPUTES

Agency Reference No.: 396-10/06
OAL Docket No.: EDVOS-10964-2006N

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

WHEREAS, D.S. is a 7 year-old girl (Date of Birth: 10/18/99) classified as eligible for special education and related services in accordance with the Individuals with Disabilities Education Act, 20 U.S.C.A. §1401, et seq., and the New Jersey Regulations pertaining to same, N.J.A.C. 6A:14-1.1, et seq. (collectively referred to as the "IDEA"); and

WHEREAS, the Garfield Board of Education (the "Board") is the "Local Educational Authority" with responsibility for providing a free appropriate public education to D.S.; and

WHEREAS, a dispute arose between the parties over D.S.'s domicile within the school district operated by the Board, resulting in the Board ceasing to fund the costs of tuition and transportation for her to attend the out-of-district placement the Board's Child Study Team had placed her, New Beginnings, located in Fairfield, New Jersey, and the Petitioners, Christian and Wanda Savinovich (the "Parents"), having to privately fund the costs of that placement; and

WHEREAS, the parties in good faith have negotiated concerning this matter and have a desire to settle this matter in an amicable way enter into this Settlement Agreement and Release (this "Agreement") in order to reach a compromise in the best interest of the parties.

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

1. Effective immediately upon the Board executing this Agreement, the Board shall accept registration of D.S. in its school district and retroactively fund the costs of D.S.'s program at New Beginnings from and including November 6, 2006 going forward per her most recent Individualized Education Program ("IEP") for the 2006-2007 school year.

2. In consideration for the terms and conditions of this Agreement, the Parents shall waive any and all claims and/or causes of action against the Board that could be raised through and including November 5, 2006.

3. In consideration for the terms and conditions of this Agreement, the Board shall waive any and all claims and/or causes of action that could be raised against the Parents or D.S. through and including November 5, 2006.

4. In consideration for the terms and conditions of this Agreement, the Board shall agree to be responsible for the costs of sending D.S. to New Beginnings through and including October 13, 2006, and the Parents shall agree to be responsible for the costs of sending D.S. to New Beginnings from and including October 14, 2006 to and including November 5, 2006.

5. All terms and conditions of this Agreement shall remain confidential to the maximum extent permitted by law. Nothing, however, shall preclude anyone from disclosing the terms and conditions of this Agreement for purposes of enforce or explain said terms and conditions to a Court of Law or government entity.

6. This Agreement represents the entire understanding between the parties and shall not be modified in whole or in part except as a mutual subsequent written and signed Agreement. It has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity for the Parties to consult with legal counsel of their choosing and option. The parties did consult with said legal counsel and acknowledge that they were represented by competent legal counsel, that they all understand the contents of this Settlement Agreement and Release, and that each party hereto shall be responsible for bearing the costs of their own attorneys' fees and costs and all other costs. It is also agreed that neither party is a "prevailing party" for any purpose through and including November 5, 2006.

7. This Agreement shall be governed by the IDEA and the laws of the State of New Jersey and constitutes a mutual release of all claims that were or could have been raised by both parties under any Federal or State Statutes or common law, as set forth herein, including any claims for compensatory education or monetary damages. It is not an admission by either party of any liability, or the violation of any law, statute, or regulation, nor shall it be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms. It shall be incorporated into a Final Order by the Administrative Law Judge assigned to this matter.

8. A formal Board Resolution approving this Agreement shall be submitted by the Board to the Administrative Law Judge assigned to this matter so that His Honor can incorporate this Agreement into an Initial Decision.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below:

Date: 12/4/2006

Christian Savinovich

Date: 12/4/2006

Wanda Savinovich

Date: Dec. 1, 2006

On behalf of Garfield Board of Education

Z:\WP51DATA\S-U\Savinovich\Settlementagreement.doc

11-205-06 **Be It Resolved,** that the Garfield Board of Education, upon the recommendation of the Superintendent of Schools, accepts and approves the terms and conditions as outlined in the Settlement Agreement and Mutual Release between Petitioners, C.S. and W.S. on behalf of their minor child D.S., and respondent, Garfield Board of Education.

MOTION: Mr. Benanti	SECOND: Mr. Damato		
	YES	NO	ABSTAIN
Mrs. Aloia (Rosemary)	X		
Ms. Visotcky (Lou Ann)	X		
Mr. Damato (Anthony)	X		
Dr. Conte (Kenneth)	X		
Mr. Benanti (Salvatore)	X		
Mr. Hicks (Heath)	X		
Mr. DeMarco (Anthony)	X		
Mr. Puzio (Edward)	X		
Mr. Wich (Gerard)	X		

I, Dennis R. Frohnapfel, Ed.D., Secretary of the Garfield Board of Education, hereby certify that the foregoing is a true copy of a motion duly adopted by said Board at a Regular Meeting held on November 27, 2006

IN WITNESS WHEREOF, I have set my hand and the seal of the Garfield Board of Education, November 28, 2006.

Dennis R. Frohnapfel, Ed.D., Secretary
Garfield Board of Education

2-07

OAL DKT. NO. EDU 652-06
AGENCY DKT. NO. 53-2/06

MICHAEL KELLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties filed no exceptions to the Initial Decision.

Upon a full and independent review, the Commissioner agrees with the Administrative Law Judge – for the reasons clearly stated in his decision – that the Board's determination to refuse to reimburse petitioner for his children's tuition at the Sea Isle Board of Education schools is appropriately affirmed.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/03/07

Date of Mailing: 1/03/07

[1] On December 29, 2006, the Commissioner received an Amended Initial Decision from the OAL, corrected solely to remove reference by name to petitioner's minor children and a specific school district employee.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

2-07

MICHAEL KELLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner is a parent whose access to his children's school was restricted by the Board following petitioner's allegedly intimidating and threatening behavior in the aftermath of his wife's extramarital affair with a Board employee. Petitioner argues that his restricted access to the school resulted in a difficult environment for his children, which necessitated their enrollment out-of-district. Petitioner seeks reimbursement for tuition paid to place his children in Sea Isle City schools.

The ALJ found that: the validity of respondent's action to restrict petitioner's access to his children's school is not before him; petitioner's claim for reimbursement of tuition is the sole issue herein; petitioner's decision to enroll his children in an out-of-district school while the instant action was pending was premature, as nothing in the law – absent an Order from the Commissioner of Education – requires respondent to pay the cost of tuition for petitioner's children when a free public education was available to them in Dennis Township. The ALJ affirmed respondent's action denying petitioner reimbursement for tuition.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusions set forth by the ALJ. The Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is dismissed.

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

January 3, 2007

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION
OAL DKT. NO. EDU 652-06
AGENCY DKT. NO. 53-2/06

MICHAEL KELLY,
Petitioner,
v
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,
Respondent.

Michael Kelly, petitioner, pro se

Paul C. Kalac, Esq., for respondent (Parker McCay, P.C., attorneys)

Record Closed: November 28, 2006 Decided: November 30, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed respondent's action barring him from the Dennis Township school except under limited circumstances, and sought reimbursement for tuition paid to place his children in a school district in which they did not reside. The petitioner requested a fair hearing and the matter was transmitted to

the OAL on February 23, 2006, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was scheduled for a hearing on October 24, 2006, in Atlantic City, New Jersey. The hearing proceeded on that date and the record remained open pending submission of post-hearing briefs, which were due on November 27, 2006. Respondent's post-hearing brief was submitted on November 28, 2006. No brief was submitted by petitioner.

FACTUAL DISCUSSION

Petitioner is a resident of Dennis Township. He has two sons: T.K., who is in the second grade; and E.K., who is in the fifth grade.

On March 19, 2004, Scott P. McCartney, Superintendent of Schools, sent petitioner a letter (P-1), which stated as follows:

> Please be advised that you are not permitted on school property except with my advanced permission. You will be permitted upon advanced request to be on school property for the following types of activities:
>
> 1) Parent/Teacher Conferences
>
> 2) Meetings requested by school district personnel
>
> 3) Signing your child in or out of school
>
> 4) Picking your child up from the school nurse
>
> 5) Picking up or dropping off your child to latch key
>
> Failure to comply will result in a trespass complaint being filed with the New Jersey State

> Police. Should you have any questions regarding this letter, please feel free to contact my office.

Petitioner testified on his own behalf. He stated that the letter (P-1) was the result of a telephone message he left on voice mail for the school's Transportation Coordinator. The sum and substance of that conversation was set forth in Exhibit P-2.

Petitioner denied that said voice mail should have caused respondent to bar him from the school.

Petitioner introduced a document apparently excerpted from a summary concerning the matter that was submitted to the Board of Education (P-3). That document reveals that petitioner's wife was working as a bus aide at the school. During the Winter/Spring of 2004, Mrs. Kelly engaged in an extra-marital affair with another employee in the transportation department. The affair ended badly, and the other employee began harassing Mrs. Kelly. According to both petitioner and Mrs. Kelly, who also testified, the other employee threatened her, abused her, stalked her, and raped her.

Petitioner claimed he was barred from the school for no good reason. The ban was reiterated in a second letter from McCartney dated October 26, 2004 (P-7). That letter also states that McCartney's intent was to provide petitioner with full access to his children.

On December 14, 2004, the Board solicitor sent petitioner's then attorney a letter offering to lift the ban, provided petitioner agreed to certain conditions. Those conditions were (P-8):

> 1. Mr. Kelly agrees that while he us [sic] on school premises he will not engage in any behavior that is inappropriate, harassing or disruptive to employees, students or the educational community.

> 2. Mr. Kelly agrees that while he is on school premises he will not seek out [the other employee], take any action that will bring him in contact with [the other employee] or make any inappropriate or threatening gestures toward [the other employee]. This includes Mr. Kelly driving his car in the vicinity of the bus garage.
>
> 3. Mr. Kelly agrees that while he is on school premises or communicating with school employees he will not act in a manner which is threatening or harassing.
>
> 4. Mr. Kelly acknowledges and understands that if these representations by him are violated, the School District may reinstitute the provisions contained in Mr. McCartney's March 19, 2004 correspondence or take other action as it deems appropriate.

Petitioner refused to agree to the conditions set forth in P-8. In a letter dated January 18, 2005 (P-9), petitioner declined respondent's offer, asserting that he and his family were the damaged parties, and that they were in need of protection from another employee. Petitioner supported that allegation by referring to a restraining order he claimed he and his wife had obtained against the other employee in Superior Court.

The "restraining order" (P-15) is actually a handwritten agreement, executed by Mrs. Kelly and by the other employee, and witnessed by Basil Beck, who served as petitioner's attorney at the time. The document contains language similar to that used in a formal restraining order. It bears a stamp indicating that it was filed in the Superior Court on May 12, 2004. Given that stamp plus the nature of the language contained therein, I **FIND** that P-15 has the force and effect of a Domestic Violence Restraining Order.

Frustrated with being banned from the school, petitioner and his wife determined to remove their children from the district and enrolled them in the Sea Isle City School system. The cost of enrolling them there was $5600. Additionally, petitioner has been tardy with his payments, and has to date been assessed $250 in late fees. Petitioner seeks reimbursement of these monies based upon the refusal of respondent to afford him access to the school. On August 18, 2005, petitioner formally demanded these monies from respondent by letter of that date (P-10).

After placing their children in the Sea Isle City system for a year, petitioner and his wife sought to return them to Dennis Township for the 2006-2007 school year. By that time, Superintendent McCartney had departed the district, replaced by George R. Papp. Papp wrote to petitioner and his wife on May 15, 2006, agreeing to the reenrollment of their children. In that letter (P-16), Papp advised that he would lift the ban against petitioner's presence in the school without advanced notice.

Petitioner then reenrolled his children in the Dennis Township school, where they are presently placed.

Petitioner's wife, Shirley Kelly, testified. She asserted that petitioner was barred from the school because he complained that she had been sexually harassed.

Mrs. Kelly stated that the other employee had harassed her, threatened her, abused her, and raped her. Instead of taking action against the other employee, respondent allowed him to continue working, and instead barred petitioner from the school. She stated she had filed a Tort Claim Notice with respondent.

Throughout the proceeding, petitioner spoke with fervent emotion. He claimed he had been humiliated and disgraced by respondent's action.

Respondent declined to call any witnesses, choosing to rely upon oral argument and briefs.

LEGAL ANALYSIS

The record before me is limited because respondent declined to call witnesses, relying instead on legal argument. Although an expanded record might cause me to have a contrary view, based upon what I now have before me, it would appear that Superintendent McCartney's action in severely limiting petitioner's access to the school was excessive. No one has explained why the limitations placed upon petitioner were for the entire school and not just the bus yard where the other employee was employed.

But the validity of respondent's action in limiting petitioner's access to the school is not before me. That matter was resolved by Papp's letter of May 15, 2006 (P-16). Petitioner's children are now back in the Dennis Township system, and all restrictions upon petitioner's access to the school have been lifted.

What remains before me is petitioner's claim for reimbursement for the tuition. He seeks the $5600 which he paid (and continues to pay) to the Sea Isle City Board of Education for the 2005-2006 school year. He asserts that he was forced to transfer his children to another school because of the arbitrary and capricious action of respondent.

I cannot agree. Petitioner's action was premature at best, and precipitous at worst. He had other options available to him, most notably the appeal to the Commissioner of Education presently before me. Although he filed this action, he did not await the outcome thereof before unilaterally removing his children.

He would have been better served by waiting for the Commissioner to rule. Instead, he formulated his own relief and now seeks confirmation thereof after the fact.

Such acts of self help cannot be countenanced. Absent an Order from the Commissioner of Education, I know of nothing in the law the would require respondent to pay the cost of tuition for petitioner's children when a free public education was available to them in Dennis Township. See N.J.S.A. 18A:38-1. While I sympathize with petitioner's circumstance, the law compels me to **AFFIRM** the actions of respondent in denying petitioner tuition reimbursement.

ORDER

I **ORDER** that respondent's action denying petitioner reimbursement for his children's tuition at the Sea Isle City Board of Education be **AFFIRMED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Bruce M. Gorman

November 30, 2006
DATE

BRUCE M. GORMAN, ALJ

E-mail Receipt of Amended Initial Decision Confirmed by the Department of Education on:

_____
DATE

Mailed to Parties:

_____
DATE

_____
OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES

For Petitioner:

Michael Kelly
Shirley Kelly

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Letter from Scott P. McCartney, Superintendent of Schools to Michael Kelly, March 19, 2004
P-2 Transcript of March 18, 2004 telephone conversation
P-3 Affirmative Action Report Finding
P-4 Not Offered
P-5 Letter from Michael Kelly to Mr. LaRosa, May 18, 2004
P-6 Letter from Michael Kelly to Mr. McCartney, October 12, 2004
P-7 Letter from Scott P. McCartney, Superintendent to Michael Kelly, October 26, 2004
P-8 Letter from Robert Muccilli, Esquire to Basil D. Beck, Jr., December 14, 2004
P-9 Letter from Michael Kelly to Basil D. Beck, Jr., January 18, 2005
P-10 Letter from Michael Kelly to Dennis Township Board of Education, August 15, 2005
P-11 Not Offered

P-12 Not Offered

P-13 Not Offered

P-14 Not Offered

P-15 Not Offered

P-16 Letter from George R. Papp, Superintendent of Schools to Michael Kelly, May 15, 2006

For Respondent:

None

#5-07

OAL DKT. NO. EDU 1424-06
AGENCY DKT. NO. 361-12/05

CRAIG STULL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Arnie Eddy

COMMISSIONER OF EDUCATION

Date of Decision: 1/05/07

Date of Mailing: 1/08/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1424-06

AGENCY DKT. NO. 361-12/05

CRAIG STULL,

Appellant,

v.

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,

Respondent.

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

Richard H. Bauch, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: December 5, 2006 Decided: December 8, 2006

BEFORE **IRENE JONES**, ALJ:

On January 19, 2006, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Petitioner, Craig Stull ("petitioner') contends that the respondent, County ("respondent") reduced his salary in violation of his tenure rights.

A hearing was scheduled for November 27 & 28, 2006 but adjourned because the parties were discussing settlement. As a result of those discussions, the parties agreed to settle the matter and signed a Settlement Agreement was forwarded to the OAL on December 5, 2006. A copy of the Settlement Agreement is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

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

12/08/06
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

12-12-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 14 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
Attorneys for Respondent,
Phillipsburg Board of Education, Warren County

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 DEC -5 P 12: 12

CRAIG STULL,

PETITIONER,

-v.-

PHILLIPSBURG BOARD OF EDUCATION, WARREN COUNTY,

RESPONDENTS.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 01424-2006N
Agency Ref. No. 361-12/05

STIPULATION OF SETTLEMENT

This Stipulation of Settlement ("the Stipulation") is entered into and made effective this 30th day of November, 2006 (the "Effective Date"), by and between Craig Stull, (hereinafter the "Petitioner"), the Phillipsburg Education Association (hereinafter the "Association"), and the Phillipsburg Board of Education, Warren County, (hereinafter the "Respondent") in the above-captioned matter.

RECITALS:

WHEREAS, the Association is the exclusive majority representative for all teachers employed by Respondent, including Petitioner, for purposes of collective negotiations concerning wages, hours and other terms and conditions of employment; and

WHEREAS, the Board and the Association are signatories to a collective negotiations agreement (hereinafter the "Agreement") covering all Board-employed teachers, including Petitioner; and

WHEREAS, on or about October 24, 2005, Respondent placed Petitioner, tenured teacher employed by Respondent, on the "Bachelor's Plus 30" level on the salary guide set forth in the Agreement, which resulted in a reduction in salary for Petitioner, as he was previously being paid at the "Master's Plus 30" level; and

WHEREAS, on or about December 5, 2005, the Association filed a grievance (hereinafter the "Grievance") on behalf of Petitioner, in accordance with the Agreement's grievance procedure, contesting Petitioner's move on the salary guide; and

WHEREAS, on or about December 6, 2005, Petitioner also challenged Respondent's action by filing a Petition of Appeal (hereinafter the "Petition")with the Commissioner of Education (hereinafter the "Commissioner"), claiming that Respondent impermissibly reduced his salary and violated his tenure rights; and

WHEREAS, on or about December 27, 2005, in response to the Petition, Respondent filed an Answer and Counterclaim, seeking recoupment from Petitioner of salary overpayment, with the Commissioner; and

WHEREAS, on or about May 15, 2006, a hearing was scheduled for November 27, 2006; and

WHEREAS, on or about October 5, 2006, Petitioner filed a Motion to Stay Further Proceedings and Dismiss Respondent's Counterclaims; and

WHEREAS, under all the circumstances, all parties are of the opinion that this matter should be settled upon reasonable terms mutually agreed to by the parties; and

WHEREAS, both parties agree that this Stipulation is merely a means to resolve a dispute by means of compromise and in no way may be interpreted or used as an admission of liability or of wrongdoing by any party; and

WHEREAS, following good faith negotiations, the parties and their designated representatives, hereby stipulate and agree to settle the above captioned proceeding upon the following terms and conditions:

1. Subject to the approval of this Stipulation by the Commissioner, Petitioner will withdraws his Petition, with prejudice.

2. Subject to the approval of this Stipulation by the Commissioner, Petitioner and the Association withdraw their Grievance, with prejudice.

3. Subject to the approval of this Stipulation by the Commissioner, Respondent withdraws its Counterclaims for salary recoupment from Petitioner, with prejudice.

4. Subject to the approval of this Stipulation by the Commissioner, Respondent agrees to maintain Petitioner on the "Bachelor's Plus 30" salary guide level at the dollar amount specified for his correct step at that level in each contract year, until such time as Petitioner is issued a Master's Degree from an accredited college or university.

5. Subject to the approval of this Stipulation by the Commissioner, at such time as Petitioner produces for Respondent's inspection an original transcript of Petitioner's graduate credits confirming that an accredited institution of higher education has conferred upon Petitioner a Master's Degree, Respondent will place Petitioner at the "Master's Plus 30" salary guide level in accordance with the practice prevailing in the District. The parties agree that graduate credits earned by Petitioner prior to his receipt of a Master's Degree, and which were not included in the credits rendering Petitioner eligible to be conferred such Master's Degree, will be accepted by Respondent for purposes of determining Petitioner's eligibility for the "Master's Plus 30" salary guide level.

6. As further consideration for the parties' covenants as set forth in this Stipulation, upon the full execution of this Stipulation and approval by the Commissioner, the parties, for

Pburg BOE/Stull (00852530:4 /BHB)Stip 103106

themselves and their past, present and future heirs, agents and representatives, forever and irrevocably release and discharge the other, and their past, present and future directors, Board members, officers, trustees, employees, attorneys, agents, representatives, subsidiaries, parent corporations, successors, predecessors, executors, administrators, insurers and assigns, from any and all claims they may have against the other resulting from anything that has happened up to the date of this Stipulation, including claims of which the parties are unaware and claims which are not specifically released and given up in the following language. Petitioner specifically releases and gives up any and all claims which he may have against Respondent arising from or relating to Petitioner's employment with Respondent, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.*, (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (7) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (8) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (9) the Constitutions of the United States of America and the State of New Jersey, (10) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (11) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (12) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.*, including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, (13) the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (14) any expressed or implied contract between the Board and the Employee, whether oral or written, (15) any collective negotiations agreement, (16) all regulations promulgated pursuant to any of the aforementioned laws, (17) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (18) any employment manual or handbook or personnel or Board policies. Respondent

specifically releases and gives up any and all claims which it may have against Petitioner arising from or relating to Petitioner's placement at "Master's Plus 30" level from 1998 through the 2004-2005 school year and/or the timing of the issuance of the Master's Degree versus the dates when Petitioner attained his thirty (30) additional graduate credits.

7. This Stipulation is not to be construed as a past practice, precedent or as an admission of liability or wrongdoing of any kind on the part of any party and may not be used in any subsequent legal or contractual proceeding for any purpose, provided that either party may refer to and use this Stipulation in any legal or contractual proceeding to enforce its terms and conditions.

8. This Stipulation is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

9. The terms and conditions of this Stipulation shall be construed according to their plain meaning, and shall not be construed in favor of or against Petitioner or Respondent.

10. All parties are bound by this Stipulation and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the parties' heirs and the executors of their estates, also are bound. This Stipulation is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

11. The parties acknowledge that they are signing this Stipulation with full knowledge of their rights, voluntarily, and of their own free will, and not under duress or coercion of any kind.

12. If this Stipulation is not fully executed by all parties, then it shall become null and void and shall be of no effect.

13. If this Stipulation is not approved by the Commissioner, then is shall become null and void and shall be of no effect.

14. This Stipulation embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Stipulation may not be modified except by written instrument executed by all the parties hereto.

IT IS THEREFORE STIPULATED AND AGREED BY THE PARTIES AND THEIR COUNSEL OF RECORD THAT THE ABOVE CAPTIONED MATTER BE DISMISSED, WITH PREJUDICE.

PHILLIPSBURG BOARD OF EDUCATION,
WARREN COUNTY

By: _____
Paul Rummerfield
President

ATTEST: _____
William Poch
Board Secretary

DATED: 11/28/06

PHILLIPSBURG EDUCATION ASSOCIATION

By: _____
Barbara Alderfer
President

ATTEST: _____

DATED: 11/2/06

Craig W. Stull
CRAIG STULL

WITNESS: Pamela A. Niles

DATED: 11/2/06

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent, Phillipsburg Board
Of Education, Warren County

By: _____
Richard H. Bauch

DATED: 11/30/06

BUCCERI AND PINCUS
Attorneys for Petitioner, Craig Stull

By: _____
Louis P. Bucceri

DATED: 10/31/06

4-07

OAL DKT. NO. EDU 6318-06
AGENCY DKT. NO. 242-7/06

J.O. on behalf of minor child R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	REVISED DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, were originally reviewed in November 2006, at which time the Commissioner observed that neither the file nor the Settlement Agreement contained a copy of a resolution by the respondent Board approving the settlement and designating Jo Ellen Basaman, Assistant Superintendent, to sign the agreement on its behalf. Nor was the agreement signed by the respondent Board's attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently rejected the proposed settlement via decision dated December 1, 2006, and ordered remand of the matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating Ms. Basaman or another individual to sign on its behalf.

On December 11, 2006, the Commissioner received from respondent a resolution dated November 2, 2006, wherein the respondent board of education ratified the settlement agreement that had been executed on October 19, 2006, and annexed to the Initial Decision of the Administrative Law Judge. Both parties represented that they are satisfied with the settlement

agreement as supplemented by the November 2, 2006 resolution, and requested that – in the interest of economy – the Commissioner issue a revised decision approving same.

Accordingly, the Commissioner adopts the settlement agreement, supplemented by the November 2, 2006 resolution of the respondent board of education, as the final decision in this matter and orders compliance with its terms.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/04/07

Date of Mailing: 1/04/07

Agreement + Release

This Agreement is made this 19th day of October 2006 between Jyoti + Ashok OBERAI + the East Brunswick Board of Education ("Board

Whereas the parties are desirous of resolving a dispute regarding the residency of Rishi + Ridhima OBERAI, children of Jyoti + Ashok OBERAI ("OBERAI" or "Parents"),

Now Therefore in consideration of the Mutual Covenants contained herein, the Board + OBERAI agree as follows:

1. The OBERAIs shall pay the Board the amount of $10,110 as tuition for Ridhima for the 2005-06 school year.

2. The payment referenced above shall be made as follows:

a) $500 within 7 days, or October 27, 2006, which payment shall be held in escrow by the Board upon formal Board approval of this Agreement.

b) $500 per month thereafter, with the first payment due December 1, 2006;

c) Final payment shall be made upon the earlier of closing on the Carteret property

property.

4. All payments shall be made to the Office of the Business Administrator, 760 Route 18, East Brunswick, NJ 08816.

5. Parents shall update their registration form upon expiration of ~~their~~ the lease on 11-5 Civic Ctr. Drive, East Brunswick or no later than August 2007

6. If any payment required hereunder is not made within 15 days of the due date, then the Board shall have the right, on notice to Jyoti oberai's counsel, Steven Sico, to file this agreement as a consent judgment for the balance then due.

7. This agreement serves as a release by the Board with respect to all issues regarding tuition & residency through the 2006-07 school y

8. This agreement shall be subject to the approval of the Board.

9. The petition shall be withdrawn by the OBERAIs upon board approval of the agree

10. This agreement shall be typed & executed by the parties, which may be in counterparts.

We agree to the above terms and conditions:

Jyoti OBERAI

ASHOK OBERAI

7-07

#7-07

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her son, E.E., was not entitled to a free public education in the Newark school district because he no longer resided in the district as of December 25, 2005. E.E. had been enrolled in Newark schools in September 2005 based on an affidavit which stated that E.E. lived in Newark with his aunt, J.H., who later filed affidavit that her nephew had been returned to his mother's custody as of December 25, 2005. Petitioner claims that – despite the fact that she owns property in East Orange – she and her son now reside in Newark, and she sought emergent relief to return E.E. to the school he attended during the 2005-2006 school year. Respondent filed a counterclaim for tuition reimbursement for the alleged period of ineligible attendance.

The ALJ found that: an affidavit submitted by J.H. in May 2006 established that E.E. had not lived with J.H. in Newark since December 2005; the lease presented by petitioner for an apartment in Newark was discredited by respondent district's contention that its investigation found the lease to be fraudulent and the petitioner to be domiciled in East Orange; petitioner's proofs and testimony as a whole were not credible; petitioner did not meet the requirements for emergent relief; and respondent presented credible evidence to support its contention that E.E. is domiciled in East Orange with petitioner Y.E. The ALJ denied petitioner's request for emergent relief, dismissed the petition, and granted respondent's request for tuition reimbursement contingent upon submission of a tuition calculation.

Adopting the ALJ's determinations in these regards, the Commissioner found, *inter alia,* that petitioner is not entitled to emergent relief and failed to meet her burden of showing that respondent was arbitrary and capricious in determining that E.E. was ineligible to attend Newark public schools. However, the Commissioner rejected the ALJ's conclusion that the proofs at the October hearing showed that petitioner's current domicile is not in respondent's school district, instead finding that petitioner presented unrebutted evidence suggesting that it is. Accordingly, the Commissioner ordered that: petitioner reimburse respondent in the amount of $4,478.88 for tuition for the period from January through June 2006; the matter be remanded to the OAL for a plenary hearing on E.E.'s current domicile; and that petitioner ensure that E.E. attends school pending the resolution of this matter.

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

January 8, 2007

OAL DKT. NO. EDU 10085-06
AGENCY DKT. NO. 322-9/06

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

To be determined in this controversy is a minor child's (E.E.'s) domicile and the school district responsible for his public education. The record provided to the Commissioner, including the audio tapes of the proceedings on October 2 and October 17, 2006, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been carefully and independently reviewed. The Commissioner has also reviewed respondent's certification identifying the amount of tuition payable for the period of time that respondent alleges petitioner's son improperly attended school in its district.

The following summary of facts and procedure is taken from hearing testimony and documentary exhibits in the record:

1. On September 27, 2005, C.H. – E.E.'s father – filed with respondent an affidavit that he could not care for E.E., and that E.E. lived in Newark with his aunt, J.H. On the same day, J.H. filed with respondent a guardian affidavit certifying that E.E. lived with her at an address on Broadway in Newark, and that she was supporting him gratis.

Relying upon these affidavits, respondent approved E.E.'s school attendance in its district.

2. E.E., who had previously gone to school in East Orange, attended school in respondent's district for the 2005-2006 school year.

3. During the course of the school year, petitioner – Y.E. – introduced herself as E.E.'s mother, and had contact with respondent's staff on many occasions.

4. On March 3, 2006, respondent mailed petitioner a "Notice of Initial Determination of Ineligibility" (Initial Determination). The Initial Determination was mailed to an address on North 17th Street, East Orange. The basis for the determination was articulated as follows:

> Residence where student is domiciled is ____ North 17th Street, East Orange, New Jersey. The guardianship affidavit submitted by [J. E. H.] is no longer in force. [J. E. H.] has renounced further guardianship of [E.E.] and/or no longer resides at ____ Broadway, Newark, New Jersey.

5. At respondent's April 5, 2006 hearing, which petitioner did not attend, respondent determined – for the reasons articulated in the Initial Determination – that E.E. was not entitled to a free public education in Newark. Although respondent alleged that it sent petitioner notice of the April 5, 2006 hearing, it did not present any evidence to support that allegation.

6. On April 5, 2006, respondent sent petitioner a Notice of Final Ineligibility (Final Notice) – mailed to the above-referenced East Orange address – which reiterated the allegations set forth in the Initial Determination. More specifically, respondent stated that it made the final ineligibility determination based on the following:

> *The guardianship affidavit issued by the district on September 27, 2005 for guardianship of [E.E.] by [J.E.H.] residing at ____ Broadway, Newark, New Jersey is no longer in force due

> to the fact that Ms. [H.] has renounced further guardianship of [E.E.] and your son no longer resides with Ms. [H.].
>
> *The residence where student [E.E.] is domiciled is ____ North 17th Street, East Orange, New Jersey. The district has video and photographic evidence of you and your child leaving your East Orange residence on four consecutive days during the month of March. The car that you use to transport your child [E.] to Rafael Hernandez School is registered to you with an East Orange address.

7. Petitioner testified at the OAL hearing that she did not get the Final Notice until April 27, 2006, when she received it from her brother, to whom it had been given when he collected E.E. from school.

8. After receiving the Final Notice, petitioner apparently presented various documents to respondent, including a lease for a property on South 10th Street in Newark.

9. A letter dated May 8, 2006 was sent to petitioner from respondent advising that J.H. had denied, via a notarized statement [handwritten and dated April 28, 2006], that E.E. lived with her, and that the landlord of ____ South 10th Street, Newark, had told an investigator that the lease petitioner had presented for those premises was fictitious. Respondent's May 8 letter further stated that May 10, 2006 would be E.E.'s last day of school in Newark.

10. On or about May 11, 2006, petitioner sent the Commissioner a petition of appeal dated May 10, 2006, with a copy of a letter that she had written to three Newark School District employees "requesting an appeal regarding the school attendance of [her] son . . . as well as to explain the late response to the 'Notice of Final Ineligibility'." Her explanation for filing her appeal past the 21 day time period allowed for such appeals under *N.J.S.A.* 18A:38-1(b), was that she did not get the final notice "until April 27, 2006 In [sic] which it was handed to me by a family member." She argued that her

May 10, 2006, letter constituted a timely appeal in that it was sent within 21 days of her alleged actual receipt of the Final Notice. Also enclosed with the petition was a copy of the September 27, 2005 affidavit by J.H. certifying that E.E. lived with her in Newark and that she was supporting him. Petitioner's appeal made no claim that E.E. lived with her in Newark on ____ South 10th Street.

11. After sending her May 10th letter/petition to the Commissioner, petitioner was advised during a telephone call she had placed to the Bureau of Controversies and Disputes (the Bureau) that if she was contending that E.E. was supported by and living with a non-parent in Newark, it was that Newark resident who would have to file the petition challenging respondent's ineligibility determination.

12. On May 12, 2006, the Bureau received a petition of appeal, under J.H.'s signature, challenging respondent's final determination of ineligibility. This enabled E.E. to remain in respondent's school.

13. Petitioner's May 10, 2006, petition did not arrive at the Department of Education until May 16, 2006. It was not docketed because J.H.'s petition had already been received.

14. On May 19, however, a typewritten notarized statement by J.H. was submitted to respondent. Therein, J.H. stated that E.E. had lived with her in Newark until December 25, 2005, at which time she had "released him to the custody of his natural mother, [Y.E.]." J.H. further certified that she "was unaware of the language [in the May 12 petition] specifically stating that [E.] reside[d] with [her]." She advised that E.E. no longer lived with her, that she was not responsible for him, and that to the best of her

knowledge he lived with his mother in East Orange. Finally, she asked that her petition be withdrawn.

15. The Bureau of Controversies and Disputes accordingly marked the petition "withdrawn" on June 14, 2006.

16. During the summer of 2006, respondent's child study team evaluated E.E., found that he was eligible for special education services, and developed an individualized education program (IEP) for him. Further, respondent placed E.E. in its Martin Luther King, Jr. School (MLK), where he began receiving services in September 2006. More specifically, he started school in Newark on September 6 or 7, and was removed from school on September 8, 2006.

17. On September 11, 2006, petitioner faxed a petition of appeal to the Commissioner, stating simply that E.E.'s attendance in respondent's school had been denied due to "residence." Attached to the petition was a copy of an email circulated between school employees in respondent's district between September 6 and 8, 2006, advising that E.E. should not be enrolled and referring to the fact that a determination of E.E.'s non-eligibility had already been made during the prior school year.

18. In a letter dated September 14, 2006, respondent asserted that the petition should be dismissed as untimely, since a determination of non-eligibility had already been made in the Spring of 2006, challenged by J.H., and then withdrawn.

19. The Bureau advised petitioner by letter dated September 15, 2006, that it appeared that a challenge to respondent's ineligibility determination had already been made and withdrawn in May/June of 2006. It cautioned her that E.E. could not attend

school in respondent's district during the pendency of her most recent petition, unless she filed an emergent application and prevailed.

20. Petitioner accordingly filed requests for emergent relief on September 22 and 25, 2006, alleging – among other things – that she had not known that J.H.'s May 12, 2006 petition had been withdrawn. Her papers were transmitted to the OAL on September 25, 2006, as an emergent matter.

21. It appears from a certification filed on December 7, 2006, by Newark Public School Business Administrator, Ronald Lee, that E.E. actually attended classes in a special education program in Newark from September 11 through September 25, 2006.

22. On September 29, respondent answered Y.E.'s petition and counterclaimed both for tuition for January 2006 through the end of the 2005-2006 school year and for the time/services that had been provided to E.E. by respondent's child study team in the summer of 2006. On the same date, respondent moved before the OAL to dismiss the petition as untimely.

23. A hearing was scheduled at the OAL for October 2, 2006, at which both petitioner's request for emergent relief and respondent's motion to dismiss were to be heard. At the beginning of the hearing the Administrative Law Judge (ALJ) stated: "since Ms. E. is not represented by counsel we did have a discussion off the record where we reviewed some of the background information."

24. At the hearing, respondent's counsel made argument supporting its motion to dismiss the petition and opposing petitioner's motion for emergent relief appealing E.E.'s September 8, 2006 removal from respondent's MLK school, but presented no evidence.

25. Respondent's counsel argued that petitioner had presented no current lease and no credit card or checking account statements showing a Newark address, and cast aspersions on the driver's license petitioner produced that showed the ____South 10th Street address. He alleged that respondent's investigator could show that it was obtained on April 27, 2006, the same day that respondent sent petitioner a letter advising that E.E. could no longer attend school in Newark and that the East Orange Board of Education had been notified of its responsibility for E.E.'s education.

Counsel stated that respondent could produce an investigator who could verify that the ____South 10th Street address claimed by petitioner in her September 2006 papers was not being used by her, and contended that the man who had verified petitioner's residence at that address was no longer the owner of same.

26. Respondent's counsel also alleged that petitioner owns the property in East Orange to which respondent sent the notices described above, and had used the address during the 2005-2006 school year on some correspondence that she had sent to E.E.'s school. According to counsel, during that school year respondent's investigator had observed petitioner leaving the East Orange address and taking E.E. from there to school in Newark.

27. Respondent's position on the motion for emergent relief was that: a) under the circumstances alleged by respondent, petitioner had no likelihood of success on the merits; b) there is no settled law that would mitigate in favor of petitioner; c) that the availability of a public education in East Orange precluded irreparable harm to E.E.; and that d) considering E.E.'s alleged domicile in East Orange and right to go to school there, and respondent's assistance to E.E. in evaluating and qualifying him for special education

services, the equities did not mitigate against denying petitioner's application for emergent relief.

28. Following respondent counsel's argument, petitioner testified under oath. As regards respondent's motion to dismiss for untimeliness, petitioner testified that she never received the Initial Notice (sent to the East Orange address) or the alleged notice of the April 5, 2006 hearing (which notice has not been produced by respondent). As in her May 10, 2006 petition, she maintained that the first notice about the residency issue that she received was dated April 27, 2006, and was given to her brother when he picked E.E. up from school. Consequently, she argued that her May 10, 2006 petition to the Commissioner was timely and should preclude the dismissal of the matter.

29. As regards her motion for emergent relief, petitioner testified that although she owns ____ and ____North 17th Street, East Orange – the property that respondent claims is her residence – she left the premises because of threats on her life, and has tenants in the property. Petitioner contended that she has a lease or leases from her tenants that prove she has not been living in the East Orange property, but the Commissioner has found no such lease(s) in the record.

30. Attached to petitioner's application for emergent relief was a copy of a notarized statement dated September 24, 2006 from Frank Hodges, who identified himself as the owner of ____ South 10th Street in Newark and stated that petitioner resided there. Petitioner referred to that statement in her October 2, 2006 testimony. She also testified that she had shown employees at the Newark Board of Education her driver's license listing the ____ South 10th Street Newark address.

31. The Commissioner presumes that petitioner intended that the foregoing would constitute the basis for the requirement that she show a likelihood of success on the merits.

32. With regard to the requirement to show irreparable harm, petitioner argued that it was irreparable harm to remove E.E. "from the situation that they had allowed him to be in: he had gotten comfortable with the teacher; the teacher's gotten comfortable with him." Petitioner further contended that MLK is closer to home. E.E. could walk to and from school.

33. Finally, petitioner asked that respondent send someone to her home to verify that she and E.E. live in Newark. Respondent's counsel declined, stating that respondent's investigation had been completed. When petitioner requested a home visit the second time, the ALJ responded "They have completed their investigation."

34. Petitioner then represented that she did not understand the process of the hearing. When questioned by the ALJ, petitioner stated she would like an adjournment to get counsel. An attorney that she had contacted could not attend the October 2 hearing because it fell on a Jewish Holiday.

35. The ALJ opined that as a result of participating in real estate transactions and running a business, petitioner should have known to seek counsel, but allowed the adjournment nonetheless, with the understanding that E.E. would not be allowed to attend school in Newark in the interim. The proceeding was adjourned to October 17, 2006, at 1:30 p.m. The ALJ warned that the hearing would go ahead on October 17 whether or not an attorney appeared for petitioner, unless the attorney provided a compelling excuse. She also gave petitioner the opportunity to reply to respondent's motion to dismiss the

petition, which petitioner had not yet done, and cautioned that failure to respond to that motion could result in negative consequences.

36. After the first hearing, petitioner filed an answer to respondent's counterclaim on October 12, 2006. In her answer, she asserted both that E.E. was living with J.H. in Newark, and that she – Y.E. – was residing in an apartment on South 10th Street in Newark. To support the latter assertion, she offered copies of a lease showing her as the tenant at that address, a driver's license bearing the same address, and a copy of a September 27, 2006 letter addressed to her from an attorney advising her that the South 10th Street premises had changed hands, and that she would have to contact the new owner or be evicted.

37. In the answer to the counterclaim, she admitted receiving the Final Notice of Ineligibility on April 27, 2006, as well as respondent's May 8, 2006 letter to her confirming E.E.'s ineligibility to attend school in Newark.

38. Petitioner filed no response to respondent's motion to dismiss her petition.

39. The hearing resumed on October 17, 2006. The ALJ recited that it was the continuation of the hearing opened on October 2, 2006.

40. Petitioner appeared without an attorney. She offered – as proof of her Newark residency – a letter from the new owner of the South 10th Street property, advising that she must contact the new owner's lawyer or be evicted. This letter had been annexed to her answer to respondent's counter-claim.

41. Petitioner reiterated her argument that since E.E. had been evaluated and enrolled in a special education program at MLK in Newark, he would be harmed by

transfer to East Orange, and that a balancing of the equities consequently mitigated in favor of petitioner.

42. Petitioner also contended that: a) she had provided respondent with sufficient proof of her residency in Newark; b) she was a resident of ____ South 10th Street and would soon be its new owner; and c) she had consequently shown that she would succeed on the merits of her claims. No evidence to support her claim of impending ownership of the South 10th Street property was offered.

43. Further, petitioner complained that she had received no response to the petition she had sent to the Commissioner on May 11, 2006.

44. Respondent did not present any witnesses or produce any further documentary evidence. Counsel reiterated his position that petitioner had not produced a current lease or bank statements showing the South 10th Street address, and speculated that the letter from the new owner of the South 10th Street property to petitioner was a form letter sent to anyone who had ever had a lease on file at that address. He further stated that it was his "understanding" from respondent's investigation (which was often referred to but never produced) that the new owner would be evicting "any of the tenants in that area."

In the Initial Decision, disseminated on November 27, 2006, the ALJ denied Y.E. emergent relief, dismissed the petition, and ordered that tuition be paid by petitioner in the amount to be set forth by respondent in "appropriate documentation." Respondent accordingly filed with the Commissioner, on December 7, 2006, a certification setting forth: a) a regular tuition figure for January through June, 2006 in the amount of $4,478.88; and b) an LLD tuition figure for the ten days E.E. attended special education classes in Newark in September 2006.

The Commissioner agrees that petitioner's request for emergent relief must fail. Although Y.E. alleged in her exceptions that "E.E. was denied [enrollment] by East Orange," she did not present any evidence supporting that contention at the hearing. Consequently she did not meet the requirement that imminent harm be shown as grounds for an emergent relief application. In addition, although petitioner presented enough indicia of residence in Newark to warrant an evidentiary hearing, she fell short of proving a likelihood of success on the merits.

The Commissioner also adopts the ALJ's determination that petitioner did not meet her burden to show that respondent's ineligibility determination for January through June 2006 was arbitrary or capricious. In her October 12, 2006 answer to respondent's counterclaim, petitioner alleged that E.E. lived in Newark with his aunt – J.H. – from January through June 2006. However, respondent offered as evidence a notarized affidavit by J.H. to the contrary. The weight of the evidence was consequently against petitioner. Petitioner did submit a copy of a lease purporting to show that she had resided on South 10th Street in Newark during 2006.[1] However, considering petitioner's contradiction of J.H.'s above referenced certification, the Commissioner cannot fault the ALJ for determining that petitioner's credibility was poor regarding the circumstances of E.E.'s domicile from January through June 2006, and for finding in favor of respondent. *See, D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004) (we generally defer to credibility determinations made by the ALJ who had the opportunity to hear the testimony and observe the demeanor of the witnesses). *See also State v. Locurto,* 157 *N.J.* 463, 470, (1999).

[1] The ALJ declined to give the lease evidentiary weight because "the District's investigation determined that lease was 'fraudulent'," and "the document was not notarized and bore no seal." (Initial Decision at 5) The Commissioner notes that it is not unusual for leases to be without notarizations and seals, and – more importantly – whatever investigation respondent may have conducted was not presented through sworn testimony or as documentary evidence at the OAL.

However, as to E.E.'s current domicile – *i.e.* since September 7, 2006 – and the district responsible for his current education, the Commissioner rejects the Initial Decision. In her papers and at the October hearing, petitioner not only presented the lease indicating her residence on South 10th Street, Newark, from August 2005 to August 2006, but also produced: a notarized letter dated September 24, 2006 from the previous owner of those premises stating that she resided there; her driver's license showing the South 10th Street address; and a letter dated September 27, 2006 from the new owner of those premises asking that she contact its representative or be evicted. She further testified that she would soon be the owner of the premises, although she produced no corroborating evidence.

By way of contrast, at the October 2006 hearing respondent's counsel – who is unable to testify about the actions of respondent's employees or investigators – referred to a district investigation from the 2005-2006 school year which allegedly rebutted petitioner's evidence, but did not produce it, or any sworn testimony about it. In turn, the ALJ relied on this non-produced evidence to conclude that "the underlying issues of petitioner's claim, [*i.e.*] domicile, has [sic] been settled by the evidence presented." (Initial Decision at 7) The ALJ wrote:

> Petitioner's evidence that she is domiciled in Newark is rejected as incredible. Indeed, the District presented credible evidence that E.E. no longer resides in the home of J.H. In addition to the Affidavit of J.H., the District investigated the alleged leased premises where petitioner claimed to reside and discovered her residence there is non-existent. The District provided further support for its determination through video and photographic evidence of petitioner and E.E. leaving the East Orange residence on four consecutive days during the month of March [2006]. The car that petitioner used to transport E.E. to Raphael Hernandez School is registered to petitioner with an East Orange address.
>
> (Initial Decision at 7-8.)

Unfortunately, there is no indication in the audio tapes of the October 2 and 17, 2006 hearings that any of the "credible evidence" referenced by the ALJ was presented at the hearing, either by way of the testimony of an investigator, or by way of authenticated documentation. Nor is said "evidence"– which in any event pertains only to January through June 2006 – in the record provided to the Commissioner.

It is undisputed that respondent performed an evaluation of E.E. over the summer of 2006, and enrolled him in special education classes at MLK on September 6, 2006. E.E.'s subsequent removal from MLK was timely challenged, pursuant to *N.J.A.C.* 6A:3-1.3(i), by Y.E.'s petition dated September 11, 2006. The Commissioner finds that while petitioner is not entitled to emergent relief, she did present evidence at the OAL hearing which suggests that she may reside in Newark. Since respondent did not rebut petitioner's proofs with competent evidence, the Commissioner remands the matter to the OAL for a plenary hearing on petitioner's current domicile.

The Commissioner reminds the parties that unless someone other than petitioner has legal custody of E.E., it is petitioner's domicile that defines E.E.'s domicile. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 *U.S.* 30, 48, 109 *S. Ct.* 1597, 1608, 104 *L. Ed.* 2d 29, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.*, 283 *N.J. Super.* 505, 521-22 (App. Div.1995), *certif. denied*, 143 *N.J.* 325 (1996); *V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286; 25 *Am.Jur.*2d Domicil § 42 (1996); *Restatement (Second) Conflict of Laws* § 22 (1971). Consequently, it is the district of petitioner's domicile that shall educate E.E. *E.A.E. on behalf of minor child S.N.W. v. Board of Education of the Township of Bloomfield, Essex County,* OAL Dkt. No. EDU 3893-06, Agency Dkt. No. 101-3/06, decided December 19, 2006; *M.L.P. on behalf of minor child C.L.P. v. Board of Education of the*

Township of Bloomfield, Essex County, OAL Dkt. No. EDU 1420-06, Agency Dkt. No. 395-12/05, decided September 19, 2006; *J.M. on behalf of minor child S.C. v. Board of Education of the Township of West Orange, Essex County*, OAL Dkt. No. EDU 1061-00, Agency Dkt. No. 347-11/99, decided May 24, 2001.

In summary, the Commissioner: 1) adopts the ALJ's conclusion that the petitioner did not prove that respondent was arbitrary and capricious in determining that E.E. was ineligible to receive a free public education in Newark during January through June 2006; 2) adopts the ALJ's determination that petitioner is not entitled to emergent relief; and 3) rejects the ALJ's conclusion that the proofs at the October hearing showed that petitioner's current domicile is not in respondent's school district.

The Commissioner accordingly directs that: 1) petitioner pay respondent $4,478.88 for E.E.'s tuition for the period from January through June 2006; 2) the matter be remanded to the OAL for a plenary hearing on E.E.'s current domicile, including the issues of petitioner's custody of E.E. and petitioner's current domicile; and 3) petitioner ensure that E.E. attends school pending the resolution of this matter.

IT IS SO ORDERED. [2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/08/07

Date of Mailing: 1/09/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
Office of Administrative Law

INITIAL DECISION
EMERGENT RELEIF
OAL DKT. NO. EDU 10085-06
AGENCY DKT. NO. 322-9/06

Y.E. o/b/o MINOR CHILD E.E.,

Petitioners,

v.

STATE OPERATED SCHOOL OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Y.E., pro se

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

Record Closed: November 21, 2006 Decided: November 22, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Y.E. appealed the action of respondent, State Operated School District of Newark, Essex County ("District" or "Board"). The District determined that E.E. was not entitled to a free public education in the District because he no longer resided in the City of Newark as of December 25, 2005. Petitioner claims she and

E.E. reside in Newark and thus, E.E. is entitled to a free education pursuant to N.J.S.A. 18A:38-1. Petitioner also seeks emergent relief to return E.E. to the Newark school. The District maintains E.E. is not domiciled in the school District and has filed a counterclaim for payment of tuition. Further, respondent moves to dismiss the petition as untimely under N.J.S.A. 18A:38-1.

On September 26, 2006, the Department of Education transmitted the matter to the Office of Administrative Law ("OAL") for a hearing as a contested case pursuant to N.J.S.A. 18A:38-1 and pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing scheduled on October 2, 2006 was adjourned at petitioner's request to permit her to retain counsel; she did not. Therefore, the hearing was held on October 17, 2006 and the record closed after review of the documents.

ISSUE

Whether petitioner has met the standards for emergent relief to attend respondent's school district?

SUMMARY OF EVIDENCE

Based on a review of the relevant evidence I **FIND** as **FACT:**

1. Petitioner's son E.E., attended the District's Rafael Hernandez School for 2005-2006.

2. J.H. is E.E.'s parental aunt and resides in the City of Newark.

3. On March 3, 2006, the District mailed petitioner an Initial Determination of Ineligibility, which informed her that E.E. was ineligible to attend the district's public school. The notice states in part:

> The District's Office of Attendance has advised me that you and your child, [E.E.] do not reside in Newark.
>
> Residence where the student is domiciled is __ Street, East Orange, NJ. The guardianship affidavit submitted by [JH] is no longer in force. [JH] has renounced further guardianship of [EE] and/or no longer resides at ___, Newark.

4. On April 5, 2006, the District mailed petitioner a Notice of Final Ineligibility, which states in part:

> You were advised of a scheduled hearing by certified and regular mail to be held on April 5, 2006. You did not appear at the hearing. The hearing was conducted [and] we have made this determination based on the following;
>
> Your son no longer resides with [JH]. The residence where student [EE] is domiciled is __ East Orange. The district has video and photographic evidence of you and your child [EE] leaving your East Orange residence on four consecutive days during the month of March. The car that you use to transport your child [EE] to Rafael Hernandez School is registered to you with an East Orange address.
>
> If you believe the district's determination is in error, you have a right to appeal...within 21 days of the date of this notice.

5. On September 15, 2006, the Department of Education notified petitioner that "the 21-day time period set forth in N.J.S.A. 18A:38-1(b)(2) for appealing the above referenced Final Notice of Ineligibility to the Commissioner has expired. If you nonetheless wish to challenge the District's determination of ineligibility, your petition may be processed."

LEGAL DISCUSSION AND CONCLUSION

The State of New Jersey provides that "public schools shall be free to . . . any child who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a minor child follows that of his parents. See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg, 2 N.J.A.R. 283, 286. The applicable statute, N.J.S.A. 18A-38-1(b)1, reads, in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child *gratis* and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Domicile is a matter of intention which may be acquired by an intention to make his home there permanently or at least indefinitely, and to abandon his old domicile. A person has the right to choose his own domicile, and his motive in doing so is immaterial. A very short period of residence in a given place may be sufficient to show domicile, but mere residence, regardless of its length, is not sufficient. Lyon v. Glaser, 60 N.J. 259, 264 (1972). Determination of domicile requires an evaluation of all the facts and circumstances of the case. Id. at 265. When there is more than one residence, a court should consider numerous factors in determining domicile, including "the physical characteristics of each, time spent and things done in each place, the other persons there, the person's mental attitude toward each place, and whether there is or is not an intention, when absent, to return." Mercadante v. City of Paterson, 111 N.J. Super 35, 39-40 (Ch. Div. 1970).

Petitioner must show that either she is domiciled within the District or that J.H. is supporting E.E. *gratis* because the parents are not capable of supporting or caring for him due to family or economic hardship. Thus, the credible evidence must

establish that the child is not residing with J.H. solely for the purpose of receiving a free public education in the District.

The record reveals that on May 19, 2006, J.H. submitted an Affidavit which states in part:

> I reside in Newark. While my nephew [EE] resided in my home in the beginning of the 2006-2006 school year, [EE] has not resided in my home since December 25, 2005. At that time I released him to his natural mother, [YE]. A petition of appeal was filed in my name on behalf of EE on May 12, 2006, claiming that EE resides with me and seeking EE's continued attendance in Rafael Hernandez School....EE does not reside with me and I am not responsible for his education. To the best of my knowledge, EE resides with his mother in East Orange. Therefore, I withdraw my Petition of Appeal claiming residency for EE submitted under my signature dated May 12, 2006.

On June 14, 2006, the Department acknowledged J.H.'s letter and considered the petition withdrawn. However, on September 15, 2006, the Department informed petitioner that "the 21-day time period set forth in N.J.S.A. 18A:38-1(b)(2) for appealing the above referenced Final Notice of Ineligibility to the Commissioner has expired. If you nonetheless wish to challenge the District's determination of ineligibility, your petition may be processed." Therefore, assuming *arguendo* petitioner timely filed the petition of appeal. I have considered the evidence and petitioner's demeanor.

Although petitioner presented an "apartment lease" purporting to rent the premises at S. 10th Street, Newark, the District's investigation determined that lease was "fraudulent". Indeed, the document was not notarized and bore no seal. While some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible the testimony must be such that the trier of fact can reasonably conclude that the witness is wholly unworthy of belief. United Stations of N.J. v. Getty Oil Co., 102 N.J. Super. 459 (Ch. Div. 1968). Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances. Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is

inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Thus, a fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. Barnes v. united States, 412. U.S. 837, 93 S. Ct. 2357, 37 Ed. 2d 380 (1973). Moreover, credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. Carbo v. United states, 314 N.J. Super. 6, 24 (App. Div. 1955). Consequently, the evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958).

Based on the whole of the evidence, I **FIND** petitioner's evidence to be incredible and her testimony unbelievable.

EMERGENT RELIEF

The standard for granting emergent relief is set forth in N.J.A.C. 6A:3-1.6, and Crowe v. DeGioia. The judge may order emergency relief if the judge determines from the proofs that:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Based on the relevant evidence, I am persuaded that petitioner has not demonstrated the requirements for emergency relief. At the hearing, petitioner acknowledged owning property in East Orange. The District conducted an investigation showing Y.E. and E.E. leaving the East Orange premises on four

consecutive days and driving to the school in Newark. Further, the District explained that petitioner must enroll her child in the East Orange school district. The District also noted that the new school district would address E.E.'s recent classification for special education. Further, the Department made clear in its letter dated September 15, 2006 that "due to the expiration of the appeal period, E.E. may not automatically attend school in the District during the pendency of such appeal."

Thus, I **CONCLUDE** that petitioner has not demonstrated E.E. will suffer irreparable harm from the enrollment and placement in the school district of East Orange, the District of domicile.

I **CONCLUDE** that the underlying issues of petitioner's claim, domicile has been settled by the evidence presented.

Accordingly, I **CONCLUDE** that petitioner has failed to establish a likelihood of prevailing on the merits of the underlying claim.

I further **CONCLUDE** that when the equities and interests of the parties are balanced, the Petitioner has not demonstrated E.E. will suffer greater harm than would the respondent if the relief is not granted. Indeed, petitioner must enroll E.E. in the East Orange school district so he can continue to receive education.

Based on the whole of the evidence, I **CONCLUDE** that petitioner has failed to establish the grounds for emergency relief in this matter. Moreover, this proceeding has addressed the underlying issue for emergent relief on matters that have been addressed at the hearing. Petitioner's evidence that she is domiciled in Newark is rejected as incredible. Indeed, the District presented credible evidence that E.E. no longer resides in the home of J.H. In addition to the Affidavit of J.H., the District investigated the alleged leased premises where petitioner claimed to reside and discovered her residence there is non-existent. The District provided further support for its determination through video and photographic evidence of petitioner

and E.E. leaving the East Orange residence on four consecutive days during the month of March. The car that petitioner used to transport E.E. to Rafael Hernandez School is registered to petitioner with an East Orange address.

Thus, I **CONCLUDE** that this proceeding concerning emergent relief and petitioner's domicile are resolved. Therefore, I direct the District to submit appropriate documentation of the calculation of tuition due.

ORDER

It is **ORDERED** that petitioner's request for emergency relief is **DENIED.** It is further **ORDERED** that the petition of Y.E. on behalf of minor child E.E. be **DISMISSED**.

It is further **ORDERED** that respondent's request of the calculation of tuition due be **GRANTED** upon submission to the Department of Education appropriate documentation.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 22, 2006
DATE

MUMTAZ BARI-BROWN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 27, 2006
DATE

Mailed to Parties:

November 27, 2006
DATE

Office of Administrative Law
OFFICE OF ADMINISTRATIVE LAW

nd

8-07

8-07

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

January 16, 2007

Dr. Nathan Parker, Superintendent
Orange School District
451 Lincoln Avenue
Orange, NJ 07050-2704

RE: ***FINAL APPROVAL OF EDUCATIONAL ADEQUACY*** **FOR THE** ***TEMPORARY CLASSROOM UNITS*** **FOR A SCHOOL FACILITIES PROJECT FOR A DISTRICT REQUIRED TO USE THE AUTHORITY TO UNDERTAKE THE PROJECT, PURSUANT TO N.J.S.A. 18A:7G-5 AND N.J.A.C. 6A:26-5.4.**
Park Elementary School #3880-120-01-0967
Relocation of Two Temporary Classroom Units
To Oakwood School
City of Orange School District
Essex County

Dear Dr. Parker:

On **November 14, 2005**, pursuant to Section 5 of the Educational Facilities Construction and Financing Act, P.L. 2000, c.72 (the "Act"), the New Jersey Department of Education-Office of School Facilities (the "Department") approved the application for the above-referenced school facilities project. The school facilities project is to be constructed by the New Jersey Schools Construction Corporation (NJSCC), a subsidiary of the New Jersey Economic Development Authority. The NJSCC on behalf of the district has now submitted the applicable detailed plans and specifications for such school facilities project pursuant to N.J.A.C. 6A:26-5.4. The submission of the detailed plans and specifications has been deemed complete by the Department and has been reviewed to determine consistency of the detailed plans and specifications with the educational specifications and schematic plans approved for educational adequacy.

The following are the Department's determinations:

The detailed plans and specifications for the above-referenced project is either consistent with the educational specifications and schematic plans or contain insubstantial differences with no adverse effect on educational adequacy. Therefore, the detailed plans and specifications are approved. The Corporation may advance the project, including review for Uniform Construction Code ("UCC") compliance as required, by sending documents to:

New Jersey Department of Community Affairs Education Unit
Division of Codes and Standards
P.O. Box 817
Trenton, New Jersey 08625

Please take notice as per NJAC 6A:26-8.1(b), a pre-manufactured trailer unit may be utilized for a maximum of only two years.

Please call Anthony Brun, your manager, Office of School Facilities with any questions regarding this matter at (609) 984-7818.

Sincerely,

Bernard E. Piaia, Jr.
Director, Office of School Facilities

BEP; ab
c: Lucille E. Davy, Commissioner
Isaac Bryant, Deputy Commissioner
Penelope Lattimer, Chief of Staff
Gordon MacInnes, Assistant Commissioner Abbott Implementation
Kathleen Forsyth, , Director of Public Information
Thomas Dowd, Interim Essex County Superintendent
Frank LoDolce, Director, Northern Region Office of School Facilities
Anthony Brun, Office of School Facilities
Adekunle James, Business Administrator, Orange Township School District
Schools Construction Corporation
DCA w/ approved plans
Yezzi Associates, Architects

9-07

ELLEN MUENCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning candidate for teacher certification appealed the Board of Examiners' determination that she could not seek employment as a provisional teacher for an additional year following two "insufficient" ratings pursuant to *N.J.A.C.* 6A:9-17.18(d). The Board held that, because petitioner's appeal had already been considered pursuant to *N.J.A.C.* 6A:9-17.18(a) – where it was found to have been untimely filed in a decision previously upheld by the Commissioner – it could not additionally proceed under *N.J.A.C.* 6A:9-17.18(d).

The ALJ recommended dismissal of the petition, concurring with the Board's interpretation of the operative rule. The ALJ found that the two provisions in question were mutually exclusive on their face, and that petitioner was entitled to appeal to the Board under one or the other of such provisions, but not both.

The Commissioner adopted in part, and reversed in part, the Initial Decision. The Commissioner fully concurred with the ALJ's (and Board's) interpretation of *N.J.A.C.* 6A:9-17.18, but did not agree that the petition should be dismissed as a result. The Commissioner found that – given the particular facts of this matter – the Board's application of the rule so as to foreclose petitioner from any opportunity for appeal placed form over substance, rendering it unreasonable under the circumstances. The Commissioner remanded the matter to the Board for consideration of the merits of petitioner's appeal pursuant to *N.J.A.C.* 6A:9-17.18(d).

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

January 9, 2007

OAL DKT. NO. EDU 08369-06
AGENCY DKT. NO. 283-8/06

ELLEN MUENCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.[1]

Upon review, the Commissioner has determined to adopt in part and reject in part the Initial Decision of the OAL, concurring with the Administrative Law Judge (ALJ) in his analysis of the regulation at issue, but disagreeing that such analysis should result in dismissal of the petition under the particular circumstances here presenting.

As a preliminary matter, the Commissioner notes that her prior decision with regard to petitioner's appeal to the Board of Examiners (Board) has already held the Board to have acted lawfully in dismissing petitioner's appeal pursuant to *N.J.A.C.* 6A:9-17.18(a), rejecting petitioner's arguments as to good cause for relaxation of the clear regulatory filing

[1] Counsel for petitioner did submit a short letter to the Commissioner "taking exception" to the Initial Decision's contention (at 3) that he "never actually addresses the [Board of Examiners'] argument***that the plain language of the regulation forecloses a petition under (d) where, as here, a petition has been brought under (a)," countering that his October 18, 2006 brief – to which he refers the Commissioner – "clearly addresses this issue." However, because this letter includes no indication of the requisite service on either the Board of Examiners or the Administrative Law Judge, the Commissioner does not consider petitioner to have filed exceptions pursuant to *N.J.A.C.* 1:1-18.4. (Parenthetically, the Commissioner notes that petitioner's October 18, 2006 brief is part of the record of this matter, but was not mentioned by the ALJ in his recitation of sources relied upon for argument, Initial Decision at 2.)

deadline, as well as her allegations of constitutional infirmity in the notice of this deadline provided to her by the State. (*Ellen Muench v. New Jersey State Department of Education, State Board of Examiners*, decided by the Commissioner April 12, 2006, slip opinion at 1-6) That decision went on, however, to note that neither the Board nor the ALJ had considered petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d) or its applicability to her situation, and petitioner's appeal was consequently remanded to the Board specifically to address "the application of *N.J.A.C.* 6A:9-17.18(d) or, if the Board determines that *N.J.A.C.* 6A:9-17.18(d) may not be applied,***articulation of the reasons therefor." (*Id.* at 6-7) On remand, the Board again determined to deny petitioner's appeal, articulating its reasons as directed by the Commissioner:

> The Board noted that the two appeal provisions of *N.J.A.C.* 6A:9-17.18(a) and (d) are mutually exclusive. In fact, 6A:9-17.18(d), specifically states, in relevant part: "Candidates who receive a recommendation of 'disapproved' or two recommendations of insufficient,' *and who do not contest the certification recommendation pursuant to (a) above* may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment." (Emphasis added.) Your client chose to appeal her second insufficient rating in the PTP program under 6A:9-17.18(a) and the reviewable issues of her appeal were fully litigated and decided. Accordingly, the provisions of 6A:-17.18(d) are unavailable to her. The fact that she may have included language citing both provisions in her initial letter of appeal does not alter the clear language of the regulation which provides appellants with alternative remedies, not supplementary ones. If Ms. Muench was seeking different relief, she should have informed the Board of Examiners of her choice prior to its initial review of her case. Her appeal is therefore dismissed in its entirety. (Board of Examiners Letter Decision of July 25, 2006, at 2)

In her appeal of this second denial, petitioner challenges – as matters of both law and fundamental fairness – the Board's interpretation of the operative rule. Petitioner contends that a candidate for certification "should not have to choose between these two remedies when each might apply to her circumstances," explaining that:

> Under the interpretation sought by the State, someone in [petitioner's] shoes might never have any aspect of her case heard on the merits. Here, the Board of Examiners refused to consider her application under subparagraph (a) on the merits, because it was late. However, at the time that she made her appeal under such paragraph (a), she had no way of knowing whether the Board [would] hear her appeal on the merits. The regulations allow the Board might waive the sixty (60) day appeal deadline. [Petitioner] had no way of knowing whether or not the Board would waive that deadline. Accordingly, she had no factual basis for deciding whether subparagraph (d) might be a more appropriate avenue of relief.
>
> Under the State's interpretation, despite numerous briefs, appeals and hearings before an Administrative Law Judge, we have reached the point in this case where no decision-maker or tryer (*sic*) of fact has ever bothered to hear [petitioner's] case on the merits. In light of all of the facts that have been previously set forth in our papers, this seems patently unfair. We are not dealing with an individual who violated some law, abused some child or engaged in some horrific conduct. [Petitioner] had a few less than stellar evaluations that can easily be explained by the facts set forth in her papers. Unfortunately, no one in the State has ever considered those facts, because the State has chosen to stand behind a strict, technical interpretation of the regulation that relieves them from ever having to do so. In my humble opinion, a citizen in the position of [petitioner] deserves better. (Petitioner's October 18, 2006 Brief in Reply to Board's Brief in Support of Motion to Dismiss, at 1-2)

The Commissioner rejects petitioner's view of the rule at issue, instead endorsing the ALJ's (and Board's) interpretation that sections (a) and (d) of *N.J.A.C.* 6A:9-17.18 are mutually exclusive on their face,[2] so that recipients of "disapproved" or two "insufficient" ratings for their period of employment under provisional certification may appeal to the Board of Examiners under either (a) or (d) – but not both. As recognized by the ALJ, the two provisions are intrinsically separate and distinct: Under (a), the candidate *disputes* the employing district's assessment of his or her performance and initiates an adversarial proceeding before the Board seeking to disprove the district's rating, while under (d), the candidate *concedes* deficient performance but seeks the Board's permission for an additional period of provisional employment through a nonadversarial demonstration of why he or she is likely to be successful if

[2] The Commissioner, like the ALJ, bases her analysis on the rule language existing at the time of petitioner's appeal (Initial Decision at 2, Note 1).

the requested opportunity is granted.[3] As the ALJ further suggests, there is nothing in the rule to suggest that a candidate for certification may come before the Board alleging that a negative provisional rating was unwarranted, and then – that challenge having failed for whatever procedural or substantive reason – return for a "second bite of the apple" with the inherently inconsistent claim that he or she does not dispute the assessment but can show that circumstances warrant a further opportunity to succeed. Nor is the Board's (and ALJ's) interpretation unfairly "strict" and "technical" as claimed by petitioner; procedural rules are a necessary and accepted fixture of appeal proceedings of all kinds, and would be rendered meaningless if they could be disregarded solely because their reasonable application in a particular situation results in loss of a claimant's opportunity for hearing on the merits.

Adopting the ALJ's (and Board's) interpretation of *N.J.A.C.* 6A:9-17.18, however, does not end the inquiry in this matter. The Commissioner differs with the ALJ's conclusion that the Board is entitled – on the basis of the referenced rule – to have its decision declining to hear petitioner's appeal under section (d) upheld by the Commissioner.

The letter of appeal submitted to the Board on behalf of petitioner on November 24, 2004 begins as follows:

> This firm represents Ellen Muench. We write pursuant to N.J.A.C. 6A:9-17.18 to appeal a second "insufficient" recommendation received by Ellen Muench from the Perth Amboy Board of Education. We seek relief from the Board for the issuance of a Standard Certificate to Ellen Muench, or in the alternative, an opportunity to seek further employment as a provisional teaching staff member. In addition, we ask that the Board relax its sixty-day requirement for "good cause" pursuant to N.J.A.C. 6A:9-17.18(c). If the Board does not deem "good cause" to exist, we seek relief pursuant to N.J.A.C. 6A:9-17.18(d) to provide Ellen Muench with an opportunity to seek provisional employment, because the facts below establish clearly and convincingly that she will succeed if granted the opportunity. Lastly, we ask for interim and immediate relief, allowing the

[3] While the Commissioner concurs with the ALJ that the rule is clear on its face, she also notes that this reading is supported by the agency summary published with the rule at proposal level on October 6, 2003 (35 *N.J.R.* 4352, 4360-61).

> petitioner to return to her teaching position with the Rahway Board of Education, pending the Board's consideration of the relief sought herein. We set forth below the facts and circumstances that justify the relief requested.

However – notwithstanding its expressly subordinate invocation of section (d), its initial self-characterization as an appeal of the "insufficient" rating received from the Perth Amboy Board of Education, and its request for one of the two outcomes specifically associated with rating disputes under section (a), *i.e.*, issuance of a standard certificate or, alternatively, an opportunity for a further year of provisional teaching – the entire substance of petitioner's five-page, single-spaced letter and its numerous appended exhibits consists of explication of the extenuating circumstances leading to her substandard performance, both in her first year of provisional teaching in the New Brunswick school district and in her second year in Perth Amboy. Not once does she even suggest – let alone directly allege or attempt to show as required by *N.J.A.C.* 6A:9-17.18(a)1-4 – that the rating she received from Perth Amboy did not reflect her actual performance. Thus, while her letter of appeal mischaracterized its own nature and requested a preferred relief – issuance of a standard certificate – available only to appellants disputing their receipt of an adverse rating, petitioner was, in fact, asking the Board's consideration based entirely on the contention that her concededly insufficient performance was due to circumstances beyond her control and that she would now succeed if allowed to continue in employment: precisely the type of appeal contemplated by section (d) of the operative rule, which did not – at the time of petitioner's submission – have a deadline for filing as did section (a).

Given the confusion as to intent and procedure evident in petitioner's good faith letter of appeal – and the magnitude of the consequences flowing from a second "insufficient" rating to a candidate for teacher certification – the Commissioner cannot accept the Board's

categorical rejection of petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d) when, upon the Board's receipt of her appeal, petitioner had neither been advised of the need nor given the opportunity to make a choice between sections (a) and (d) of the rules and "[inform] the Board of Examiners of [such] choice prior to its initial review of her case." (Board of Examiners Letter Decision, *supra*) Under these circumstances – where the Board effectively made the necessary choice *for* petitioner, without her knowledge and in a manner that foreclosed her from any possibility of hearing on the merits – the Commissioner finds the Board's July 25, 2006 decision denying petitioner's section (d) appeal to have placed form over substance to an extent that rendered it unreasonable under the circumstances, and thus, susceptible to reversal on review.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is adopted with respect to its interpretation of the operative rule, but rejected as to its dismissal of the petition. This matter is remanded to the Board of Examiners for consideration of the merits of petitioner's appeal pursuant to *N.J.A.C.* 6A:9-17.18(d).

IT IS SO ORDERED.[4]

Lucille Edy

COMMISSIONER OF EDUCATION

Date of Mailing: 1/09/07

Date of Decision: 1/09/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08369-06S
AGENCY DKT. NO. 283-8/06

ELLEN MUENCH,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF STATE BOARD OF EXAMINERS,
Respondent.

Sean F. Byrnes, Esq., for petitioner
Melissa T. Dutton, Deputy Attorney General, for respondent (Stuart J. Rabner, Attorney General of New Jersey, attorney)

Record Closed: November 9, 2006 Decided: November 21, 2006

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

This matter was previously before this judge for hearing regarding Ms. Muench's attempt to challenge a second "insufficient" rating received during employment under a provisional teaching certificate. She had sought relief from the Board of Examiners ("Examiners") under N.J.A.C. 6A:9-17.18(a), and because her petition was filed with the Examiners after the 60-day period permitted in that regulation she sought a waiver of the 60-day filing limit under N.J.A.C. 6A:9-17.18(c). The Examiners transferred that contested case to the Office of Administrative Law for hearing and in an interlocutory order issued by this judge, I determined that the Examiners' motion to dismiss the petition as untimely should be determined only after a hearing during which the petitioner could seek to establish "good cause" for a waiver of the 60-day filing deadline. In an Initial Decision dated February 28, 2006, I ordered the dismissal of the petition,

concluding both that it was untimely and that the petitioner had failed to demonstrate "good cause" for a waiver of the filing deadline. On April 12, 2006, Acting Commissioner Davy affirmed the ruling that the petition was untimely and that good cause had not been demonstrated, but she remanded the matter to the Examiners for consideration of whether Ms. Muench could avail herself of the provisions of N.J.A.C. 6A:9-17.18(d). On July 25, 2006, the Examiners advised Ms. Muench that her appeal was denied because, having first asserted a challenge to the "insufficient" rating under subparagraph (a) and (c) of the regulation, she was precluded by the regulation from seeking relief under subparagraph (d). Counsel for Ms. Muench filed a Verified Petition of Appeal with the Commissioner on August 15, 2006, challenging the refusal of the Examiner's to grant Ms. Muench relief under subparagraph (d). The Examiners moved on September 14, 2006, to dismiss the petition for failure to state a claim. The Commissioner transferred the matter to the OAL on October 24, 2006, with specific direction to consider "*solely* . . . the possible applicability of *N.J.A.C.* 6A:9-17.18(d) to petitioner's situation." In a telephone conference with counsel on November 9, 2006, I determined that the only decision to be made at this time is whether the conclusion reached by the Examiners that they need not consider the petition on its merits was proper. Counsel agreed that no material facts affecting this issue were in dispute and were satisfied that they had included all relevant arguments concerning the question in their letter briefs to the Commissioner filed on September 14 and October 16 by the Examiners and October 5 by Ms. Muench. As such, I will now decide the matter based upon an analysis of the applicable law as if the parties had each moved for summary decision.

N.J.A.C. 6A:9-17.18(d) provides that candidates for certification who receive "a recommendation of 'disapproved,' or two recommendations of 'insufficient,' and who have not challenged the certification recommendation pursuant to (a) above may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment." [i] (Emphasis supplied). The Examiners' motion argues that Ms. Muench clearly did file a challenge to the "insufficient" recommendation, seeking relief under (a) and asserting that this relief should be permitted under a time waiver

[i] As counsel note, the language of this provision has been changed since the time that the petitioner sought to challenge the second "insufficient" rating. That change, which amended the language, "who have not challenged" to "who do not contest," is not relevant here, and the matter is decided utilizing the prior language applicable when Ms. Muench filed her original petition.

permitted under subparagraph (c), and therefore, even though that petition was never considered on its merits due to the determination that it was untimely filed, the existence of that "challenge" precludes an attempt to obtain an additional opportunity to seek provisional employment under (d). The very language of the regulation is such that the two possible remedies are mutually exclusive and require the petitioner to choose in advance the relief she seeks. Once a "challenge" is pursued, a request under (d) for an "additional opportunity" is precluded. Thus, the Examiners argue that given her previous choice to pursue the (a) remedy, no relief can be given to the petitioner under this petition, which seeks the (d) remedy.

In response, counsel for Ms. Muench never actually addresses the argument presented by the Examiners, that is, that the plain language of the regulation forecloses a petition under (d) where, as here, a petition has been brought under (a). Instead, the petitioner claims that the facts pertaining to her two years of teaching experience, following each of which she received an "insufficient" rating, support her request for relief under (d). Indeed, in the prior hearing, where she sought relief under (a), Ms. Muench likewise asserted that the "good cause" determination under (c) was not limited to the issue of whether she had good reason for having missed the deadline, but was instead a question of whether the totality of the facts involved in her teaching experience and the issues surrounding that experience demonstrated "good cause" for simply ignoring the deadline so that the merits of her cause could be reached. And while he asserts that in her original petition Ms. Muench mentioned both the (a) and (d) remedies, he does not deal with the language of the regulation which specifically limits resort to (d) to situations where the petitioner has "not challenged the certification recommendation pursuant to (a)."

Discussion

The key to deciding the question of whether the relief which Ms. Muench seeks through this petition may be available to her is the plain language of the regulation itself. The language of the regulation, if clear, is the basis for determining its meaning, and where it is "clear and unambiguous," susceptible to but one interpretation, there is no need to "resort to extrinsic interpretative aids." In re Passaic County Utils. Auth., 164

N.J. 270, 299 (2000) (citing Bergen Commercial Bank v. Sisler, 157 N.J. 188, 202 (1999). The sole task is then to carry out the direction of the regulation. New Jersey Dep't of Law and Public Safety v. Bigham, 119 N.J. 646, 651 (1990). This regulation is, indeed, quite clear, for it states without any caveat that the relief possible under (d) is available only to those "who have not challenged the certification recommendation pursuant to (a) . . ." (emphasis supplied). Only such persons "may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment." Those persons who have instead challenged the certification recommendation pursuant to (a) cannot then avail themselves of the possible remedy afforded by (d). While the regulation could of course have been written differently and permitted one who sought relief under (a) to alternatively seek relief under (d), the drafters did not choose to provide for seeking alternative means of relief, choosing instead to require the petitioner to make the choice of which exclusive means of relief to pursue. There is nothing ambiguous about the language employed to set out this choice. The fact that a petitioner such as Ms. Muench might initially express her interest in obtaining relief, citing both the (a) and (d) provisions, does not insulate her from the need to choose which of the two provisions to actually pursue. The choice imposed on the petitioner at the outset is therefore to either seek relief by means of a challenge under (a) and therefore forego the possibility of seeking an additional opportunity for provisional employment under (d), or to forego a challenge of the recommendation under (a) and instead to seek an additional opportunity under (d). Since Ms. Muench sought to challenge the recommendation and pursued that relief under (a), albeit unsuccessfully, she cannot now seek relief under (d) and thus no relief may be afforded to her under the petition. While the determination regarding the relief sought under (a) was resolved due to her failure to meet the filing deadline rather than on the merits, there is no warrant for treating her attempt to invoke (a) with any less consequence than had it been resolved against her on the merits. Knowing as she did that her filing for relief was occurring after the 60-day deadline and that she would have to plead, "good cause" in order to be permitted to pursue her challenge, she could have simply pursued the additional opportunity under (d), but she instead chose to move forward with her challenge under (a) and litigate the good cause issue. Presented with the choice, she chose to pursue the challenge, and thereby she precluded herself from pursuing the "additional opportunity." Therefore, as the facts are not in dispute and the Examiner's

have demonstrated that the law requires that their position prevail on these facts, I **CONCLUDE** that the Examiners are entitled to the **DISMISSAL** of the petition. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 21, 2006
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 22, 2006
DATE

Mailed to Parties:

NOV 28 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

FOR THE PETITIONER:

None.

FOR THE RESPONDENT:

None.

#19-07

OAL DKT. NO. EDU 1161-06
(EDU 9442-01 ON REMAND)
AGENCY DKT. NO. 346-9/01

R.R., on behalf of minor child, J.L.-R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) – wherein the Administrative Law Judge (ALJ) dismissed petitioner's appeal and granted the respondent Board of Education's (Board) request for tuition due to petitioner's failure to appear as scheduled at two OAL hearings – have been reviewed.

Within the time permitted for the filing of exceptions pursuant to *N.J.A.C.* 1:1-18.4, however, petitioner sent a letter explaining his absence and asking that he be permitted to present evidence showing J.L.-R.'s entitlement to attend school in the Board's district. In response, the Board notified the Commissioner that it would have "no objection to vacating the Initial Decision***and reinstating this matter so that the petitioner may proceed to a hearing." (Letter of Board Counsel, dated January 3, 2007)

Given that this matter concerns a student's entitlement to a free public education and that the Board has no objection to proceeding to hearing, notwithstanding petitioner's prior failure to appear, the Commissioner finds it appropriate to permit this matter to proceed as originally intended.

Accordingly, the Initial Decision is rejected for the reasons set forth herein and the matter is remanded to the OAL for hearing on the merits of petitioner's claim.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/11/07

Date of Mailing: 1/12/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1161-06
AGENCY DKT. NO. 396-9/01
ON REMAND EDU 9442-01 FTA

R.R. on behalf of MINOR CHILD,
J.L.-R. V.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Roger Rojas, pro se

Anthony V. D'Elia, Esq., for respondent
(Chasen, Leyner & Lamparello, attorneys)

Record Closed: October 10, 2006 Decided: November 29, 2006

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

STATEMENT OF THE CASE

On January 10, 2005, the Commissioner of Education remanded the matter to the Office of Administrative Law ("OAL"), "in the interest of fundamental fairness to a

pro se petitioner who may be facing the possibility of a tuition assessment that this matter should be returned to the OAL for continued proceedings."[1]

A hearing on remand was scheduled on October 5, 2006. Notices were mailed to the parties. Petitioner failed to appear at the hearing on October 5, 2006. The Board of Education of Clifton submitted the affidavit of Karen L. Perkins, business administrator and board secretary. (Attached). The affidavit provides, in detail, the total amount due for tuition reimbursement for J.L.-R. minor, who was enrolled in the school district from September 20, 2001 to October 6, 2006. The total amount is $40,140.00.

CONCLUSION

I **FIND** and **CONCLUDE** that petitioner had two opportunities to appear before the OAL and appeal the decision of the Board. Further, petitioner has not filed an objection or any response to the Board's calculation of tuition reimbursement.

ORDER

It is **ORDERED** that the petition of R.R. on behalf of minor child J.L.-R.V. be **DISMISSED**. It is further **ORDERED** that the tuition reimbursement as calculated by the Board of Education in the City of Clifton be **GRANTED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

[1] Petitioner failed to appear at the hearing scheduled on November 13, 2003.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 29, 2006
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

November 29, 2006
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 30 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

18-07

OAL DKT. NO. EDU 6160-06
AGENCY DKT. NO. 224-6/06

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
MADELAINE P. GLACKEN,	:	DECISION
SCHOOL DISTRICT OF THE TOWNSHIP	:	
OF EDISON, MIDDLESEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) – wherein the Administrative Law Judge (ALJ) returned the matter to the Department due to the respondent's apparent abandonment of her intent to defend against the Order to Show Cause issued by the Commissioner pursuant to *N.J.S.A.* 18A:26-10 – have been reviewed.

Within the time permitted for the filing of exceptions pursuant to *N.J.A.C.* 1:1-18.4, however, counsel for respondent submitted a certification explaining the miscommunication that led to his failure to appear at the scheduled prehearing conference and asked that his client not lose her opportunity to present a meritorious defense on the basis of an administrative error. The Edison Township Board of Education – which initiated the Commissioner's issuance of the referenced Order – filed no objection to respondent's request.

Upon consideration of counsel's submission and the absence of objection by the Board, the Commissioner concludes that the interests of justice would be best served by permitting this matter to proceed as originally intended. Accordingly, the Initial Decision is rejected for the reasons set forth herein and the matter is remanded to the OAL for hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/07
Date of Mailing: 1/12/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
PRE-HEARING CONFERENCE
OAL DKT. NO. EDU 6160-06
AGENCY DKT. NO.224-606

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF MADELAINE P. GLACKEN, EDISON TOWNSHIP SCHOOL DISTRICT, MIDDLESEX COUNTY

Mary H. Smith, Esq., for petitioner, (Wilentz, Goldman, & Spitzer, attorneys)

Stephen E. Klausner, Esq., for respondent

Record Closed: November 30, 2006 Decided: December 1, 2006

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

This matter is an action by way of Order to Show Cause to suspend the Teaching Certificate of Madeline P. Glacken, respondent, for unprofessional conduct pursuant to N.J.S.A. 18A:26-10. It is alleged respondent broke her employment

contract with the School District of Edison in mid-term without notice or just cause. Respondent, in her answer, denied the charge.

On June 13, 2006, the Edison Township Board of Education filed an Order to Show Cause with the Department of Education alleging respondent's improper conduct. Respondent filed a Certification in Opposition on July 31, 2006, denying the allegations of the Board and requesting a hearing. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on August 8, 2006. The matter was assigned to the undersigned for disposition.

Initially, an in-person prehearing conference (IPP) was scheduled for October 4, 2006; however, it was adjourned because of a scheduling conflict with the court. The IPP was rescheduled to November 6, 2006. Respondent's counsel requested an adjournment from that date because he was attending the State Bar Convention in Rome, Italy. The request was granted. The IPP was again rescheduled to November 22, 2006. On October 30, 2006, the undersigned telefaxed respondent's and plaintiff's counsel a letter advising them of the November 22, date. On November 1, 2006, the OAL Clerk's Office sent respondent's and plaintiff's counsel an official notice that the IPP was scheduled for November 22, 2006.

On the scheduled IPP date plaintiff's counsel appeared at the required time but respondent's counsel failed to appear.

Nine days have passed, which includes the Thanksgiving holiday, since the scheduled in-person prehearing conference. During that period, and as of the writing of this Initial Decision, neither respondent nor her counsel have contacted the OAL to offer any explanation for non-appearance. See N.J.A.C. 1:1-14.4(a)

Therefore, I **CONCLUDE** the respondent no longer seeks to defend the matter. In accordance with N.J.A.C. 1:1-14.4(a), I **ORDER** the Clerk to return the matter to the transmitting agency for appropriate disposition.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 1, 2006
DATE

JOHN SCHUSTER III, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/1/06
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 6 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mh/cad

20-07

#20-07

OAL DKT. NO. EDU 9997-06
AGENCY DKT. NO. 319-9/06

KENTWOOD ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

The record of this matter and the Partial Stipulation of Settlement transmitted by the Office of Administrative Law (OAL) have been reviewed. Because the Department of Education is a party to the matter, the settlement is deemed – with respect to all issues it addresses – to be a final decision pursuant to *N.J.A.C.* 1:1-19.1(c) and (d). The matter shall now proceed, as provided in the Stipulation, solely with respect to the question of the average daily enrollment to be applied to Kentwood Academy by the Department.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/07
Date of Mailing: 1/12/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTIAL DECISION
PARTIAL SETTLEMENT
OAL DKT. NO. EDU 9997-06
AGENCY DKT. NO. 319-9/06

KENTWOOD ACADEMY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Daniel R. Esposito, Esq., for Petitioner
(Kalison, McBride, Jackson & Murphy, P.A., attorneys)

Cynthia Raymond, Deputy Attorney General, for Respondent
(Stuart Rabner, Attorney General of New Jersey, attorneys)

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on September 25, 2006, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, and assigned to the undersigned.

A hearing was scheduled on September 26, 2006 and continued to December 12, 2006 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing on December 12, settlement discussions were held and a partial settlement was reached.

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

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

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

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

3. The parties have agreed that the remaining issue shall be heard on Wednesday, April 4, 2007 at 10:00 a.m.

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

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

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

December 13, 2006
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

Receipt Acknowledged:

Dec 15, 2006
DATE

Joan Lemaster
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

jb

Partial Stipulation of Settlement

Kentwood Academy,

Petitioner

v.

New Jersey Department of Education,

Respondent.

OAL DKT. NO. EDU-9997-06

Agency Ref. No. 319-9/06

Partial Stipulation of Settlement

In accordance with the OAL's Order of October 4th 2006, the parties having a good faith dialogue, having resolved all outstanding issue and concerns related to the deficiencies ~~related to~~ of Kentwood Academy as had been set forth in the Department's August 7, 2006 letter and subsequent correspondence,

It is hereby agreed that:

(1) Kentwood Academy is in compliance with all regulations where they were previously found to be noncompliant.

(2) Kentwood Academy is not on conditional approval status by the Department, and

(3) Kentwood Academy is free to accept, and sending districts are free to refer students to Kentwood Academy, and

(4) Kentwood Academy shall in good faith, coorperate with the Department's monitoring going forward in accordance with the Department's regulations; and

(5) The Department of Education shall issue a letter forthwith to any sending district Boards of Education, stating that Kentwood Academy has resolved the prior concerns of the Deptartment; is in compliance with applicable Department of Education regulations, and is not on conditional approval status and thereby all sending districts are free to refer students to Kentwood Academy going forward.

(6) The case will remain open solely as to the issue of the Applicable Average Daily Enrollment ~~[illegible]~~ to be applied to Kentwood

Dated: 12/12/06

Daniel Esposito, Esq.
Attorney for Petitioner

Dated: 12/12/06

Cynthia Raymond

Cynthia Raymond, DA
Attorney for Respondent

1-5-07

#23-07

OAL DKT. NO. EDU 1323-06
AGENCY DKT. NO. 366-12/05

JOHN FLORA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREDON, SUSSEX COUNTY, RESPONDENT.	:	DECISION

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/17/07

Date of Mailing: 1/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1323-06

AGENCY DKT. NO. 366-12/05

JOHN FLORA,

Petitioner,

v.

FREDON TOWNSHIP BOARD OF EDUCATION,

Respondent.

Gary A. Kraemer, Esq., for petitioner
(Daggett, Kraemer, Eliades, Vanderwiele & Ursin, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 6, 2006 Decided: December 6, 2006

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This matter was transmitted to the Office of Administrative Law on January 13, 2006 for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

December 6, 2006
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12-8-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 2006
DATE

ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

nd

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OFFICE OF ATTY. GEN.
2006 DEC -6 P 1:41

STIPULATION OF SETTLEMENT AND RELEASE

This Stipulation of Settlement and Release is entered into by and between John Flora (hereinafter "Flora") and the Fredon Township Board of Education (hereinafter "Board"), subject to the terms and conditions contained herein:

WHEREAS, on or about June 10, 2005, a Complaint was filed with the School Ethics Commission against John Flora, a member of the Board, by Janet and Henry Carstens (hereinafter "Complainants") alleging four (4) counts of violations to the School Ethics Act (the "Ethics Matter"; and

WHEREAS, an Answer to the violations and a Motion to Dismiss was filed by Attorney Gary A. Kraemer on behalf of Flora; and

WHEREAS, at its July 26, 2005 meeting, confirmed by letter dated August 24, 2005, the School Ethics Commission dismissed the allegations contained in Paragraphs one, three and four and referred the allegations in Paragraph two for a hearing; and

WHEREAS, on October 25, 2005 the Complainants and Flora resolved the remaining allegation in the Complaint with the Complainants agreeing to withdraw the remaining allegation in Paragraph two, and Flora agreeing to withdraw his request for sanctions against the Complainants for filing a frivolous complaint; and

WHEREAS, Flora requested indemnification of his legal fees and costs from the Board for the defense of the Ethics matter pursuant to *N.J.S.A.* 18A:12-20; and

WHEREAS, a dispute arose over the Board's legal responsibility for these costs and the Board denied reimbursement; and

WHEREAS, on or about December 6, 2005, Flora filed a Petition of Appeal against the Board before the Commissioner of Education seeking indemnification for all reasonable counsel fees and litigation expenses from the underlying ethics proceedings in the amount of $4,331.25 together with such additional fees incurred by the enforcement action pursuant to *N.J.S.A.* 18A: 12-20 (the "Indemnification Proceeding"); and

WHEREAS, a separate action was also filed by these same Complainants against Flora on or about January 18, 2005 in the Superior Court of New Jersey, Sussex County, Law Division, Docket No. SSX–L–701-05 (the "Lawsuit"), and Attorney Gary A. Kraemer filed an Answer on behalf of Flora, and requested indemnification on behalf of Flora from the Board, and on or about September 13, 2006 the Board obtained insurance coverage through School Alliance Insurance Fund for this civil action; and

WHEREAS, BASED UPON ALL OF THE FOREGOING, Flora and the Board have decided to fully and finally resolve and settle the Indemnification Proceeding and all claims arising between them concerning the indemnification of legal fees and costs relating to the Ethics Matter and the Lawsuit.

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

1. In exchange for the payment of $3,500.00, Flora agrees to hereby waive and release any and all claims he has or could have had relating to the Ethics Matter and the Lawsuit, and agrees to the filing of a Stipulation of Dismissal with prejudice in the Indemnification Proceeding. The parties agree that Flora is proscribed from reinstituting the Indemnification Proceeding at any time now or in the future, in this or any other forum.

2. The foregoing shall constitute full and complete settlement regarding any and all claims of whatever nature that Flora may have against the Board, its agents and employees, individually or collectively, that were raised or could have been raised in the Indemnification Proceeding, and constitutes a full and final Release to the benefit of the Board, its agents and employees regarding the same.

3. This Agreement does not constitute an admission of wrong-doing and/or liability by any of the parties, nor does it constitute an admission of violation of any statute, regulation, rule, policy or legal duty. This Agreement shall not be cited as precedent nor shall be used in any future legal proceedings (except for the enforcement of its own terms, by either party or their representatives).

5. Each party to this Agreement hereby acknowledges that they have had ample opportunity to review this Agreement and the terms embodied herein, understand the terms, entire into the Agreement voluntarily, and have consulted with and been represented by competent counsel prior to executing this Agreement.

6. This Agreement shall be governed by and shall be subject to the laws of the State of New Jersey. Any action arising out of or relating to this Agreement shall be subject to the exclusive jurisdiction of the laws of the State of New Jersey and shall be venued exclusively in the Courts of the State of New Jersey.

7. This Agreement and all of its terms shall remain confidential to the greatest extent permitted by law. This Agreement is subject to the approval of the Board.

IN WITNESS WHEREOF, the parties have caused this Agreement and Release to be duly executed as of the day and year indicated.

Date: 10/13/06

JOHN FLORA

FREDON TOWNSHIP
BOARD OF EDUCATION

Date: 10/13/06

JOSEPH MANNING, Vice President

STATE OF NEW JERSEY)
SS:
COUNTY OF SUSSEX)

I CERTIFY that on October 13, 2006, before me personally came John Flora, known to me to be the individual described in and who executed the foregoing Agreement, and he duly acknowledged to me that he voluntarily and knowingly executed said Agreement after having read and understood said document.

Attorney or Notary Public

LISA BEATTY
A Notary Public of New Jersey
My Commission Expires OCT. 27, 2009

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent,
Fredon Township
Board of Education.

John Flora, Petitioner, vs. FREDON TOWNSHIP BOARD OF EDUCATION, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOR 01323-2006N AGENCY REF. NO.: 366-12/05 **STIPULATION OF DISMISSAL**

RECEIVED
STATE OF N.J.
OFFICE OF ALJ
2006 OCT 6 P

It is hereby stipulated and agreed by and between the attorneys for Petitioner, John Flora, and Respondent, Fredon Township Board of Education, that the above action be dismissed with prejudice and without costs.

DAGGETT, KRAEMER, ELIADES
VANDERWIELE & URSIN
Attorneys for Petitioner,
John Flora

By: _____
Gary A. Kraemer, Esq.

Dated: Oct. 6, 2006

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Attorneys for Respondent,
Fredon Township Board of Education

By: _____
Nathanya G. Simon, Esq.

Dated: 10/16/06

24-07

#24-07

OAL DKT. NO EDU 1995-06
AGENCY DKT. NO. 35-1/06

IN THE MATTER OF THE TENURE	:	
HEARING OF GARRY HOWARD,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF ROSELLE, UNION COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters, and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a).* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/17/07

Date of Mailing: 1/18/07

* Because respondent is a tenured custodian rather than a certificated teaching staff member, forwarding of this matter to the State Board of Examiners is uncalled for here.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1995-06

AGENCY DKT. NO. 35-1/06

IN THE MATTER OF THE TENURE HEARING OF GARRY HOWARD, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY,

---

Nicholas Celso, Esq., for petitioner, Borough of Roselle School District (Schwartz, Simon, Edelstein Celso & Kessler., attorneys)

Louis Bucceri, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: December 4, 2006 Decided: December 8, 2006

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The School District of the Borough of Roselle ("District") certified charges of unbecoming conduct, insubordination, chronic and excessive absenteeism and other just cause against respondent, Garry Howard, ("Howard") a tenured custodian

employed by the District. The District filed the written charges with the Commissioner of Education on January 18, 2006.

The Department of Education transmitted the matter to the Office of Administrative Law ("OAL") on February 6, 2006 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to 15 and 52:14F-1 to -13. Hearings were held on November 15 and 16, 2006.

At the November 16th hearing, the parties agreed to settle this matter. Due to the nature of the charges, Howard was advised by his attorney that since this is a tenure revocation proceeding, any settlement agreement herein is subject to the approval of the Commissioner of Education. Further, that the Commissioner could refer this matter to the State Board of Examiners for further action. Thereafter, Howard acknowledged that he fully understood the charges and the consequences of this settlement. See Cardonick v. Brookline Board of Education, 1990 S.L.D. 842.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save significant legal expenses and costs, as well as, time expended by administrators and witnesses.

I further **FIND** that Howard had full opportunity to consult with legal counsel prior to entering into the agreement. He is aware that pursuant to N.J.A.C. 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, he was informed by counsel that notwithstanding the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I have reviewed the record and terms of the attached the settlement which is incorporated herein by reference and **FIND**:

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

12/08/06
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

Dec 13, 2006
DATE

Steven Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 19 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

Roselle Public Schools
710 Locust Street
Roselle, N.J. 07203

Katie B. Lamar
Interim Superintendent of Schools
(908) 298-2040 x2041
Supt.'s Office Fax (908) 298-3353

John D' Angelo
Business Administrator/Board Secretary
(908) 298-2040 x2111
Fax (908) 298-8794

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OFFICE OF ATTORNEY GENERAL
2006 DEC 12 P 4:0

Paul Greben
Administrative Assistant/Director
(908) 298-2040 x1502
Fax (908) 298-1852

Jo Ann Reddick Guest
Supervisor of Curriculum K-12
(908) 298-2040 x2045
Fax (908) 298-6928

RESOLUTION

MOVED by Ms. Edwards, seconded by Ms. Tanner, to approve the following Resolution:

RESOLVED, that the Board hereby approves the Settlement Agreement and Release ("Settlement") in the matter captioned I/M/O Tenure Hearing of Garry Howard, School District of the Borough of Roselle, Union County, bearing Agency Docket Number 35-1/06 and OAL Docket Number EDUTH 01995-2006N, in accordance with the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED, that a copy of the Settlement shall be included in the permanent minutes of this meeting; and

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement on behalf of the Board; and

BE IT FURTHER RESOLVED, that the Board accept Mr. Howard's resignation effective April 1, 2007.

ROLL CALL: Yes - Mr. Aubourg, Mr. Burch, Ms. Tanner, Ms. Edwards, Rev. Moore

Abstain - Mr. Simmons

Motion approved 5, 1 Abstain

Certified to be a true copy of a resolution adopted by the Roselle Board of Education at their meeting held on November 27, 2006.

Certified by Board Secretary

JD:gr

Equal Opportunity Employer

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Roselle Board of Education

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2006 DEC
STATE OF N.J.

IN THE MATTER OF TENURE HEARING OF GARRY HOWARD, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO. 35-1/06
OAL DOCKET NO. EDUTH 01995-2006N

ADMINISTRATIVE ACTION

STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Roselle Board of Education ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Roselle School District; and

WHEREAS, Garry Howard commenced employment with the Board as custodian with the District in March, 1991; and

WHEREAS, on December 15, 2005, Darlene Roberto, Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with the Board Secretary (See, Exhibits A & B, respectively); and

WHEREAS, on January 9, 2006, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about January 19, 2006, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about February 3, 2006, an Answer was filed on behalf of Respondent; and

WHEREAS, on or about February 6, 2006, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Irene Jones; and

WHEREAS, the hearing in this matter commenced on November 15, 2006 and continued on November 16, 2006; and

WHERAS, at the conclusion of the testimony on November 16, 2006, but prior to the conclusion of the proceedings, which were expected to last for at least two more days, the parties agreed to settle the matter; and

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

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. **Tenure Charges to be Moot**

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. **Resignation**

Respondent has tendered his irrevocable resignation from all employment with the Board, effective as of the close of business on April 1, 2007.

3. **Payment**

The Board will pay to the Respondent his regular salary, pursuant to contract, through April 1, 2007. Respondent waives his right to all other compensation from the Board of any kind, including but not necessarily limited to payment for unused sick, vacation and personal days.

4. **Health Benefits**

The Board agrees to pay the premium for Respondent's health benefits at their current level, through April 1, 2007, after which Respondent shall have the same COBRA rights as any other former employee.

5. **Release**

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

Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to have the District pay any amounts for his or his dependents' health insurance coverage under COBRA. Also, excluded from this release is any claim for indemnification Respondent may have against the Board pursuant to Title 18A. Lastly, this release does not apply to any right Respondent might have to collect unemployment benefits and any application for such benefits will not be opposed by the Board.

6. **Surrender of Board Property**

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

7. **Public Interest**

The proposed settlement of this tenure dispute will serve the public interest because, as a result of Respondent having tendered his irrevocable letter of resignation from his employment with the Board, the Board will not have to incur any further legal fees in connection with the prosecution of this matter. Further, the Board's operation will not be disrupted by having staff members out of the District to testify in connection with this matter, nor will it have to pay for substitute employees.

8. **Board Approval**

The Board President is authorized to execute this Agreement on behalf of the Board of Education.

9. **Assent to Terms**

Respondent hereby acknowledges that he entered into this agreement with a full understanding of his rights and that he was fully informed of the implications of this agreement by his counsel. Respondent also enters into without duress of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Marc H. Zitomer, Esq., 10 James Street, Florham Park, New Jersey 07932. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will not be entitled to the entire consideration described herein.

10. **Entire Agreement**

This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties. All terms of this Agreement are deemed material.

11. **Governing Law**

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Darry Howard Date: 11-22-06
GARRY HOWARD

WITNESS:
/s/ Cheryl Howard Date: 11-22-06

FOR THE ROSELLE BOARD OF EDUCATION:

Rev. James E. Moore, Sr. Date: 11/30/06
REVEREND JAMES MOORE, BOARD PRESIDENT

ATTEST:
John D'Angelo Date: 11/30/06
JOHN D'ANGELO,
Board Secretary/Business Administrator

Garry Howard
1211 Crescent Avenue
Roselle, NJ 07203-2508

November 22, 2006

John D'Angelo,
Board Secretary/Business Administrator
Roselle Board of Education
710 Locust Street
Roselle, NJ 07203-1919

Re: Letter of Resignation

Dear Mr. D'Angelo:

I hereby submit my resignation from any and all positions of employment with the Roselle School District, effective April 1, 2007. This resignation is expressly conditioned upon the Roselle Board of Education's approval of and compliance with the Stipulation of Settlement signed by me on November 22, 2006, as well as the approval of that Stipulation by the New Jersey Commissioner of Education, but is otherwise irrevocable. This resignation may not be deemed to be any form of admission.

Sincerely,

Garry Howard 11-22-06
Garry Howard

25-07

#25-07

OAL DKT. NO. EDU 7930-05
AGENCY DKT. NO. 101-4/05

KENNETH DAMKEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed settlement agreement – as set forth in the July 20, 2006 letter of petitioner's counsel, and approved by the Board of Education – and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C*. 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement and adopts it as the final decision in this matter. In so doing, however, the Commissioner observes that central terms of the agreement appear to have been effectuated by the parties prior to final agency approval, contrary to *N.J.A.C.* 1:1-19.1. Accordingly, the Commissioner cautions that, in controverted matters transmitted to the OAL, proposed settlements should not be effectuated without the Commissioner's approval, and that parties act at their peril in so doing.

With the caution noted above, the matter is hereby dismissed, subject to continued compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Eday
COMMISSIONER OF EDUCATION

Date of Decision: 1/17/07
Date of Mailing: 1/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07930-05

AGENCY DKT. NO. 101-4/05

KENNETH DAMKEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

Respondent.

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

John P. Harrington, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: December 14, 2006 Decided: December 18, 2006

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

This matter was transmitted to the Office of Administrative Law (OAL) on July 22, 2005, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on December 12 and 13, 2006. Prior to the date of hearing the parties settled the matter. The attached Letter Settlement Agreement was

submitted on July 20, 2006 and on December 14, 2006, the parties submitted the Resolution by the Board of Education, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

December 18, 2006
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

12-20-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 21 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

Springstead & Maurice
Attorneys at Law
39 Hudson Street, Hackensack, NJ 07601
(201) 343-0003
Telecopier (201) 487-0212

ALFRED F. MAURICE
N.J. & Fl. Bars

HAROLD N. SPRINGSTEAD, L.L.M.
(certified criminal trial attorney)

LAUREN E. MCGOVERN

July 20, 2006

By Facsimile:(908) 647-1492
John P. Harrington, Esq.
Appruzzese, McDermott, Mastro & Murphy
P.O. Box 112
Liberty Corner, New Jersey 07938

Re: Damken v. Tenafly Board of Education
OAL Docket No. EDUOR 07930-2005N
Agency Ref. No. 101-4/05

Dear Mr. Harrington:

This is to confirm the settlement of the above action on the following terms:

1. The Board will contract with Mr. Damken to engage him as a non-tenured Spanish teacher in the District for the 2006-2007 school year.
2. Mr. Damken will be paid on the 7th step of the teachers salary guide and receive a .7 (seven tenths) full time equivalent position at an annual rate of pay of $40,275.
3. In consideration for the appointment to the .7 position, Mr. Damken will resign his tenured position with the school district.
4. In addition, Mr. Damken will withdraw, with prejudice, his action before the Commissioner of Education.
5. Subsequent to the 2006-2007 school year, the Board will have the option to continue or non-renew Mr. Damken's employment as a non-tenured teacher with the District.
6. Mr. Damken will receive the full benefit of the Separation of Service Plan that was the subject of the above action and receive the cash benefits thereof as if he retired on June 30, 2006.

Please confirm that this settlement is acceptable to the Board and appropriate documents confirming the same will be drafted.

Very truly yours,

ALFRED F. MAURICE

AFM:mb
Cc: Mr. Kenneth Damken

Kenneth Damken
7-21-06

LAW OFFICES
APRUZZESE, McDERMOTT, MASTRO & MURPHY
A PROFESSIONAL CORPORATION

VINCENT J. APRUZZESE (1)(2)*
FRANK X. McDERMOTT (1)(2)*
FRANCIS A. MASTRO (1)*
FREDERICK T. DANSER, III
MAURICE J. NELLIGAN, JR. (4)
BARRY MARELL
ROBERT T. CLARKE
MARK J. BLUNDA (1)◊
JAMES L. PLOSIA, JR.
LISA BARRÉ-QUICK (1)(2)(3)
JOHN P. HARRINGTON
ROBERT J. MERRYMAN (3)
ARTHUR R. THIBAULT, JR.
LINDA GANZ OTT
RYAN S. CAREY (2)

(MAIL TO)
P. O. BOX 112
LIBERTY CORNER, N.J. 07938

(DELIVER TO)
SOMERSET HILLS CORPORATE CENTER
25 INDEPENDENCE BOULEVARD
WARREN, N.J. 07059

(908) 580-1776

FAX: (908) 647-1492

WEBSITE: www.ammm.com

JAMES F. MURPHY
(1938-1990)

521 FIFTH AVENUE
SUITE 1700
NEW YORK, NEW YORK 10017
(212) 292-4218

ALSO D.C.(1) N.Y.(2) PA.(3) MD.(4)
◊CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
*OF COUNSEL

December 14, 2006

VIA Facsimile & Regular Mail (973) 648-2358
The Honorable Mumtaz BariBrown, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 DEC 18 A 9:47

RE: Kenneth Damken v. Tenafly Board of Education
OAL Docket No.: EDUOR-07930-2005N

Dear Judge Bari-Brown:

Enclosed is a resolution from Respondent Tenafly Board of Education reflecting the hiring of Kenneth Damken pursuant to the settlement agreement in the above matter. We trust this meets your need for confirmation of the Board's approval of the settlement.

Respectfully, submitted,

John P. Harrington

JPH/baj
Encl.
Cc.: Alfred F. Maurice, Esq.
Wayne Demikoff

S:\JPH\Tenafly BOE\Letter to Judge Bari-Brown forwarding resolution in Damken matter.doc

RESOLUTION P-4 HIRES

BE IT RESOLVED that the following persons be employed to fill the positions listed for the length of time and compensation indicated and subject to all federal, state, county, and local regulations governing said employment in accordance with Senate Bill #851 regarding a criminal history background check:

NAME AND POSITION	EMPLOYMENT DATES	CLASSIFICATION AND SALARY
Pasqualina Arlia Long-term substitute for Resource Center-Mackay	9/1/06-6/30/07	M.A., Step 1 $44,299 annual salary
Kenneth Damken Teacher of Spanish –Smith .5, HS .2 FTE	9/1/06-6/30/07	M.A.+48, Step 7 $40,275 annual salary Prorated for .7 FTE
Diana Ling English-High School	9/1/06-6/30/07	B.A., Step 1 $42,148
Pamela Mendeloff Resource Center teacher-Mackay	9/1/06-6/30/07	B.A., Step 2 $43,069
Patricia Pacheco .6 FTE Art Teacher-High School	9/1/06-6/30/07	M.A., Step 1 $26,579 annual salary for .6 FTE
Dara Peskin Resource Center *pending receipt of NJ certification as Teacher of Students with Disabilities	9/1/06-6/30/07	M.A., Step 2 $45,604 annual salary
Lee-Ann Schaadt Long-term Substitute –Smith School	9/1/06-6/30/07	B.A., Step 1 $42,148 annual salary
Elisa Schwartz .6 FTE Speech Therapist* *pending receipt of NJ certification-Speech	9/1/06-6/30/07*	M.A., Step 10 $35,361 annual salary for .6 FTE assignment
Lisa Wowkun Science teacher – Middle School	9/1/06-6/30/07	B.A.+8, Step 5 $46,754 annual salary
Barbara Cardona 19 hr. Special Ed Aide – Middle School	9/1/06-6/30/07	$15.96 an hour $11,099 annual salary
Linda Ribaudo 19 hr. Special Ed Aide-Middle School	9/1/06-6/30/07	$15.96 an hour $11,099 annual salary

Andrea Gude Lunch Aide-Middle School	9/1/06-6/30/07	$15.30 an hour 3 hrs. a day, 183 days $8,400 annual salary
Florence Glennon Lunch Aide – Maugham School	9/1/06-6/30/07	$15.30 an hour 1.75 hrs. a day, 174 days $4,659 annual salary
Norma Breit Lunch Aide – Maugham School	9/1/06-6/30/07	$15.30 an hour 1.75 hrs. a day, 174 days $4,659 annual salary

RESOLUTION P-5 CREATION OF EXTRA COMPENSATION POSITIONS

BE IT RESOLVED that the Board approves the creation of the following extra-compensation positions for the 2006/2007 school year:

EXTRA-COMPENSATION POSITION	STIPEND
Middle School Cross Country Coach	$2,990
Virtual High School Advisor/Coordinator	(to be determined)

RESOLUTION P-6 EXTRA-COMPENSATION APPOINTMENTS

BE IT RESOLVED that the Board approves the following extra-compensation appointments for the 2006/07 school year:

NAME	POSITION	STIPEND
Veronica Capone*	VHS Site Coordinator*	To be determined
Susan Toth*	Cross Country –MS*	$2,990
Brian Sabourin	Chess Club -MS	$ 709
Diana Park	Team Leader –MS	$2,297

*pending approval of Resolution P-5 above

RESOLUTION P-7 ELIMINATION OF 30 HOUR-A-WEEK SPECIAL ED AIDE POSITION CREATION OF POSITION OF HIGH SPECIAL EDUCATION AIDE – EXTENDED DAY

BE IT RESOLVED that the Board approves the elimination of a 30 hour Special Education Aide position at the High School and the creation of the following special education aide position:

POSITION	HOURS PER YEAR AND HOURLY RATE
Special Education Aide-Extended Day High School	1265 hours per year $15.96 an hour, $20,189 annual salary

26-07

OAL DKT. NO. EDU 8155-05
AGENCY DKT. NO. 182-7/05

BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN LAAG,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement & General Release, and Initial Decision issued by the Office of Administrative Law – pursuant to *N.J.A.C.* 1:1-19.1 – have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/17/07

Date of Mailing: 1/18/07

* The Commissioner is, however, compelled to comment on Term #4 of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions are a matter of public record.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8155-05

AGENCY DKT. NO. 182-7/05

BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG BURLINGTON COUNTY,

Petitioner,

v.

JOHN LAAG,

Respondent.

Roger A. Barbour, Esq.,for petitioner (Barbour & Barbour, P.A., attorneys)

Hercules Pappas, Esq., for respondent (Pappas & Richardson, LLC, attorneys)

Record Closed: December 15, 2006 Decided: December 21, 2006

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

This matter was transmitted to the Office of Administrative Law on October 13, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

December 22, 2006
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

12/27/06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 29 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

9-1 in order 12-18-06

FILED

2006 DEC 15 A 10:20

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PAPPAS & RICHARDSON, L.L.C.
HERCULES PAPPAS, ESQUIRE
14 North Maple Avenue
Marlton, NJ 08053
(856) 985-2380
Attorney for Defendant

SHAMONG TOWNSHIP BOARD OF EDUCATION PETITIONER v. **JOHN LAAG** RESPONDENT	OFFICE OF ADMINISTRATIVE LAW DOCKET: EDUOS-08155-2005S **Settlement Agreement**

SETTLEMENT AGREEMENT & GENERAL RELEASE

This Settlement Agreement is made between the Shamong Township Board of Education (hereinafter "Shamong") and John Laag (hereinafter "Laag").

RECITALS

1. Shamong commenced an action for the recovery of non-resident tuition in the Office of Administrative Law of New Jersey, Docket Number EDUOS08155-2005S.
2. In the Action Shamong alleged that Laag's children attended Shamong Township schools while the family was living in another municipality.
3. The parties desire to resolve the issues among them, and to settle the Action.

NOW THEREFORE, in consideration of the conditions, covenants, obligations and mutual agreements set forth in this Agreement, and in full settlement of Shamong's claims against Laag, the parties agree as follows:

1. Nothing provided in this Agreement shall constitute an admission by Laag of liability or wrongdoing, or the violation of any law, rule, regulation, public policy or contract provision.
2. In full and complete settlement of all the claims which were or could have been asserted by Shamong against Laag from the beginning of time to the present,

Laag shall pay to Shamong the sum of Two Thousand Five Hundred Twenty Dollars and Fifty Centers ($2,520.50) (the "Settlement Sum"). Payment shall be made within ten (10) days of execution of this Agreement by all parties.

3. Shamong further agrees to release Laag from any responsibility for tuition for any and all of Laag's children, to wit: Jessica Laag, Dana Laag and Catherine Laag.

4. The parties acknowledge that this Agreement is confidential, and agree not to disclose any information regarding any of the terms of this Agreement, except to the parties' attorneys in the matter.

5. All parties to this Agreement had an opportunity to review this Agreement and obtain independent legal counsel to review same.

6. Upon the execution of this Agreement, the parties shall execute and file a Stipulation of Dismissal with Prejudice of the Action.

IN WITNESS WHEREOF, this Agreement has been executed and delivered on the date written below.

ROGER A. BARBOUR
Attorney for Petitioner
Dated: December 4, 2006

HERCULES PAPPAS
Attorney for Respondent
Dated: 11/28, 2006

THOMAS P. CHRISTENSEN
Superintendent
Dated: 12/6, 2006

JOHN LAAG
Respondent
Dated: 11/21, 2006

Pappas & Richardson, LLC

JOHN D. FUTEY, A.L.J.
December 18, 2006

27-07

OAL DKT. NO. EDU 10428-06
AGENCY DKT. NO. 317-9/06

S.A., on behalf of minor child, J.O.-K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on December 7, 2006, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/18/07
Date of Mailing: 1/18/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4-1.1 *et seq.*

28-07

A.P., SR., on behalf of minor child, D.K., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner contested respondent's determination that his ward, D.K., was not domiciled in respondent's district during the 2005-2006 school years. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance, based on observations by an investigator that D.K. was living at an address in Burlington.

The ALJ found that petitioner has proven by a preponderance of evidence that D.K. was domiciled in respondent's school district during the period in question; that the address in Burlington was never a permanent domicile; and concluded that respondent was required to provide D.K. with a free public education. The ALJ dismissed the respondent's counterclaim for tuition.

Upon an independent and thorough review of the record, the Commissioner adopts the Initial Decision as the Final Decision in this matter.

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

January 18, 2007

OAL DKT. NO. EDU 0541-06
AGENCY DKT. NO. 24-1/06

A.P., SR., on behalf of minor child, D.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge, for the reasons clearly presented in his decision, that A.P. was a domiciliary of respondent's district for the period at issue herein, *i.e.,* December 12, 2005 through June 20, 2006, thereby entitling minor child D.K. to free attendance in the district's schools during this time.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/18/07
Date of Mailing: 1/18/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00541-06S
AGENCY DKT. NO. 24-1/06

A.P., SR., ON BEHALF OF MINOR CHILD, D.K.,
Petitioner,
v.
BOARD OF EDUCATION OF BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

A.P., Sr., petitioner, pro se
Peter Spaeth, Esq., for respondent (Wolff, Helies, Duggan, Spaeth & Lucas, attorneys)

Record Closed: November 28, 2006 Decided: December 5, 2006

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

The Bordentown Regional School District Board of Education advised Mr. A.P., Sr., that it disputed that a child for whom he serves as guardian, D.K., was entitled to receive a free public education provided by the Board, as it did not believe that Mr. P. was actually domiciled within the regional school district. Following issuance of a Notice of Initial Determination of Ineligibility on December 9, 2005, the District issued a Notice of Final Ineligibility to Mr. P. on December 16, 2005. In addition to claiming that it did not have any obligation to provide a free education to D.K., this Notice also alerted Mr. P. that if no appeal was filed from the Board's decision, that the Board might assess Mr. P. tuition at the rate of $56 per day for each day D. attended the district's school while not entitled to do so at no cost. On January 13, 2006, Mr. P.'s appeal was

received by the Department of Education's Office of Controversies and Disputes. The Board filed an Answer to Mr. P.'s appeal, received by the DOE on February 10, 2006. The contested case was transferred to the OAL on February 16, 2006. A prehearing conference was held by Honorable John Futey, ALJ, on March 14, 2006. Subsequently, Judge Futey recused himself and the case was reassigned to this judge.

While the Board did not make a specific counterclaim for tuition in its Answer, it sought to assert such a claim at the hearing which was held on November 20, 2006. Mr. P. acknowledged that he was aware of the claim, as indeed the Notice of Final Ineligibility had referred to the possibility of such claim. However, as there never was a formal counterclaim or any other notice that an assessment of tuition might be claimed at a rate greater than the $56 rate noted in the Notice, I denied the Board's attempt to claim a daily tuition rate higher than $56 a day. Further, as the Board agrees that Mr. P. has been domiciled within the district during the current 2006-2007 school year, its contention that he was not so domiciled and its consequent claim for tuition is limited to the period from December 12, 2005, through June 20, 2006, a period of 118 school days.

Following the hearing on November 20, I permitted Mr. P. an opportunity to file a reply to the arguments set forth by the Board's counsel in his pre-trial memorandum, which was filed just prior to the hearing. Mr. P. replied on November 28 and the record closed as of that date.

Evidence

Mr. P. testified that he purchased the property located at 99 Dunns Mill Road, Bordentown in 2003. He moved in during the summer of 2003. A single family home is situated on this property, which is adjacent to the property of the Board on which the high school is located. Prior to that time, Mr. P. resided at 636 Oakland Avenue in Burlington, New Jersey. Mr. P. is D.K.'s uncle and has guardianship over the boy, who was 14 years old and in 9th grade during the period of school attendance in question here.

Photographs of the outside of the home located at 99 Dunns Mill Road were offered into evidence by the Board. These show that much of the siding is missing, and remains so, but the decision in this case is not governed by the appearance of the exterior of the home. Mr. P. testified that he remained in the home until an incident forced him to leave, and while he was gone on military duty with the National Guard for a period of 20 days, animals entered the home through a door improperly installed by a contractor and did much damage. The condition of the home was such that he had to stay with friends and then move to Tenby Chase in Delran in October 2003. He remained there until the summer of 2004, moved back to his mother's home at 636 Oakland Avenue, Burlington, in October 2004 and then finally returned to Dunns Mill Road in December 2005. In the interim he took over guardianship of D.K. in 2004. D.K. resided with him in Delran and then in Burlington.

D.K. was enrolled in the Burlington School District in 2004 and then in Bordentown Regional in the fall of 2005. This enrollment was initiated because the plan was to move into Dunns Mill Road full time, but this was not accomplished during the months of September, October and November 2005. Additionally, it was Mr. P.'s desire that given the intended move, that D. enjoy four years at Bordentown, rather than one year in Burlington followed by three years in Bordentown. In November 2005, Mr. James G. Lymper, Vice-Principal at the Bordentown Regional High School, contacted Mr. P. and advised of a "60-day policy" regarding renovation of a house. As a result of this conversation, Mr. P. discussed with a contractor the cleaning up of the bedrooms in the Dunns Mill Road house so as to permit him to live there full time with D.K. According to P., they had lived in Dunns Mill Road part-time since the summer of 2005, but they moved in permanently in December 2005. The house has three bedrooms and D.K. has his own bedroom. Mr. P. also has a two year old child who resides with him part-time. As of December, the bedrooms were cleared, but a partition was placed in front of the kitchen and a back room, due to the placement there of tools by the contractor and the intention to take that part of the house off to allow an expansion. A gas line that had been broken was repaired before they moved in full-time, but due to the tools, Mr. P. would go to his mother's house in Burlington and cook an amount of food to bring back to Dunns Mill Road, where he had a refrigerator and a microwave.

While Mr. P. is technically still employed as a corrections officer by Mercer County, for the past two years he has been on military leave, serving in the National Guard and assigned unspecified duties in "South Jersey."[i] He works nights on active duty and is not home three nights a week. He has a 50%-50% custody arrangement with the mother of his 2 year old child. If he is not home a nanny stays with the child. About once a week Mr. P.'s duties conflict with D.K.'s school work and D.K. stays in the Dunns Mill Road house by himself, with his mother checking on the boy. On weekends, they might go to Mr. P.'s mother's house. There were occasions when D.K. did not spend the night at Dunns Mill Road and would be at Oakland Avenue, such as the nights when major cooking took place at the Burlington address. The Oakland Avenue address was listed for sale for about 14 months until it was sold on November 7, 2006. If he could have done so, he would have stayed at Dunns Mill Road all of the time.

Evidence produced under subpoena from Mercer County showed that Mr. P. had not advised his employer of any change of address to Dunns Mill Road. He testified that he always showed a post office box as his mailing address, a common occurrence with corrections officers. He remains on full pay with the County and his checks are direct deposited to his account. His pay stubs are sent to his post office box.

Victoria Rivera-Cruz, Personnel Director for Mercer County, testified that county employees are responsible for supplying current addresses and telephone numbers to the employer. Mr. P. has been employed with the County's Department of Corrections since 1991. On November 15, 2005, an address at Oakland Avenue was provided to the County for the first time, along with a post office box in Trenton. On January 13, 2006, a memorandum received by her office indicated a change in the post office box but did not change the street address, which remained at 636 Oakland Avenue. She did not have any document signed by Mr. P. evidencing this change, only a memo to this effect. Similarly, she had no document signed by P. reflecting the change of address to Oakland Avenue on November 15, 2005. However, on August 8, 2006, he did sign a document transferring his post office box. Ms. Rivera-Cruz was not aware of any specific change of address form utilized by the Corrections Department, although the County does have such a form. Administrative staff at the Department of

[i] Mr. P. was unsure whether he could be more specific as to the exact nature of his military assignment.

Corrections can advise the Personnel Department of address changes requested by corrections officers. Ms. Rivera-Cruz was aware of a disciplinary issue that prevented Mr. P. from being on the grounds of the Correction Center in January 2006. The January change of address notice was generated by Sonya Caldwell, an employee at the Corrections Center. In August 2006, Mr. P. came to the County's Administration Building and sought to discuss with her issues regarding his employment status and a disciplinary issue. He placed his request for a change of the post office box on a demographic sheet supplied to her by a staff member. She does not recall him raising any issue at that time regarding any alleged unauthorized changes of his address occurring in either November 2005 or January 2006.

Ronald Franks, a retired Bordentown Township police sergeant employed by the school district for matters dealing with security, truancy and residency, testified regarding his surveillance of Mr. P. and D.K. over a period from January 9, 2006, through June 1, 2006. On January 9, Mr. Lymper had told him to meet with P. at 99 Dunns Mill Road so that he could observe the interior of the home. He arrived there at 6:30 am and waited until 7:45, but no one answered the door. School starts at 7:35. There were no cars visible and no lights on and no sign of anyone there. No one came out. Later that morning, Lymper advised Franks that P. was at the house and he went there, where he saw P., D.K. and P.'s son. The downstairs was messy and clearly under construction. The bedrooms were upstairs and he had to climb over a ladder to get to the stairs. There was no furniture downstairs, but in the two bedrooms he saw there was a small single bed, a dresser and a lamp in each. A blanket and pillow were on each bed. No clothing was visible. A yellow Hummer was in the driveway, which he identified as Mr. P.'s vehicle. He next investigated the matter on March 6. He went to Mr. P.'s mother's home on Klockner Road in Hamilton, but saw no one coming from there. On Tuesday March 7, he observed 99 Dunns Mill Road from 6:30 to 7:40 am, driving past the house and then parking in the school driveway next to the house. He saw no vehicles or any persons. After school ended he went to 636 Oakland Avenue and saw the Hummer in the driveway and a white Ford on the street. There was a "For Sale" sign on the property. Thereafter he conducted surveillance on several days in March and again in May. The results are summarized below. The gray Altima referred

to was identified in testimony by Mr. P. as belonging to the nanny who would watch the children when he was unavailable.

Date	Location observed	Time of observation or arrival	observations
3/8	Dunns Mill Road	6:30-7:36 am	No vehicles, lights or activity observed;
3/9	Dunns Mill Road	6:40-7:30 am	No vehicles, lights or activity, Hummer arrives at school at 7:28 from direction of Route 130 (opposite from direction of 99 Dunns Mill Road);
3/10	Dunns Mill Road	6:30-7:36 am	No vehicles, lights or activity, D.K. in school on time;
3/13	Dunns Mill Road	6:30-7:35 am	No vehicles, lights or activity. D.K. in school on time;
3/14	Oakland Avenue	6:45 am	observed Hummer, white Ford and Gray Altima, female exited house with small child and D.K., drove D.K. to school;
3/15	Oakland Avenue	6:36 am	Hummer and Ford observed, Hummer to school at 7:25 am;
3/16	Dunns Mill Road	7-7:35 am	No vehicles, lights or activity observed;
3/17	Dunns Mill Road Oakland Avenue	6:15 am 6:29 am	Nothing observed, then to Hummer and Ford observed, Mr. P and D.K. to school in Hummer at 7:21 am;
3/21	Oakland Avenue	6:15 am	Altima and Ford observed-female and two children leave for school at 7:19 am;
5/24	Dunns Mill Road		No improvements to outside of house;
5/30	Oakland Avenue	6:25 am	Ford, Hummer and Altima observed-female and two children depart for school;

6/1	Oakland Avenue	Ford and Hummer observed, Mr. P. and D.K. depart for school at 7:16 am.

Mr. Franks acknowledged that while there is no attached garage at Dunns Mill Road, there is a structure further back on the property. However, he asserted that from the spot on the school parking lot where he parked his vehicle he could see if any vehicles were exiting from the property. He noted that spot on a diagram entered as Exhibit J-8 and claimed that he could see the front yard of the house from that location, but not the front porch. Someone could conceivably go through the back of the Dunns Mill Road property to the back of the high school, hopping the chain link fence to gain access to the school lot.

James G. Lymper, High School Vice-Principal for two years and responsible for the 9th and 11th graders, spoke to Mr. P. sometime before November 21. He had been alerted by a secretary to the fact that D.K. had been late to school quite a few times at the beginning of the year. She said that D.K. said that he was living in Burlington City. Lymper called P. and discussed the renovations to the Dunns Mill property. After this discussion, in which Mr. P. expressed his desire to have D.K. have his high school experience in one, rather than two, high schools, Mr. Lymper wrote to Mr. P. that he had until December 9, as P. told him that he was going to have the contractor make the Dunns Mill house liveable by that date.

The Concept of Domicile

N.J.S.A. 18A:38-1 provides that

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
> b. (1) Any person who is kept in the home of another person domiciled within the school district . . .

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991) (quoting Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944)). Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977). The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. State v. Benny, 20 N.J. 238, 251 (1955). A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Ibid. Thus, "the concept of 'domicile' may have different content and shades of meaning depending upon the context in which it is used." In re Estate of Gillmore, 101 N.J. Super. 77, 87 (App. Div.), certif. denied, 52 N.J. 175 (1968).

Nonetheless, "(e)very person has a domicile at all times, and no person has more than one domicile at any one time." Id. at 87 (citation omitted). "Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile." Benny, supra, 20 N.J. at 251. A very short period of residence in a given place may be sufficient to acquire domicile. Domicile is established by the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." Lyon v. Glaser, 60 N.J. 259, 264.

There is nothing inherent in a construction site that would prohibit it from qualifying as a domicile. However, where a person has more than one residence, the following factors are useful in determining his domicile: "the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient

objective indicia, by way of proofs, supporting the actual existence of that domicile." Unanue, supra, 255 N.J. Super. at 376.

The Commissioner of Education commented upon the domicile issue in reviewing the initial decision in F.P., on behalf of N.P.. & S.P. v. Board of Education of Point Pleasant Beach, Ocean County, OAL DKT. NO. EDU 6951-98, Final Decision (Commissioner of Education April 12, 1999),

> Domicile is thus intrinsically identified with the concept of home. As stated by the *Unanue* court, ". . . identification of domicile with the concept of home continues to have vitality in New Jersey '[h]ome is the place where a person dwells and which is the center of his domestic, social and civil life. '" (*Unanue*, supra at 374) Moreover, the concepts of home and domicile "mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence." (*Id.* at 375).
>
> Establishing a domicile involves an act of volition, *i.e.*, a person has the right to choose his own domicile; moreover, a person's motive in doing so is immaterial "so long as the necessary ingredients for establishment of the new domicil are present." *Lyon v. Glaser,* 60 *N.J.* 259, 264, 288;, *Unanue, supra* at 375.
>
> Central to the issue of determining true domicile, particularly when multiple residences are involved in the dispute, is the concept of "indicia of domicile." The *Unanue* Court concluded "[it] is clear that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile. Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that requisite subjective intent be present since domicile is `very much a matter of the mind - of intention.'" (*Unanue, supra* at 376, citing *Lyon, supra*) Such indicia oftentimes are statements relative to domicile in such documents as tax returns, wills, trusts, or other formal documents and statements made by an individual to others as to his/her domicile. The *Unanue* decision indicates that such recitals are evidential of actual domicile but the Court concluded, they are not at all conclusive, rather "[t]hey are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile ." (*Id.* at 377)
>
> As correctly noted by the ALJ, a change in domicile is a matter of intention, *i.e.*,"[a] change of domicile. . . is effected if a person actually moves to a new abode intending to remain there for an indefinite period of time and establishing it as a place of fixed present domicile,

notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time ." (*Unanue*, *supra* at 378, citations omitted)

The following passage from *Lyon*, *supra*, synthesizes well the concurrence of elements referenced above which one has to consider when determining which particular residence is a person's true domicile.

> Domicil is very much a matter of the mind - of intention. One may be acquired, or changed to a new one, when there is a concurrence of certain elements, i.e., an actual and physical taking up of an abode in a particular State, accompanied by an intention to make his home there permanently or at least indefinitely, and to abandon his old domicil. A person has the right to choose his own domicil, and his motive in doing so is immaterial. . . . A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects the change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests. (*Lyon*, supra at 264)

The *Unanue* court identified three elements which must be considered when trying to ascertain if a change of domicile has occurred,

> 1) whether there had been an actual and physical taking up of an abode in a particular state;
> 2) whether the subject had an intention to make his home there permanently or at least indefinitely ; and
> 3) whether the subject had an intention to abandon his old domicile. (*Unanue*, *supra* at 376).

One must evaluate all of the facts and circumstances of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. (*Id.*, citations omitted) Furthermore, if there are sufficient objective proofs brought to the record to support the actual existence of domicile, a person's choice of domicile must be honored, even when the person has multiple residences. (*Id.*)

Mr. P. purchased the home at 99 Dunns Mill Road in 2003. Thus, he owned the property well before he became D.K.'s guardian in 2004 and well before he enrolled

D.K. in the Bordentown Regional school district in September 2004. According to his undisputed testimony, Mr. P. lived in the house in 2003 and removed from the house after it suffered damage during his absence on military duty in the summer of 2003, all well before he became the child's guardian or the child entered the school district. There is no specific evidence in this record which would support any conclusion that the purchase of the house was made for the purpose of providing a claim for free attendance of D. in the Bordentown Regional district. While the full story of Mr. P.'s efforts to renovate the home and repair the damage and of his difficulties with contractors was not spread on the record, nevertheless there is undisputed testimony that repairs were undertaken starting in the summer of 2005 and cleanup efforts were made. There is also undisputed testimony that Mr. P., on military leave for a very long period from his employment as a corrections officer for Mercer County, was required to spend several nights during the school week at work, no doubt presenting significant problems with child care and supervision for both his very young child whose custody he shared with the child's mother and also for D.K., himself only fourteen years old at the time of the school attendance at issue here. Mr. P. explained that he had a nanny who assisted watching the children and that the condition of the Dunns Mill Road home was disrupted, so much so that he only contends that he moved in "full-time" in December 2004, not in September, October or November, a period of time when D.K. attended Bordentown Regional, but a period which predates the Board's provision of notice to Mr. P. that he had to either establish domicile or remove the child from the district and pay tuition for days when the child was not domiciled within the district. The Board, acting through Mr. Lymper, gave notice to Mr. P. by letter dated November 29, 2005, that he had to establish his family's permanent residency at Dunns Mill Road by December 9 or else sign D. out of school. Mr. P. asserts that he did move in full time and that the Dunns Mill Road residence was not simply one of his residences, but was his domicile, that place to which he always intended to return. There is clear and unrefuted evidence that on numerous occasions thereafter, in March and May 2005, observations by Mr. Franks showed that D.K. did not go to school from Dunns Mill Road, but was instead seen exiting Oakland Avenue and being transported by either Mr. P. or the nanny to the High School. There is no reason to doubt Mr. Franks' testimony as to his observations. It is clear that whatever the legal status of the home at Dunns Mill Road, at least on thirteen dates in March, May and the first of June, D.K.

started his day not from there, but instead from Oakland Avenue. But the question that must be considered in the context of a decision as to Mr. P.'s domicile is what is the meaning of these observations when considered in the context of the undisputed testimony of Mr. P. about his hours of work on military duty, his child care arrangements and his intentions about both the Oakland Avenue and the Dunns Mill Road residences.

There is no magic formula that provides how much furniture a house must contain in order to be a domicile, or how comfortable it must be. The evidence shows that when Mr. Franks went to the home in January he observed beds and dressers. It is not clear whether he actually went into closets or looked in the dressers to see if any clothing was present. He only testified that he saw none visible. Significantly, when he went to observe Oakland Avenue on March 7, he observed a "For Sale" sign on the property. This is a clear indication that Mr. P. did not intend that Oakland Avenue remain his place of residence and, were it argued that this was his domicile, the presence of the "For Sale" sign certainly indicates an intention to change that status. If one puts up a residence for sale, and if the placement thereof is bona fide, then one by design abandons any intention that he will make that residence his permanent abode. It may remain his residence until the sale occurs, but that period in which it remains so becomes very uncertain and cannot support any claim of an intention of permanency. Thus, if the offer of sale of the residence which the Board apparently contends was the domicile vitiates the status of that residence as a place to which the person can have an intention of making it "a permanent abode," Lyon, supra., we must look at whether there is any other residence for which the person has such an intention.

I **FIND** that Mr. P., having moved into Dunns Mill Road for a short period in 2003 with the intention that it be his home, credibly contends that he always intended to return to Dunns Mill Road, that his wanderings after the damage in the summer of 2003 were simply temporary stations on the way back to Dunns Mill Road. He was forced to remove from Dunns Mill Road by damage to that property, he was at least to some extent thwarted in his intention to return there full-time due to financial concerns, a custody dispute and problems with a contractor. The fact that he did not reside at Dunns Mill Road for a period from sometime in the summer of 2003 until at least December 2005 does not determine that this did not remain his domicile, just as the

fact that Mr. Unanue did not return to New Jersey from 1970 until his death in 1976 did not change his domicile to Puerto Rico. Unanue, supra. at 378. His stay at Dunns Mill Road in 2003 may have been short, but having moved there with an intention that it be his home, his domicile, he never abandoned his intention to return to that home, and having moved finally to Oakland Avenue, he certainly manifested his intention to abandon that residence. As the Lyon Court stated,

> A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects the change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests.
> [Lyon, 60 N.J. at 264]

Much was made by the district about the lack of any listing with the employer of Dunns Mill Road as Mr. P.'s address. However, given the fact that for the past two years Mr. P. has not actually worked at the County position, despite remaining on the payroll, and has received his checks by direct deposit and his mail at a post office box, I am loath to read much into the fact that he did not supply the Dunns Mill Road address to the County. In actuality, he was not living there regularly, due to the factors already addressed. But, as Lyon points out, that he resided elsewhere did not necessarily change his domicile, and it is domicile that is the touchstone under the statute, not residence.

I **CONCLUDE** that the location of Mr. P.'s domicile was and remained Dunns Mill Road. Therefore, I **CONCLUDE** that D.K. was entitled to receive a free public education from the Bordentown Regional Board of Education during the period from December 12, 2005, through June 20, 2006. Mr. P.'s petition is **GRANTED** and the Board's counterclaim is therefore **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 5, 2006
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

December 6, 2006
DATE

Mailed to Parties:

DEC 9 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Affidavit of I.B. dated 4/9/06

J-2 Affidavit of A.P., Sr., dated 3/10/00

J-3 Photograph of house

J-4 Photograph of house

J-5 Photograph of house

J-6 Photograph of house

J-7 Photograph of house

J-8 Hand drawn diagram of Dunns Mill Road

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

R-1 Not in evidence

R-2 Not in evidence

R-3 Mercer County Demographic Information

R-4 Letter dated 11/21/05 from James G. Lymper to Mr. A.P.

R-5 Letter dated 11/29/05 from James G. Lymper to Mr. A.P.

R-6 Notice of Initial Determination of Ineligibility Dated 12/9/05

R-7 Notice of Final Ineligibility dated 12/16/05

34-07

JOHN W. RUBY, II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY; ROBERT COPLAND, INDIVIDUALLY; AND LAWRENCE LOCASTRO, INDIVIDUALLY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a former facilities manager in respondent's district – alleged that the Board terminated him in violation of his tenure rights and other provisions of school law, as well as the "whistleblower" law and law against discrimination. Petitioner asserted that he was entitled to tenure rights as a business manager, and stated that he had also filed a Notice of Tort Claim in Superior Court. Respondent filed motion for summary judgement, asserting, *inter alia*, that: petitioner was not employed as a business manager; many of petitioner's claims are not under the jurisdiction of the Commissioner; and the petition should be dismissed because it failed to state a claim upon which relief may be granted.

The ALJ found, *inter alia*, that: the Commissioner has complete jurisdiction over the issue of whether petitioner had tenured status with respondent Board, and whether the manner in which he was terminated violated procedural rights; Type II school districts have no authority to appoint a business manager; petitioner cannot be found to be employed in a position which the district is not legally authorized to have, and therefore he could not legally obtain tenure in such position; and the Veterans' statute did not confer tenure upon petitioner as he was an employee hired for a "fixed" or "stated" period of time. The ALJ concluded that petitioner seeks relief to which he is not entitled as a matter of law, and granted respondent's motion to dismiss the petition.

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in his decision – that the Board's motion to dismiss for failure to state a claim upon which relief may be granted is appropriately awarded; the Initial Decision of the OAL is adopted as the final decision in this matter.

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

January 22, 2007

OAL DKT. NO. EDU 6661-06
AGENCY DKT. NO. 297-9/06

JOHN W. RUBY, II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY; ROBERT COPLAND, INDIVIDUALLY; AND LAWRENCE LOCASTRO, INDIVIDUALLY,	:	DECISION
RESPONDENTS.	:	

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

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in his decision – that the Board's motion to dismiss for failure to state a claim upon which relief may be granted is appropriately awarded.

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

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/22/07
Date of Mailing: 1/22/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06661-06S
AGENCY DKT. NO. 297-9/06

JOHN W. RUBY, II,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY; ROBERT COPELAND, INDIVIDUALLY; AND LAWRENCE LOCASTRO, INDIVIDUALLY,
Respondents.

Lavinia Lee Mears, Esq., for petitioner (Mears Law Firm, attorneys)

David B. Rubin, Esq., for respondents

Record Closed: October 10, 2006[1] Decided: December 20, 2006

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

John Ruby II filed a Petition with the Commissioner of Education alleging that he had been wrongfully terminated from his position as Facilities Manager for the Board of Education of the Township of Piscataway in violation of tenure laws. In his Petition, he notes that he also has filed a Notice of Tort Claim regarding alleged violations of several statutes and that in his view "jurisdiction is more properly vested with the New Jersey Superior Court, Law Division. . ." The Petition asks that the Commissioner refer "this matter" to the Law Division.

[1] The record closed on October 10, 2006, when the last brief was received. The 45-day statutory time period to issue the initial decision in this case expired on November 24, 2006. On December 20, 2006, Judge Fidler filed a nunc pro tunc request to extend the time period to January 8, 2007

In response to the Petition, the Board filed its Answer and a motion for summary decision, asserting in the Answer that many of the petitioner's claims fell outside the jurisdiction of the Commissioner but also contending in the motion that the Petition should be dismissed because it failed to state a claim upon which relief may be granted. The Department of Education, Office of Controversies and Disputes, transferred the case to the Office of Administrative Law without any decision by the Commissioner on the motion. The case was assigned to Administrative Law Judge Joseph F. Fidler and then transferred to this judge on December 6, 2006. I have examined the briefs filed by counsel and treat the respondent's motion not as a motion for summary decision, but, as it was more properly described by the respondent in the body of the Notice of Motion, as a motion to dismiss the petition for failure to state a claim upon which relief may be granted.

In his Petition, Mr. Ruby argues that the he was a tenured employee of the District by virtue of the terms of N.J.S.A. 18A:17-2, which provides for tenure for a "business manager," a title specifically listed in that statute as a position in which tenure can be achieved. In making the motion to dismiss, the Board disputes that he was a "business manager," and as such asserts that the statute simply does not cover the position he actually held. Additionally, Mr. Ruby claims that he achieved tenure upon his appointment to the position of Facilities Manager under the terms of N.J.S.A. 38:16-1. In response, the Board contends that this Act also does not apply to Mr. Ruby, because his appointment to the position was one which had a "fixed" or "stated" period of time and is thus excluded from the Act's coverage by its very terms. Finally, Mr. Ruby argues that he was terminated in violation of N.J.S.A. 18A:27-1, because the Board failed to accord him rights to which that provision entitles him. The Board contends that contrary to his view, Mr. Ruby's termination was accomplished within the confines of the law and he was not deprived of any procedural rights to which he was entitled given the nature of his position and legal status. In addition, the Board contends that he failed to take action necessary to invoke certain rights of which he claims to have been deprived.

Counsel for petitioner argues that the determination of this motion should be withheld until after the completion of discovery, contending that there are or are likely to

be disputes of fact that would prevent summary decision from being granted and require a hearing. Brill v. Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). However, in reply, counsel for the Board clarifies the intent of the motion as one directed at a failure to state a claim for which relief may be granted, and concedes, for the purpose of the motion, the correctness of the facts asserted in the petition. A motion to dismiss for failure to state a claim is recognized by the Rules of Court, R. 4:6-2 (e), and where the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1 et seq., do not specifically address a matter relating to procedure, reference may be made to the Rules of Court for guidance. N.J.A.C. 1:1-3(a). A motion to dismiss for failure to state a claim for which relief may be granted is based on the pleadings themselves. These are to be "searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken." Pressler, Current N.J. Court Rules, Comment R. 4:6-2, (Gann); Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989).

As noted above, petitioner has requested that this matter be transferred to Superior Court due to the existence of claims for relief which arise under statutes not within the Commissioner's jurisdiction. However, it is clear that the Commissioner has complete jurisdiction over the school law issue of whether this employee had tenured status with the respondent Board, and the Commissioner certainly has jurisdiction to determine if the manner in which the Board terminated the petitioner's employment violated the procedural rights and obligations which the petitioner claims were not honored. There appears no reason to put off the determination of these questions. The petitioner chose to file this petition. He contends that he had to do so in order to protect his rights against the 90-day rule, but if he felt that the entire matter should be resolved in a judicial proceeding, he was not compelled to invoke the Commissioner's jurisdiction. Having chosen to do so, he has no complaint that the Commissioner will determine the issues that fall within her jurisdiction.

DISCUSSION

Was Mr. Ruby a "Business Manager?"

Mr. Ruby's first claim to tenured status arises from N.J.S.A. 18A:17-1, which provides that "[no] secretary, assistant secretary, school business administrator or business manager of a board of education of any school district shall, during the term for which he was appointed, be dismissed or reduced in compensation, except for neglect, misbehavior, or other offense unless it is otherwise provided in his contract of employment." Thus, the law recognizes the existence of a position denominated "business manager," a position that may be filled by a school board. But further legislation appears to limit the category of school board which may appoint a "business manager." School districts are classified as either a Type I or a Type II district, and Piscataway is a Type II district. N.J.S.A. 18A:17-25 provides "[a] business manager may be appointed in any type I school district, and subject to the provisions of article 1 of this chapter, may be removed from such office, by a recorded roll call majority vote of the full membership of the board of education and shall receive such salary as the board shall determine." Thus, the Legislature provided that in a type I district, the position of business manager can exist. But this statute says nothing about the authority of a type II district, such as Piscataway, to appoint a business manager.

To counsel for petitioner, who argues that her client, whose position with Piscataway was labeled as "Facilities Manager," was nevertheless the business manager for the Piscataway District, the lack of any reference in the statutes to the authority of a type II district to appoint a business manager is not an impediment to his holding that title and status, with the protection it carries for the holder against the sort of removal to which Mr. Ruby was subjected. She first argues that there is a factual dispute as to the position he held, one that cannot be determined without discovery and even perhaps a hearing. She asserts that his job title and duties reflect the position of business manager or school business administrator. As for the statute, she asserts that N.J.S.A. 18A:17-2 "does not expressly limit its tenure protections provided to the 'business manager' described in N.J.S.A. 18A:17-25. Nothing in the statutory framework would prevent a Type II school district from creating a position analogous to

the N.J.S.A. 18A:17-25 business manager position and assigning similar duties. . . ." But in so arguing, counsel fails to explain why the Legislature specified that the appointment of a "business manager" was specifically permitted to a type I district and did not simply provide for such an appointment by "any school district." Indeed, although neither counsel appears to have commented on this, N.J.S.A. 18A:17-30 specifically addresses the case of type II districts, providing that these, if they have a board of school estimate, "may employ and dismiss a business assistant, fix his duties, compensation and term of employment." The Legislature thus appears to have drawn a clear distinction between the type I and type II districts concerning their authority to appoint someone assigned to deal with "business" matters. Further, the "business manager" appointed under N.J.S.A. 18A:17-25 is required to post a bond with the board "for the faithful discharge of his duties," and this appointee "shall have a seat on the board and the right to speak on all matters relating to his department but shall not have the right to vote." Neither the requirement for the posting of a bond nor the right to a non-voting seat on the board are provided for in connection with the position of "business assistant" as authorized by N.J.S.A. 18A:17-30. The distinction between type I and type II districts appears to be related to their size and the status of the community served by the district as a city or as a town. This could explain the distinction between the authority of the type I district to "appoint" a "business manager" and the type II district to "employ" a "business assistant." Even the choice of words regarding the means of employment, that is, "appoint" for the business manager and "employ" for the business assistant, may connote a distinction between the positions.

In Smith v. Board of Education of the Township of Willingboro, Burlington County, 97 N.J.A.R. 2d (EDU) 205, Administrative Law Judge Judge M. Kathleen Duncan (now DOE's Director of Controversies and Disputes) noted in a footnote on page 207 that "Only Type I school districts are authorized to employ business managers," citing N.J.S.A. 18A:17-25 and N.J.S.A. 18A:9-2. The Commissioner adopted Judge Duncan's initial decision without disturbing this conclusion, 97 N.J.A.R. 2d (EDU) 207. I agree with Judge Duncan that given the enactment of these statutes by the Legislature and the distinctions drawn, there appears to be no warrant for a type II district to appoint a business manager. Thus, as Mr. Ruby contends that he was, in effect, the "business manager" for the district and his tenured status arose from the

provisions of N.J.S.A. 18A:17-1, I must **CONCLUDE** that he cannot be found to be employed or appointed to a position which the district was not legally authorized to have and therefore, he could not legally obtain tenure in that position. Perhaps he might demonstrate that he was a "business assistant." But even if he did, N.J.S.A. 18A:17-1 does not afford tenure protection to persons employed as a "business assistant." Tenure is a statutorily created status and, as such, its application must be limited only to those positions for which it is authorized. Thus, on this claim, I **CONCLUDE** that no relief can be given to Mr. Ruby from his termination as Facilities Manager.

Veteran's Tenure

Mr. Ruby contends that N.J.S.A. 38:16-1 protects him from removal from the Facilities Manager position. His status as a veteran under this legislation is not challenged. However, the Board denies that he is protected by this statute.

N.J.S.A. 38:16-1 provides

> No person now holding any employment, position or office under the government of this State, or the government of any county or municipality, including any person employed by a school board or board of education, . . . whose term of employment, office or position is not now fixed by law, . . . who has served as a soldier, sailor, marine or nurse, in any war of the United States, . . . shall be removed from such employment, position or office, except for good cause shown after a fair and impartial hearing, but such person shall hold his employment, position or office during good behavior, and shall not be removed for political reasons.
>
> For the purposes of this section no term of office, position or employment of any person shall be deemed to be fixed by law or coterminous with that of the employing or appointing board or body by reason of the fact that such person was or is appointed or employed by a noncontinuous board or body; provided, however, that in no event is it intended that this act shall apply to appointments made for a fixed or stated period of time.

Unlike other statutes that confer protection upon certain employees depending upon the category of employment they hold, i.e., teachers, board secretaries, school business administrators and business managers, this legislation appears to confer protection against removal from employment to persons who hold a broad range of

employments, positions and offices based upon their service in the Armed Forces during certain designated periods. But this protection is not conferred on every single veteran holding any employment, office or position. By its own terms the legislation does not apply to those who hold appointments where the term is "fixed by law" or "made for a fixed or stated period of time." The Board argues that Mr. Ruby was hired in 1998 for a one year period and has subsequently been appointed for a series of consecutive one-year periods, most recently for the 2005-2006 school year, as demonstrated in the letter offered as Exhibit 12 by Mr. Ruby and as confirmed by his brief in the footnote at page 13. There, counsel for Mr. Ruby writes,

> As a factual matter, Petitioner vigorously disputed the contention that he was only a fixed or temporary employee. Petitioner never signed a contract. Indeed, Petitioner was hired with the understanding that he was a full time permanent employee and that he would be renewed each year as a matter of course. This is what in fact happened every year of Petitioner's employment until he was unlawfully terminated.

The Board argues that as each year Mr. Ruby's appointment had to be renewed and was therefore employment for a "fixed or stated period," on its face the statute does not apply and thus no relief can be afforded to Mr. Ruby by its terms. In response, Mr. Ruby, whose counsel contends that the board has "misquoted" the statute, contends that he was tenured from his first day of employment in the district. There is no statute that limits the time a person may be appointed to serve as Facilities manager. As such the position is not one whose "term . . . is fixed by law." However, despite claiming a misquote which is never explained, counsel does not address the entire legislative scheme as reflected in the actual wording of the enactment, for she fails to comment upon the second paragraph of the statute, which contains the limitation relied upon by the board, that is, regarding "appointments made for a fixed or stated period of time." Presumably, the argument would be that if Mr. Ruby were indeed tenured as of the first day of his appointment in 1998, there was no need for the yearly renewal of his appointment by the board and therefore the position is not one for a "fixed or stated period of time." But despite her contention that he was hired as a "full time permanent employee," she concedes that he knew he would be "renewed each year," and the board did apparently appoint him on a yearly basis for a stated period of time, as the most recent appointment shows. The veterans' tenure statute does not dictate when a

position of employment is or is not properly one with a "fixed" or "stated" period of time; it merely says that if the employment fits that description, it is not intended to affect such employment. Given the year to year appointments to which Mr. Ruby was subject, with the appointments made for the coming school year, the Veterans' statute did not confer tenure upon him and no relief can be obtained based upon this statute.

N.J.S.A. 18A:27-4.1

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of P.L.1975, c.132 (C.18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. The chief school administrator shall notify the officer or employee of the nonrenewal pursuant, where applicable, to the provisions of section 1 of P.L.1971, c.436 (C.18A:27-10).
>
> c. The provisions of this section shall not apply to the appointment, transfer, removal, renewal or nonrenewal of a person who is a treasurer of school moneys, election officer, board auditor, board attorney or board secretary, except a board secretary who performs business administration functions.

Mr. Ruby argues that the manner of his termination violated the above-quoted statute and also the rule established in Rice v. Union County Board of Ed., 155 N.J.

Super. 64 (App. Div. 1977), which requires that he be provided with a so-called "Rice notice" before the board discussed his employment. He claims that the district's Superintendent "usurped" the authority of the board in terminating his employment. He was never notified by the board of the impending termination. Indeed, he contends this was at least partially because the board itself was not notified of the Superintendent's intention. He did not receive any "written statement of reasons for nonrenewal" and did not have any "informal appearance before the board" due to the lack of notice. But the board argues that the petitioner seriously misunderstands the statute and the requirements that it presents. The statute states clearly that a non-tenured, non-teaching staff employee such as Mr. Ruby, "who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed." N.J.S.A. 18A:27-4.1(b). It says nothing about any requirement that the board affirmatively act to endorse such nonrenewal. As for the need to notify the board before notifying the employee of the chief school administrator's decision not to renew, the board argues that this can be accomplished in many ways, and that as the nonrenewal is deemed to have occurred where there is no recommendation to renew, the Board did not have to engage in the sort of discussion that would trigger the requirement for a Rice notice in order for the nonrenewal to become legally effective. As for the "written statement" and "appearance" provisions, board counsel argues that the responsibility to request these benefits is, by statute, placed upon the employee, and here Mr. Ruby did not make any such request. In making this argument, counsel concedes that N.J.S.A. 18A:27-4.1 does not specify that a request must be made in order for the employee to obtain either the statement or the appearance, but he notes that N.J.S.A. 18A:27-3.2 places the responsibility on a teaching staff member receiving notice that a teaching contract will not be offered for the succeeding school year to request such a written statement of reasons and N.J.A.C. 6A:32-4.6, which provides for the "informal appearance" before the board, places the same responsibility to make such request upon the non-tenured teaching staff member.

> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.
> [N.J.S.A. 18A:27-3.2]

> (a) Whenever a nontenured teaching staff member has requested in writing and has received a written statement of reasons for nonreemployment pursuant to N.J.S.A. 18A:27-3.2, he or she may request in writing an informal appearance before the district board of education. Such written request shall be submitted to the board within 10 calendar days of receipt of the board's statement of reasons. [N.J.A.C. 6A:32-4.6]

Board counsel notes that it is not clear to him from the wording of N.J.S.A. 18A:27-4.1 whether the right to a written statement and a board appearance is limited to teaching staff members, but contends that as N.J.S.A. 18A:27-3.2 and N.J.A.C. 6A:32-4.6, which each only speak of these rights in the context of teaching staff members, each require that a teaching staff member must make the written request in order to obtain these rights, the reasonable understanding of N.J.S.A. 18A:27-4.1 is that the "certificated or non-certificated officer or employee" whose rights are addressed therein must make such a written request if they seek to exercise these rights. As it is uncontested that Mr. Ruby did not do so after he concededly received notice on June 5, 2006, that his appointment would not be renewed for the succeeding 2006-2007 school year, he cannot complain that his rights under N.J.S.A. 18A:27-4.1 were violated.

I **CONCLUDE** that the board's arguments regarding the "written statement" and "appearance" rights are persuasive. If teaching staff members must request these, then there is no reason to believe that other employees who receive notice of nonrenewal must not also request these rights if they choose to exercise them. Not every such employee may desire to receive a written statement of reasons, and more so, not every one will seek to go before the board and seek reemployment. The requirement that one who desires to invoke the written statement and even more, to appear before the board, request these opportunities is entirely sensible and in accord with the scheme demonstrated by N.J.S.A. 18A:27-3.2 and N.J.A.C. 6A:32-4.6. As Mr. Ruby does not argue that he requested these opportunities, he cannot complain that he did not receive them.

CONCLUSION

Based upon the above discussion, I **CONCLUDE** that Mr. Ruby's petition seeks relief to which he is clearly not entitled as a matter of law. Additional discovery is not likely to change the facts as they relate to these requests. The motion to dismiss for failure to state a claim for which relief may be granted is **GRANTED** and the Petition is **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 20, 2006
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

December 20, 2006
DATE

Mailed to Parties:

DEC 26 2006
DATE

OFFICE OF ADMINISTRATIVE LAW
CHIEF ADMINISTRATIVE LAW JUDGE

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

39-07

OAL DKT. NO. EDU 10976-06
AGENCY DKT. NO. 400-11/06

VANAS CONSTRUCTION CO., INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY AND DOBCO, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his Initial Decision. The Commissioner determines that because no settlement terms were brought to the record and the document appended to the decision is an advisement of dismissal, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal; consequently, this matter is no longer deemed to be a contested case before her and is, accordingly, dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/07

Date of Mailing: 1/23/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10976-06

AGENCY DKT. NO. 400-11/06

VANAS CONSTRUCTION CO., INC.,

Petitioner,

v.

BOARD OF EDUCATION OF ENGLEWOOD,

BERGEN COUNTY AND DOBCO, INC.,

Respondents.

Joseph J. Hocking, Esq., for petitioner, Vanas Construction Co., Inc. (Hedinger & Lawless, L.L.C., attorneys)

Dennis McKeever, Esq., for respondent, Board of Education of Englewood (Lindabury, McCormick, Estabrook & Cooper, P.C. attorneys)

Christopher L. Weiss, Esq., for respondent, Dobco, Inc. (Ferro, Labella & Zucker, L.L.C., attorneys)

Record Closed: December 26, 2006 Decided: December 26, 2006

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 8, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

An oral argument was scheduled on November 9, 2006. The attached Stipulation of Dismissal was submitted on December 26, 2006, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

12/26/06
DATE

BARRY E. MOSCOWITZ, ALJ

Receipt Acknowledged:

1-4-07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 4 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

da

HEDINGER & LAWLESS L.L.C.
Attorneys at Law
147 Columbia Turnpike, Suite 200
Florham Park, New Jersey 07932
(973) 301-9100
Attorneys for Petitioner,
Vanas Construction Co., Inc.

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW

2006 DEC 26 A 10: 27

VANAS CONSTRUCTION CO., INC.,

Petitioner,

v.

ENGLEWOOD BOARD OF EDUCATION and DOBCO, INC.

Respondents.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

DOCKET No.: EDU-109-76-06
AGENCY No.: 400-11/06

STIPULATION OF DISMISSAL WITH PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same is hereby dismissed with prejudice and without costs against either party.

LINDABURY MCCORMICK & ESTABROOK
Attorneys for Respondent,
Englewood Board of Education

By:_____
Dennis McKeever, Esq.

Dated: December 12, 2006

HEDINGER & LAWLESS L.L.C.
Attorneys for Petitioner,
Vanas Construction Co., Inc.

By:_____
Joseph J. Hocking

Dated: December 18, 2006

FERRO LABELLA & ZUCKER L.L.C.
Attorneys for Respondent,
Dobco, Inc.

By:_____
Christopher L. Weiss

Dated: December 11, 2006

LAW OFFICE OF
HEDINGER
&
LAWLESS
L.L.C.

HEDINGER & LAWLESS L.L.C.
Attorneys at Law
147 Columbia Turnpike, Suite 200
Florham Park, New Jersey 07932
(973) 301-9100
Attorneys for Petitioner,
Vanas Construction Co., Inc.

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW

2006 DEC 26 A 10: 27

VANAS CONSTRUCTION CO., INC., Petitioner, v. **ENGLEWOOD BOARD OF EDUCATION and DOBCO, INC.** Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET No.: EDU-109-76-06 AGENCY No.: 400-11/06 **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same is hereby dismissed with prejudice and without costs against either party.

LINDABURY MCCORMICK & ESTABROOK
Attorneys for Respondent,
Englewood Board of Education

By:_____
Dennis McKeever, Esq.

Dated: December 12, 2006

HEDINGER & LAWLESS L.L.C.
Attorneys for Petitioner,
Vanas Construction Co., Inc.

By:_____
Joseph J. Hocking

Dated: December 18, 2006

FERRO LABELLA & ZUCKER L.L.C.
Attorneys for Respondent,
Dobco, Inc.

By:_____
Christopher L. Weiss

Dated: December 11, 2006

LAW OFFICE OF
HEDINGER
&
LAWLESS
L.L.C.

#40-07

OAL DKT. NO. EDU 11309-04
AGENCY DKT. NO. 270-8/04

BRIAN P. Mc DEVITT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD HIGH SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Stipulation of Dismissal with Prejudice, transmitted to the Commissioner by the Office of Administrative Law, have been reviewed. Appropriately categorized as a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2, such withdrawal is approved by the Commissioner and this matter is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/22/07

Date of Mailing: 1/23/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

DKT. NO. EDU 11309-04

AGENCY DKT. NO. 270-8/04

BRIAN P. MCDEVITT,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCOTCH PLAINS FANWOOD HIGH SCHOOL DISTRICT, UNION COUNTY,

Respondent.

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

Casper P. Bohem, Jr., Esq., for respondent

Record Closed: December 15, 2006 Decided: December 19, 2006

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

The matter was transmitted to the Office of Administrative Law (OAL) on October 26, 2004 for determination as a contested case. A hearing was scheduled for February 2, 2005, which was adjourned by the petitioner because the newly retained counsel needed more time to prepare the file. It was rescheduled to June 1, 2005. It was adjourned again, because the attorney was waiting for the outcome of a related case. The hearing date of October 27, 2005, was rescheduled for November 15, 2005, due to the petitioner's attorney's vacation. On November 15, 2005, this matter was placed on the inactive List for six months, due to the death of the petitioner. The petitioner's attorney needed time to

amend the complaint and to add the estate as a party. Subsequently, multiple telephone conferences were held. The matter was listed for a hearing on October 31, 2006.

The parties were ultimately able to settle the matter, and they submitted the attached fully executed Stipulation of Dismissal with Prejudice on December 15, 2006. Having reviewed the record and the Dismissal terms, I **FIND**:

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

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

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

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

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

12/19/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

Dec 22, 2006
DATE

K. Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 2 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

Oxfeld Cohen, PC
60 Park Place, 6th Flr.
Newark, NJ 07102-5504
Attorneys for Petitioner

RECEIVED
2006 DEC 15 P 2:41
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

BRIAN P MCDEVITT,	:	**OFFICE OF ADMINISTRATIVE LAW BEFORE JUDGE CAROL I COHEN, A.L.J.**
Petitioner,	:	
vs	:	
	:	**DOCKET NO: EDU 11309-04**
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD County of Union,	:	**STIPULATION OF DISMISSAL WITH PREJUDICE**
Respondent	:	

This matter having been amicably resolved by the parties, it is hereby stipulated and agreed that the Petition in the above-entitled matter is dismissed with prejudice but without costs against either party.

Dated: November 7, 2006

Oxfeld Cohen, PC

By: Sanford R Oxfeld, Esq.
Attorneys for Petitioner

By: Casper P Boehm, Jr., Esq.
Attorneys for Respondent

Oxfeld Cohen, PC
60 Park Place, 6th Flr.
Newark, NJ 07102-5504
Attorneys for Petitioner

RECEIVED
2006 DEC 15 P 2:41
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BRIAN P MCDEVITT,	**OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	**BEFORE JUDGE CAROL I COHEN, A.L.J.**
vs	
	DOCKET NO: EDU 11309-04
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD County of Union,	**STIPULATION OF DISMISSAL WITH PREJUDICE**
Respondent	

This matter having been amicably resolved by the parties, it is hereby stipulated and agreed that the Petition in the above-entitled matter is dismissed with prejudice but without costs against either party.

Dated: November 7, 2006

Oxfeld Cohen, PC

By: Sanford R Oxfeld, Esq.
Attorneys for Petitioner

By: Casper P Boehm, Jr., Esq.
Attorneys for Respondent

43-07L

43-07

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

January 25, 2007

J. Peter Sokol, Esq.
McOmber & McOmber, P.C.
54 Shrewsbury Avenue
Red Bank, NJ 07701

Richard E. Danielson
3 Wesley Street
Monmouth Beach, NJ 07750

Dear Parties:

Upon review of the record in *In the Matter of the Tenure Hearing of Richard E. Danielson, School District of the City of Long Branch, Monmouth County,* Agency Dkt. No. 343-9/06, I note the Board Attorney's January 16, 2007 representation that the Board wishes to withdraw the charges filed against Mr. Danielson – a tenured custodian alleged to have abandoned his position with the district – due to Mr. Danielson's resignation from employment, which has been duly accepted by the Board.

In light of this information, I find that no purpose would be served by further proceedings in this matter. Accordingly, I approve the Board's withdrawal of its charges and dismiss the matter as a contested case before me.

Sincerely,

Lucille E. Davy
Commissioner

c: County Superintendent
Jones Addo

#41-07

OAL DKT. NO. EDU 2158-04
AGENCY DKT. NO. 27-1/04

LAVONIA TILLINGHAST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY AND JOHN DOES 1-10	:	DECISION
RESPONDENTS.	:	
	:	

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

Upon review, the Commissioner adopts the finding of the Administrative Law Judge – based on the representations of petitioner's attorney – that petitioner has accepted this agreement; therefore, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/07

Date of Mailing: 1/24/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2158-04
AGENCY DKT. NO. 27-1/04

LAVONIA TILLINGHAST,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY AND JOHN DOES 1-10,
Respondents.

Christina Y. Emery, Esq., for petitioner

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

Record Closed: December 8, 2006 Decided: December 28, 2006

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

This matter was transmitted to the Office of Administrative Law on March 22, 2004, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

Petitioner's counsel has represented on the record that he has explained the settlement to petitioner, and that she has acknowledged that the annexed settlement represents the agreement between the parties. Counsel for petitioner has further stated that petitioner has received and continues to receive from the Division of Pensions the benefits called for in the settlement.

For reasons unexplained, petitioner has declined to come to her counsel's office and execute the agreement. Notwithstanding that failure, I **FIND** that petitioner has accepted the settlement by virtue of her statement to that effect made to her counsel, and by virtue of her accepting the benefits from the Division of Pensions.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

December 28, 2006
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

1/3/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 5 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

Law Offices
PARKER McCAY, P.A.
Three Greentree Centre
7001 Lincoln Drive West
Marlton, NJ 08053
(609) 596-8900
Attorneys for Respondent, Township of Cinnaminson Board of Education

2009 DEC 29 A 8:28

LAVONIA TILLINGHAST,	:	OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY
Petitioner,	:	OAL DOCKET NO. EDU-02158-2004S
vs.	:	Civil Action
TOWNSHIP OF CINNAMINSON BOARD OF EDUCATION,	:	STIPULATION OF SETTLEMENT
Respondent.	:	

The Petitioner, Lavonia Tillinghast ("Tillinghast ") and the Respondent, Township of Cinnaminson Board of Education ("Board of Education"), hereby stipulates and agrees as follows:

WHEREAS, Tillinghast was employed by the Board of Education; and

WHEREAS, Tillinghast retired from employment in the School District; and,

WHEREAS, Tillinghast filed the above-captioned lawsuit against the Board of Education; and,

WHEREAS, Tillinghast and the Board of Education, through their respective counsel have engaged in settlement discussions and as a result have mutually agreed upon the terms set forth in this Settlement Agreement ("Agreement"); and,

IT IS HEREBY STIPULATED AND AGREED by and between the parties, for the consideration stated herein, as follows:

1. For and in consideration of the undertakings of Board set forth herein, and intended to be legally bound, Tillinghast does hereby remise, release and forever discharge Board of Education from any all manner of action and causes of action, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has or hereafter may have, or which her heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of her employment with the Board of Education to the date here present, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to her employment relationship and/or affiliation with Board of Education, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state, or local laws and any common law claims or hereafter recognized and any and all claims arising out of her employment with the Board of Education, with the exception of claims arising from the breach of this Agreement. Tillinghast is unaware of any factual basis for any such claims at this time.
2. The Board of Education, for and in consideration of the undertakings of Tillinghast set forth herein, and intending to be legally bound, do hereby remise, release and forever discharge Tillinghast and her heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which they ever had, now have, or hereafter may have, or which the officers, members, employees and/or agents of Board of

Education, their respective successors and assigns, heirs, executors, or administrators hereafter may have by reason of any manner, cause or thing whatsoever, from the beginning of Tillinghast's employment with Board of Education to the date of these presents, and particularly, without limitation, of the foregoing general terms, any claims arising from or relating in any way to Tillinghast's employment relationship and/or affiliation with Board of Education, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws in any common law claims now or hereafter recognized, and any and all claims arising out of Tillinghast's employment with Board of Education except for claims arising from the breach of this Agreement.

3. The Board of Education shall pay in full settlement and accord of all claims Tillinghast asserted against the Board of Education and any and all claims which Tillinghast could have asserted as enumerated above the sum of $2,000.00.
4. Board shall cooperate with the New Jersey Division of Pensions and Tillinghast with respect to issues that may arise concerning Tillinghast's pension.
5. By entering into this Agreement, neither party is making any admission with respect to any of the issues raised by the respective parties.
6. Each party is to bear their own cost and attorneys fees.
7. Tillinghast and Board of Education agree and acknowledge that the Agreement and the parties described herein and the settlement and termination of any claims that the parties have against each other, as set forth herein, is not and shall not be construed to

be an admission of any violation of any federal, state or local statute or regulation or of any duty owed by and between the parties.

8. By signing this Agreement, the parties certify that they have had the opportunity to discuss the Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly and without any coercion or improper inducement.
9. In the event that any portion of this Agreement is determined to be illegal, the parties agree in advance, to reform the Agreement so that each party receives the full benefit of the bargain.
10. By signing this Agreement, each signatory represents that he or she is a party or has been duly authorized by a party to sign that party's behalf.
11. The parties agree that this Agreement may be signed and counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

[NOT LAST PAGE]

Intending to be legally bound hereby, Tillinghast and Board execute the foregoing Agreement this ____ day of _____, 2006.

S. ROBERT FREIDEL, JR. ESQUIRE
ATTORNEY FOR LAVONIA
TILLINGHAST

FRANK P. CAVALLO, JR. ESQUIRE
ATTORNEY FOR THE BOARD OF
EDUCATION OF CINNAMINSON
TOWNSHIP SCHOOL DISTRICT

Intending to be legally bound hereby, Tillinghast and Board execute the foregoing Agreement this 19th day of September, 2006.

Witness:

_____

~~LAVONIA TILLINGHAST~~
S. Robert Kreidler, Jr. on behalf of Lavonia Tillinghast per Ct. order.

Witness:

BOARD OF EDUCATION OF
CINNAMINSON TOWNSHIP
SCHOOL DISTRICT

BOARD SECRETARY

Harry E. Drew II
BOARD PRESIDENT

#47-07

47-07

OAL DKT. NO. EDU 8011-05
AGENCY DKT. NO. 222-8/05

BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	
and	:	
BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
INTERVENOR.	:	

The record of this matter and the parties' proposed Settlement Agreement and Stipulation of Dismissal have been reviewed.

Because the Department of Education is a party to this matter, the settlement is deemed to be a final decision with respect to the Department pursuant to *N.J.A.C.* 1:1-19.1(c) and (d).* The Commissioner additionally approves the settlement in all other respects pursuant to *N.J.A.C.* 1:1-19.1 and adopts it in its entirety as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 1/31/07
Date of Mailing: 2/01/07

* It was for this reason the file was returned to the agency by the Office of Administrative Law without issuance of an Initial Decision.

Law Offices
PARKER McCAY
1009 Lenox Drive
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Lawrenceville, NJ 08648
(609) 896-4222 Office
(609) 896-9023 Fax
Attorneys for Flemington Raritan Reg. School District Board of Education

DELAWARE TOWNSHIP BOARD OF EDUCATION, **Petitioner,** **v.** **NEW JERSEY DEPARTMENT OF EDUCATION,** **Respondent,** **v.** **FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,** **Intervenor.**	**BEFORE THE COMMISSIONER OF EDUCATION AND OFFICE OF ADMINISTRATIVE LAW** **STATE OF NEW JERSEY** **OAL DOCKET NO. EDU 8011-05S** **SETTLEMENT AGREEMENT AND STIPULATION OF DISMISSAL**

This Agreement is made this 9th day of November, 2006, by and between the Delaware Township Board of Education (Delaware), the New Jersey Department of Education (DOE) and the Flemington-Raritan Regional School District Board of Education (Flemington-Raritan).

WITNESSETH

Whereas, A dispute has arisen as to the School District which is responsible for the tuition costs of a student (S.W.) placed at Kids Peace for the period July 1, 2005 through January; and

Whereas, The dispute is currently pending before the Office of Administrative Law as OAL Dkt. No. EDU 8011-05S under the caption Delaware Township Board of Education v New Jersey Department of Education v Flemington-Raritan Regional School District Board of Education; and

Whereas, The Parties have agreed to settle this matter on mutually acceptable terms; and

Whereas, The Parties wish to memorialize the terms of the settlement;

NOW, THEREFORE, the Parties set forth their full and complete agreement as follows:

1. Within 20 days of the approval of this Agreement, Delaware Township shall remit to the Flemington Regional School District the sum of $13,530 to be applied toward the payment of Kids Peace Corporation invoice number 2006065 dated June 5, 2006.

2. Upon receipt of the payment referenced in paragraph 1, Flemington-Raritan shall pay to Kids Peace Corporation the full amount ($23,530) of invoice number 2006065 dated June 5, 2006.

3. The undersigned attorneys certify that this settlement agreement has been approved by their respective clients.

4. This Agreement may be executed in two (or more) counterparts, each of

which, when executed and delivered, shall be deemed to be an original, and of which counterparts, taken together, shall constitute but one and the same Agreement. An original signature transmitted by facsimile shall be deemed to be an original for purpose of this Agreement.

5. Upon final execution of this document, the pending OAL matter will be dismissed with prejudice.

Delaware Township Board of Education	**Department of Education**	**Flemington-Raritan Reg. Sch. Dist. Board of Education**
By _____	By _____	By _____
Vito A. Gagliardi, Jr. Esq.	Cynthia A Raymond, DAG	David W. Carroll, Esq.
Date: 12-15-06	Date: 12/22/06	Date: Nov 15, 2006

#48-07M

48-07

OAL DKT. NO. EDU 206-07
AGENCY DKT. NO. 458-12/06

S.D. AND S.D. on behalf of minor child, M.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION ON
RESPONDENT.	:	APPLICATION FOR EMERGENT RELIEF

The pleadings, audio tapes of the January 16, 2007 hearing, and the hearing exhibits pertaining to the above captioned matter have been reviewed. The Commissioner agrees with the Administrative Law Judge (ALJ) that petitioners have failed to show that emergent relief is warranted in this case.

The evidence shows that petitioners enrolled their minor child, M.D., in respondent's school district on the understanding that they lived temporarily with a local family while waiting to purchase a home that was under construction in one of respondent's sending districts. Upon investigation, respondent determined that petitioners did not, in fact, reside in the sending district. After notice and hearing, respondent disenrolled the minor child. (Notices were sent to the addresses petitioners themselves supplied to respondent.) Petitioners did not appeal the disenrollment within the twenty-one days allowed by *N.J.S.A.* 18A:38-1, and were consequently obliged to file an emergent application to attempt to re-enroll M.D. in respondent's middle school during the pendency of the residency dispute.

At the hearing, the petitioning father appeared *pro se*. He was instructed by the ALJ that – pursuant to *N.J.A.C.* 6A:3-1.6 – in order to receive emergent relief, petitioners' burden was to show:

1. That without the relief petitioners sought, M.D. would be irreparably harmed;
2. That petitioners' legal rights were settled;
3. That petitioners were likely to succeed; and
4. That the balance of equities favored petitioners.

Failure to prove any one or more of the four prongs would bar petitioners from the relief they sought.

As to the first prong of the test, the facts in the record showed that M.D. began school in respondent's district on September 7, 2006; that petitioners received written notice – on or about October 13, 2006 – of their obligation to provide, within 90 days of M.D.'s start date, original documentation supporting residency; and that since no such original documentation was produced by petitioners, M.D. was disenrolled on or about December 18, 2006 – after notice and a hearing. On or about January 5, 2007, petitioners advised respondent that M.D. would be home schooled. Considering the foregoing, the Commissioner cannot find that a return to the school in which M.D. spent less than four months is necessary to avoid irreparable harm.

As to the second and third prongs of the test, the facts offered by petitioners at the hearing did not support their residency in respondent's district (or sending district) and the concomitant right to a free education in Kingsway for M.D. To the contrary, at the hearing, petitioners no longer even argued that they lived with the above referenced local family. Rather, they contended that they were domiciled in respondent's sending district, solely by virtue of their

expectations that they would someday own a home in Swedesboro that was still owned by the builder and still not finished - over a year after the projected completion date.

Finally, in light of the apparent duplicities of petitioners' representations to respondent about residency, the Commissioner cannot conclude that the equities favor the petitioners, even accepting, *arguendo,* the non-specific and largely irrelevant allegations that the petitioners made at the hearing about deficiencies in respondent's registration procedures, materials and notices, and about the propriety of respondent's investigative activities. Nor can the Commissioner conclude that petitioners are being harmed by M.D.'s disenrollment – after three and one half months – from a school district in which they have not proven residence.

In summary, petitioner's application for emergent relief is denied. A plenary hearing in the Office of Administrative Law (OAL) on the underlying issues of 1) whether petitioners can prove the residency requirements for M.D. to attend respondent's middle school and 2) whether, to the contrary, petitioners owe respondent tuition for the three and one half months of M.D.'s attendance at respondent's middle school, is scheduled for March 13, 2007.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/07

Date of Mailing: 2/02/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#49-07

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANE ROTHACKER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges of abandonment of position, chronic and excessive absenteeism, and insubordination against Diane Rothacker, a tenured special education teacher, after her failure to return to work following an unpaid personal leave of absence which expired on September 1, 2003. Respondent was directed via both certified and regular mail to file an Answer to the tenure charges against her, but failed to do so. Because no reply was received in response to the Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner reviewed the tenure charges certified against the respondent, and the evidence in support of those charges. Deeming such charges to be admitted, and noting that respondent has twice failed to respond to the allegations against her, the Commissioner finds that respondent's actions constitute excessive absenteeism and insubordination amply warranting dismissal from her tenured position. Summary judgment is granted to the District, and Diane Rothacker is dismissed from her tenured teaching position as of the filing date of this decision.

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

February 1, 2007

AGENCY DKT NO. 441-11/06

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANE ROTHACKER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
THE CITY OF NEWARK,	:	
ESSEX COUNTY.	:	
	:	

For the District, Adam S. Herman, Esq., Office of the General Counsel,
Newark Public Schools

This matter was opened before the Commissioner of Education on November 30, 2006 through certification of tenure charges of abandonment of position, chronic and excessive absenteeism, insubordination and other just cause by the State-operated School District of the City of Newark (District) against Diane Rothacker (respondent), a tenured teacher. Respondent did not reply to the charges when they were initially filed with the District, and subsequently, the District determined to certify the charges. On November 29, 2006, the District served respondent – via regular mail and certified mail, return receipt requested – with the District's resolution, Certification of Determination, and transmittal letter to the Commissioner, referencing the previously filed and served charges.

Upon receipt of the certified charges on November 30, 2006, the Commissioner directed respondent - via both certified and regular mail - to file an Answer to such charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner*," and that failure to

answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted by the charged employee.[1] [2]

No reply was received from either respondent or counsel on her behalf.

The Commissioner's review of the certified tenure charges, and the statement of evidence in support of them, indicated that respondent was granted an unpaid personal leave of absence **which expired on September 1, 2003** and – despite numerous written inquires from the District – respondent has neither returned to work nor provided notice of her intent to return. Respondent's protracted absence from the District has caused a substantial interruption in the continuity of educational instruction and a corresponding adverse impact upon the students of the District's schools.

Deeming such charges to be admitted, and noting that respondent has twice failed to respond to the allegations against her, the Commissioner finds that respondent's actions constitute abandonment of her position, chronic and excessive absenteeism, insubordination and other just cause amply warranting dismissal from her position.

Accordingly, summary decision is hereby granted to the District, and respondent Diane Rothacker is dismissed from her tenured teaching position in the District's employ as of the filing date of this decision.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/07
Date of Mailing: 2/02/07

[1] Although the certified mail copy of this notification was returned as "unclaimed," the copy sent by regular mail was not returned and is, therefore, presumed delivered.

[2] It is noted that although the notice acknowledging filing of the charges before the Commissioner correctly stated that such charges were filed on November 30, 2006, the notice itself was dated November 15, 2006. When this incongruity was subsequently discovered on January 4, 2007, a corrected notice was sent to the parties. In the interest of fairness, this matter was held an additional 15 days to accord respondent an opportunity to submit an Answer.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

51-07

#51-07

OAL DKT. NO. EDU 13136-05
AGENCY DKT. NO. 258-9/05

VINCENT LUCREZI,	:	
PETITIONER.	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/05/07

Date of Mailing: 2/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13136-05

AGENCY DKT. NO. 258-9/05

VINCENT LUCREZI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

Harold N. Springstead, Esq., for petitioner (Springstead & Maurice, attorneys)

Stanley Turitz, Esq., for respondent (Ferrara, Turitz, Harraka & Goldberg, P.C., attorneys)

Record Closed: January 12, 2007 Decided: January 12, 2007

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 29, 2005, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on October 30 and 31, 2006. Prior to the dates of hearing the parties settled the matter. The attached Stipulation of settlement was

submitted on January 12, 2007, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

January 12, 2007
DATE

MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

1-17-07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 2007
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

FERRARA, TURITZ, HARRAKA & GOLDBERG, PC
505 Main Street
Hackensack, New Jersey 07601
(201) 489-8787
Attorneys for Respondent, Ridgefield Board of Education

VINCENT LUCREZI **Petitioner** **vs** **BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY** **Respondent**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **Agency Docket No.: 258-9/05** **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement ("Agreement") is made and entered into by and between Petitioner, Vincent Lucrezi and Respondent, Ridgefield Board of Education.

WHEREAS, Petitioner filed an action with the Commissioner of Education, Agency Docket No. 258-9/05 and the parties have settled the matter and wish to to further memorialize that settlement by incorporating the terms thereof in this Agreement

NOW THEREFORE, in consideration of the mutual promises contained in this agreement, it is now stipulated and agreed as follows:

1. In consideration of Petitioner waiving any future claims to the Associate Teacher position and any remuneration associated therewith, Respondent agrees to pay Petitioner $5,660.00 in restored salary for the 2005-2006 school year for a total salary (including the stipend) of $83,606.00.

2. It is agreed that Petitioner is at the appropriate step on the guide for the 2006-2007 school year, that being MA-15 step 18 at a total salary of $88,828.00.

3. Petitioner has or shall file a Stipulation of Dismissal with Prejudice with the Court concerning this action.

Ferrara, Turitz, Harraka & Goldberg, P.C.
Attorneys for Respondent, Ridgefield
Board of Education

By: Stanley Turitz, Esq.
Dated: 12/21/06

Springstead & Maurice
Attorneys for Petitioner,
Vincent Lucrezi

By: Harold N. Springstead, Esq.
Dated: 11/12/06

01/12/2007 10:14 FAX 2014870212 SPRINGSTEAD & MAURICE

52-07

#52-07 R

S.B., on behalf of minor child, R.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her nephew, R.B., was not eligible for a free education in the Township of Ewing School District during the 2005-2006 school year. Petitioner contended that R.B. did in fact reside in Ewing. Respondent Board filed a counterclaim for payment of tuition for R.B.

The ALJ found, *inter alia*, that: petitioner provided no evidence that she supported R.B. gratis throughout the year in question; R.B.'s mother, M.B., provided for all expenses incurred by her son; R.B. lived primarily in Trenton with M.B. from September 2005 to late February 2006; and, accordingly – pursuant to *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:22-3.2 – S.B. failed to meet her burden to prove that R.B. met the requirements governing attendance in a public school by an affidavit student. The ALJ dismissed the petition, and ordered S.B. to pay tuition in the amount of $10,015.35.

Upon careful and independent review of the record, the Commissioner adopted the recommended decision of the OAL, dismissed the petition, and directed petitioner to pay tuition for the period of R.B.'s ineligible attendance in the Board's schools in the amount of $10,015.35.

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

February 5, 2007

OAL DKT. NO. EDU 8744-06
(EDU 4412-06 ON REMAND)
AGENCY DKT. NO. 201-6/06

S.B., on behalf of minor child, R.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full and independent review, the Commissioner agrees with the determination of the Administrative Law Judge (ALJ) that petitioner has failed to sustain her burden, pursuant to *N.J.S.A.* 18A:38-1(b)(2), of establishing that R.B. was entitled to a free public education in the schools of Ewing Township during the 2005-2006 school year. The Commissioner, similarly, concurs with the ALJ that the Board must prevail on its counterclaim for tuition.

Accordingly, the recommended decision of the OAL is adopted. Petitioner is hereby directed to pay tuition to the Board of Education of Ewing Township – in the amount of $10,015.35 – for the period of R.B.'s ineligible attendance in its schools, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 2/05/07

Date of Mailing: 2/06/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8744-06

(ON REMAND OAL DKT. NO. EDU 4412-06

AGENCY DKT. NO. 201-6/06

S.B. O/B/O R.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

S.B., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: January 3, 2007 Decided: January 11, 2007

BEFORE **DOUGLAS H. HURD**, ALJ:

For the 2005-2006 school year, R.B. was enrolled as a student in the Ewing School District. By resolution, dated April 24, 2006, the Ewing Board of Education, after a hearing, determined that R.B. is domiciled on a permanent basis with his mother, M.B., in Trenton.

S.B. is R.B.'s aunt, and she is a resident of Ewing Township. On May 22, 2006, S.B. filed a petition of appeal contesting the Board's conclusion. She claimed that R.B. was in fact residing with her in Ewing Township. On June 1, 2006, the District filed an

Answer to the petition and a Counterclaim against S.B. seeking reimbursement of tuition.

The Department of Education transmitted the case to the Office of Administrative Law, where it was filed on July 20, 2006. A hearing was scheduled for August 18, 2006. The parties appeared at the hearing, but the matter was postponed because S.B. requested an opportunity to hire an attorney. The matter was rescheduled for October 5, 2006. On October 5, 2006, S.B. did not appear at the hearing. No adjournment of the hearing date had been granted, and S.B. did not provide a written explanation of her non-appearance within the 24-hour or one-day time period prescribed in N.J.A.C. 1:1-14.4(a). Since a written explanation was not provided by 9:00 a.m. on October 6, 2006, an Initial Decision was issued dismissing Petitioner's appeal and granting Respondent's counterclaim for tuition.

Petitioner subsequently filed an explanation for her nonappearance by facsimile after 4:00 p.m. on October 6. Despite the written explanation being outside the one-day time period prescribed by N.J.A.C. 1:1-14.4(a), the Commissioner of Education remanded the matter for a determination pursuant to N.J.A.C. 1:1-14.4(b) and a hearing on the merits if necessary.

At a hearing on December 19, 2006, after arguments by the parties, I determined that Petitioner's explanation for her nonappearance on October 5, 2005 to be excusable. The evidence showed that Petitioner's nonappearance was not meant to intentionally delay the proceeding. Accordingly, we then proceeded to a hearing on the merits of the case on that date.

ANALYSIS

R.B. resided with his mother in Trenton through his 9th grade year in 2002-2003. During the summer of 2003, R.B. enrolled in the Ewing Township School District ("District"). R.B.'s aunt, S.B., told the District that R.B. was residing with her and her husband to assist them in household duties and functions because they had medical conditions that limited what they could do. Based on these representations, R.B. was

enrolled in the District as an affidavit student pursuant to N.J.S.A. 18A:38-1 because his residency was due to a family hardship. R.B. was enrolled in the Ewing Township School District for 10th, 11th and 12th grades. He graduated in June 2006.

The District seeks to recover tuition for the year 2005-2006 based on an investigation it conducted to determine R.B.'s residency. The District conducted surveillance between September 6, 2005 and January 17, 2006. Thirty out of thirty-four surveillances indicated that R.B. was leaving his mother's residence in Trenton to attend Ewing high school. At the hearing, both S.B. and M.B. confirmed that from September 2005 through late February 2006 R.B. did in fact reside primarily with M.B. in Trenton. Both testified that S.B.'s husband passed away in the Fall of 2005 and that before and after his passing it was best for R.B. to stay with his mother in Trenton. Both testified that from late February 2006 through the end of the school year that R.B. resided primarily with S.B. in Ewing. Significantly, M.B. testified that she provided for all expenses incurred by R.B. throughout the 2005-2006 school-year.

This case is governed by N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.2, the respective statute and regulation governing attendance in a public school by an affidavit student. The statute provides that the Petitioner has the burden of proof at a residency hearing. One of the elements that S.B. must establish is that she supported R.B. gratis as if he were her own child and assumed all personal obligations for the child relative to school requirements. N.J.S.A. 18A:38-1(b)(1). The regulation likewise provides that S.B. would have to support "the student without remuneration as if the student were his or her own child." N.J.A.C. 6A:22-3.2(a). S.B. also has to assume all personal obligations for the student relative to school requirements. N.J.A.C. 6A:22-3.2(a)(1)(ii)(1).

As noted above, M.B. testified that she provided for all expenses incurred by R.B., such as clothing, school supplies, etc. This support goes far beyond what is allowed for affidavit students in N.J.A.C. 6A:22-3.2(a)(3). R.B. worked as well, but any personal expenses beyond what his job covered were provided by M.B. Petitioner, S.B., provided no evidence that she supported R.B. without remuneration as if he were her own child. Indeed, the evidence is undisputed that S.B. did not support R.B. gratis as if

he were her own child throughout the year in question. Accordingly, S.B. did not meet the requirements of the statute, and as such does not meet her burden of proof. In addition, Petitioner and M.B. admitted that R.B. lived primarily in Trenton with M.B. throughout most of the 2005-2006 school year – from September 2005 to late February 2006.

Since R.B. was inappropriately enrolled in the Ewing Township School District for the 2005-2006 school year, S.B. is liable to the Board for tuition for that school year. David Mikalauskas, attendance and residency officer for the Board, testified regarding tuition reimbursement. He certified to the amount of tuition owed by S.B. on a rate of $55.64 per day for 180 days. The school year was 181 days, however, the Board is seeking reimbursement for 180 days based upon the Board not contesting the appropriateness of R.B. attending the first day of school in September 2005. The testimony by Mikalauskas provides reliable evidence attesting to the amount of tuition owed by Petitioner.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Petitioner's appeal of the Board's April 24, 2006 resolution disenrolling R.B. is **DISMISSED**. In accordance with N.J.S.A. 18A:38-1, S.B., on behalf of R.B., must pay $10,015.35 to the Ewing Township Board of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 11, 2007
DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1-11-07
DATE

Mailed to Parties:

JAN 17 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

mh

APPENDIX

LIST OF WITNESSES

For Petitioner:

S.B.

M.B.

For Respondent:

Robert L. Smith, Residency Investigator

David Mikalauskas, Attendance and Residency Officer

LIST OF EXHIBITS

For Petitioner:

P-1 Hearing Packet containing Exhibits A through M

For Respondent:

R-1 Affidavit

R-2 Eligibility Policy

56-07

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT,

PETITIONER,

V.

J. H.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board filed a complaint seeking reimbursement from respondent, J.H., of the costs of tuition pertinent to the period of ineligible attendance of respondent's daughter during the 2005-2006 school year. Respondent failed to appeal the Board's residency decision, and failed to answer the Board's petition seeking payment of tuition.

The Commissioner directed respondent to submit an answer to the petition pursuant to *N.J.A.C.* 6A:3-1.5, and informed respondent that if no answer was submitted, each count of the petition would be deemed admitted and the matter could then be decided summarily. As no answer was subsequently filed, the Commissioner granted summary decision in favor of the Board, and ordered respondent to pay tuition in the amount of $4,617.60.

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

February 8, 2007

56-07

AGENCY DKT. NO. 451-12/06

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J. H.,	:	DECISION
RESPONDENT.	:	

For Petitioner, Capizola, Baker, Lapham & Fralinger

J. H., *Pro Se*

This matter was opened before the Commissioner of Education on December 7, 2006 by way of a verified petition against respondent, the parent of a student who formerly attended school in petitioner's district. Petitioner alleged that the student had been ineligible to attend school in its district from September 6, 2005 to February 15, 2006 and demanded tuition reimbursement for that period of time.

By notice dated December 7, 2006 – which was sent both to the Newfield, New Jersey address that respondent had provided to petitioner, and to the address of the home in Clayton, New Jersey, which respondent reportedly owns – the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the petition. On January 5, 2007, the Bureau directed respondent for a second time, via both certified and regular mail to both addresses, to file an answer to the petition. The certified letter sent to the Newfield address was returned to the Commissioner unclaimed, but the notice sent by certified mail to the Clayton address – and both notices sent by regular mail – were not returned.

The first communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, an individual against whom a petition is filed shall have 20 days from

receipt of the petition to file an answer. The second notice advised that if respondent did not file an answer within ten days of her receipt of same, each count of the petition would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Bureau has received neither an answer to the petition from the respondent nor from any attorney purporting to represent respondent.

Petitioner's business administrator has certified that $4,617.60 is the amount of tuition due for the amount of time that respondent's child improperly attended school in petitioner's district.

The Commissioner concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order that respondent pay the tuition.

As to petitioner's request for interest, the Commissioner finds that petitioner has not met the standards set forth in *N.J.A.C.* 6A:3-1.17(a)(1), *N.J.A.C.* 6A:3-1.17(c)(1) and *N.J.A.C.* 6A:3-1.17(d).

IT IS THEREFORE ORDERED that summary decision shall be granted to the petitioner, and that respondent shall pay tuition in the amount of $4,617.60 for the period of time in which her daughter was ineligible for a free education in the Buena Regional School District. Petitioner's request for interest is denied.[1]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/8/07

Date of Mailing: 2/8/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

57-07

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
S.F. AND L.F.,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioning Board filed a complaint seeking reimbursement from respondents, S.F. and L.F., of the costs of tuition pertinent to the period of ineligible attendance of respondents' minor child, D.F., during the 2005-2006 school year. Respondents failed to appeal the Board's residency decision, and failed to answer the petition seeking payment of tuition.

The Commissioner directed respondents to submit answer to the petition pursuant to *N.J.A.C.* 6A:3-1.5, and informed respondents that if no answer was submitted, each count of the petition would be deemed admitted and the matter could then be decided on summary judgment. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondents to pay tuition in the amount of $8,875.80.

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

Mailed 2/08/07

AGENCY DKT. NO. 370-10/06

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
S.F. AND L.F.,	:	DECISION
RESPONDENTS.	:	
	:	

This matter was brought before the Commissioner of Education by the Board of Education of the City of Clifton (Board) by way of a Petition of Appeal filed on October 16, 2006,[1] requesting that respondents be ordered to pay the Board tuition for the period of their child, D.F.'s ineligible attendance in its schools, September 7, 2005 through June 26, 2006; and

The Board served a copy of both the petition and the amended petition on respondents, by certified and regular mail; and

The Commissioner, by notices dated October 16, 2006 and November 16, 2006,[2] directed that an Answer to the petition be submitted pursuant to *N.J.A.C.* 6A:3-1.5; and

Having received no response to these communications, on December 7, 2006 the Commissioner notified respondents – by regular and certified mail[3] - that if an Answer was not submitted, each count of the petition would be deemed admitted and the matter could then be

[1]An Amended Petition of Appeal – correcting the name of one of the respondents – was filed on November 16, 2006.

[2] Second notice sent as a result of receipt of the Board's amended petition.

[3]Although the certified mail copy of this notification was returned as "unclaimed," the copy sent by regular mail was not returned and is, therefore, presumed delivered.

decided on a summary judgment basis pursuant to the Commissioner's authority granted by *N.J.A.C.* 6A:3-1.5(e); and

As of this date, neither respondents nor any attorney on their behalf has filed an Answer to the petition and, therefore, each count of the petition is deemed to be admitted; and

By letter dated January 8, 2007, the Board advised both the Commissioner and the respondents that the per pupil cost for D.F.'s ineligible attendance in its schools during the period September 7, 2006 through June 26, 2007 was $8,875.80 (180 days @ $49.31 per day); and

Subsequent to this notification, neither respondents nor any attorney on their behalf has contested the Board's calculation of tuition; and

Deeming the Board's allegations against respondents to be admitted in the absence of their submission of an Answer, the Commissioner finds that respondents' child, D.F., was ineligible – pursuant to the provisions of *N.J.S.A.* 18A:38-1 – to attend school free of charge in the Clifton School District for the period September 7, 2005 through June 26, 2006, as set forth by the Board herein.

IT IS THEREFORE ORDERED that summary decision shall be granted to the Board of Education of the City of Clifton and that respondents shall pay tuition in the amount of $8,875.80, as requested by the Board, for the period of time in which their daughter was ineligible for a free education in the Clifton School District.[4]

Lucille Edary

COMMISSIONER OF EDUCATION

Date of Decision: 2/08/07

Date of Mailing: 2/08/07

[4] This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

60-07

OAL DKT. NO. EDU 8957-06
(EDU 2859-06 ON REMAND)
AGENCY DKT. NO. 149-4/06

MELISSA MEEHAN AND JOHN AND RENEE MEEHAN	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/14/07

Date of Mailing: 2/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8957-06

(ON REMAND OF EDU 2859-06)

AGENCY DKT. NO. 149-4/06

MELISSA MEEHAN AND JOHN AND RENEE MEEHAN,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

Respondent.

Melissa Meehan and John and Renee Meehan, petitioners, pro se

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

Record Closed: January 17, 2007 Decided: January 29, 2007

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

This matter was transmitted to the Office of Administrative Law on November 29, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Resolution Approving Settlement of Residency Dispute Release and a withdrawal letter from the petitioners indicating the terms thereof, which are attached and fully incorporated herein.

I have reviewed the record and the terms thereof and I **FIND**:

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

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

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

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

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

January 29, 2007
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

1/31/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 2007
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

WASHINGTON TOWNSHIP BOARD OF EDUCATION
RESOLUTION APPROVING SETTLEMENT OF RESIDENCY DISPUTE

2007 JAN 11 A 9:39
STATE
OFFICE OF

WHEREAS, M. M. is former student of the Washington Township School District ("School District"), having graduated from the Washington Township High School in June, 2006; and

WHEREAS, a dispute arose as to the eligibility of M. M. to attend school in the School District pursuant to N.J.S.A. 18A:38-1; and

WHEREAS, on March 28, 2006 the Washington Township Board of Education, Gloucester County, New Jersey ("Board") determined that M. M. was ineligible to attend the Washington Township High School; and

WHEREAS, on or about May 5, 2006 M. M. and her parents, R. M. and J. M. ("Petitioners") filed a Petition of Appeal with the Commissioner of Education challenging the Board's decision of ineligibility, OAL Dkt. No. EDU-OS-02859-06, Agency Ref. No.: 149-4/2006 ("Petition of Appeal"); and

WHEREAS, in order to resolve any and all disputes between the parties without resort to further time-consuming and costly litigation, the Petitioners and the Board have agreed to a full and final settlement of all claims and matters involving M. M.'s eligibility to attend school in the School District, as well as any and all claims asserted in or which could have been asserted in the Petition of Appeal; and

WHEREAS, based upon the recommendation of administration and its Solicitor, the Board approved the offer of settlement of the residency dispute with the Petitioners by agreeing to accept Eight Thousand Seven Hundred Twenty-Six dollars and Ninety-

Three cents ($8,726.93) in full satisfaction of all claims of tuition for M. M.'s attendance at the High School at its September 26, 2006 Board meeting; and

WHEREAS, the parties executed a Settlement Agreement and General Release ("Agreement") and presented the Agreement to the Honorable Richard F. Wells, Administrative Law Judge, who approved the Agreement via an Initial Decision dated October 25, 2006; and

WHEREAS, on November 20, 2006 the Commissioner of Education withheld her approval of the Initial Decision because of the absence of a Board resolution approving the Agreement and designating the individuals to sign the Agreement on the Board's behalf.

NOW, THEREFORE, on this 19th day of December, 2006 **BE IT RESOLVED** as follows:

1. The Board reaffirms and approves the settlement of the residency dispute involving M. M. in the amount of $8,726.93; and

2. Board President Richard Gerber and Board Secretary/School Business Administrator Margaret Meehan, CPA, are authorized and designated to execute the settlement agreement on behalf of the Board.

Margaret Meehan, CPA
School Business Administrator/Board Secretary
Washington Township Board of Education
Date: December 19, 2006

1/17/2007
~~October 27, 2006~~

Honorable Richard F. Wells, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, Nj 08625-0049

Re: Meehan, et al. v. Washington Twnshp Board of Ed
OAL Dkt. No. EDU 2859-06
Agency Reference No.: 149-4/2006

Dear Judge Wells:

In reference to the above matter. An agreement has been reached and I withdraw the Petition of Appeal. A copy of the fully executed Settlement Agreement and General release was sent to you by the attorney for the Washington Twp. Board—Mr. Joseph Betly dated October 23, 2006. (Capehart Scatchhard)

Thank you for your time in this matter,

John Meehan

Renee Meehan

John Meehan

Melissa Meehan

61-07

DREW BRADFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former teacher in respondent's district – alleged that the Board acted improperly in failing to renew his employment at the end of a one year contract that expired in June 2001. The petition in this matter was filed on August 17, 2006. Petitioner had previously filed a separate complaint in Superior Court that was largely based on allegations of discriminatory conduct and retaliation; he sought, but failed, to amend that complaint in March 2004 to include the substance of his current petition. Respondent Board filed a motion for summary judgment, asserting that petitioner's appeal was untimely.

The ALJ found, *inter alia*, that: the circumstances of this matter do not meet the criteria for relaxation of the 90-day limitations period, as petitioner had knowledge of the alleged procedural violations and termination of his contract in 2001; petitioner's claims in the instant matter are distinct from those made in his 2001 complaint in Superior Court; and petitioner's assertion that Superior Court should have transferred his Title 18A action to the Commissioner under R1:13-4, the case transfer rule, is without merit. The ALJ concluded that summary decision is appropriate, and granted respondent's motion to dismiss the petition.

Upon a full and independent review, the Commissioner adopted the Initial Decision with supplementation. More specifically, the Commissioner found that petitioner's claims under *N.J.S.A.* 18A:27-3.1 were untimely, and the alleged violations of *N.J.S.A.* 18A:27-4.1 – even if true – could not serve as a basis for the relief petitioner seeks.

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

February 14, 2007

61-07

OAL DKT. NO. EDU 10878-06
AGENCY DKT. NO. 288-8/06

DREW BRADFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Initial Decision, exceptions filed by petitioner on January 22, 2007, and respondent's reply to petitioner's exceptions have been reviewed.[1] The Commissioner adopts the Initial Decision of the Office of Administrative Law (OAL) as the final decision in this matter for the reasons articulated by the Administrative Law Judge (ALJ) and with the following supplementation.

By way of exception to the Initial Decision, petitioner argues that his claims pertaining to respondent's alleged violations of *N.J.S.A.* 18A:27-3.1 and *N.J.S.A.* 18A:27-4.1, which claims were brought in Superior Court almost three years after the events of which they complain, are timely under the 90-day statute of limitations for instituting petitions under the school laws (*N.J.A.C.* 6A:3-1.3(i)). He contends that he first discovered the facts upon which the claims are based via his attorney after review of respondent's January 27, 2004 motion in Superior Court for summary judgment. Within 90 days he filed a motion to amend his Superior Court complaint to add the school law claims, and asserts that – pursuant to *R.* 1:13-4 – the

[1] As the rules do not provide for sur-reply exceptions, the Commissioner did not consider petitioner's submission dated January 25, 2007.

Superior Court judge should have issued an order transferring his claims to the Commissioner of Education. For the following reasons, the Commissioner finds petitioner's exception without merit.

First, petitioner does not specifically identify the facts supporting his new (March 2004) allegations that he was not evaluated properly or notified in the correct sequence of his non-renewal. Second, as to petitioner's invocation of *N.J.S.A.* 18A:27-3.1 – which requires observation and evaluation of non tenured teaching staff members three times per academic year – petitioner must be charged with having known whether and when an observer was in his classroom in the 2000-2001 school year, and whether and when he received evaluations. Thus, the claim under *N.J.S.A.* 18A:27-3.1, which petitioner filed in March 2004, was untimely.

Third, petitioner's invocation of *N.J.S.A.* 18A:27-4.1 – even if deemed timely – cannot help him. Petitioner relies on the portion of the statute that states:

> Prior to notifying the [nontenured] officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation.
>
> *N.J.S.A.* 18A:27-4.1(b).

However, there is nothing in the statute to indicate that the purpose of that sentence is for anyone's benefit other than the board's. More specifically, in light of the fact that an officer or employee whose contract is not renewed may ask for reasons and an informal appearance before the board, *N.J.S.A.* 18A:27-4.1(b), it stands to reason that the board's timely awareness of the chief school administrator's recommendation is beneficial to the board. Nor does petitioner's early notice harm him in any way. Thus, even if petitioner had presented proofs that the Union Superintendent had advised him of his non-renewal before, instead of after advising the BOE – and even if petitioner had timely raised this fact – it does not follow that the remedy may be

petitioner's reinstatement. Reinstatement of an employee deemed unsuitable by the chief school administrator simply because the administrator allegedly switched the order of serving notice is neither called for in the statute nor sensible.

Finally, petitioner had notice via a nonrenewal letter dated May 1, 2001, and signed by petitioner on May 2, 2001, that the chief school administrator would not renew his employment. Consequently, the 90-day period to appeal his nonrenewal began on May 2, 2001. *Cordell Wise v. Board of Education of the City of Trenton, Mercer County*, Commissioner's Decision No. 301-00, decided September 11, 2000 (petitioner was required to file his petition within 90 days of the notice of his nonrenewal, not within 90 days of the exhaustion of other avenues and mechanisms).

Accordingly, summary judgment is granted in favor of respondent and the petition is dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/14/07

Date of Mailing: 2/14/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10878-06
AGENCY DKT. NO. 288-8/06

DREW BRADFORD,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent

Drew Bradford, petitioner, pro se

Jacqueline A. DeGregorio, Esq., and **Margaret A. Miller**, Esq., for the respondent (Weiner Lesniak, attorneys)

Record Closed: December 22, 2006 Decided: January 2, 2007

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9, alleging that respondent acted improperly in failing to renew petitioner's employment. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15. Respondent asserts that the appeal is untimely and filed a motion for summary

decision, see, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

The relevant facts are undisputed. Petitioner was hired by respondent as a teacher for the 2000/01 school year; the contract extended through June 30, 2001. By letter dated May 1, 2001, district superintendent Theodore Jakubowski informed petitioner that his employment would not be renewed for the next school year. In response petitioner and his attorney, Carol K. Boyd, Esq., appeared at a May 8, 2001 work session meeting of the Board to request a statement of reasons and a formal hearing. Petitioner was given an opportunity to address the Board at this meeting and to present testimonials regarding his teaching ability. Thereafter, on May 21, 2001, Superintendent Jakubowski supplied petitioner with a statement of reasons.

Petitioner sought another opportunity to address the Board in public session and a meeting was convened on June 12, 2001. Petitioner addressed the Board for forty-five minutes and the Board also heard from parents who supported his cause. In letters of June 14, and June 18, 2001, the Board advised petitioner that it would take no further action and that his employment was not being renewed for the reasons discussed in the Superintendent's May 21, 2001 correspondence.

On August 17, 2001, petitioner filed a complaint in the Superior Court asserting violations of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., as well as violations of his constitutional and federally protected rights under 42 U.S.C. 1983, 1981 and 1985, defamation, and loss of prospective economic benefit. To a large degree the individual counts were based on alleged discriminatory conduct and retaliation. On January 27, 2004, respondent filed a motion for summary decision. Petitioner filed a cross motion on March 1, 2004 seeking to amend his complaint to add procedural violations regarding the timing of his evaluations, N.J.S.A. 18A:27-3.1 and the steps respondent followed to non-renew his contract, N.J.S.A. 18A:27-4.1. By order dated April 16, 2004, the Superior Court denied petitioner's motion to amend the complaint and granted the District's summary decision motion. Petitioner sought reconsideration which was also denied. Petitioner appealed and on September 26,

2005 the Appellate Division affirmed the decision below. A Petition for Certiorari to the New Jersey Supreme Court was declined on December 12, 1995; a petition to the United States Supreme Court was denied on May 22, 2006. The current matter was filed on August 17, 2006. This is the substance of the record.

An employee's appeal to the Commissioner must be filed within ninety days of the time he receives notice of a District's adverse action, N.J.A.C. 6A:3-1.3. Limitations periods, particularly in labor relations, are intended to stimulate diligent filings so that whatever the result parties can quickly move on. For this reason the requirement is generally construed strictly, Kaprow v. Board of Educ. of Berkley Tp., 131 N.J. 572 (1993).

Petitioner argues that his situation is the exception recognized by cases like, Kacmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978) and Townsend v. Great Adventure, 178 N.J. Super. 508 (App. Div. 1981). I disagree. In Kacmarek, the New Jersey Supreme Court discussed circumstances that would lead to relaxation of a statute of limitations. The employee there incorrectly filed an unfair labor practice claim in the Superior Court that should have been filed with the Public Employment Relations Commission (PERC) and the six month limitations period passed before the employee realized his error. Among the factors considered by the Supreme Court in relaxing the limitations period was that the law had recently changed and it was not then plain that PERC was the correct venue. In the instant matter the Commissioner's exclusive jurisdiction under title 18A is longstanding.

The Kacmarek Court also pointed to the filing in Superior Court as proof that plaintiff had not "slept on his rights". Our petitioner too feels that he was diligent by filing in the Superior Court, but there is a difference. In Kacmarek, the claims in court and before PERC were of a piece and plaintiff simply filed in the wrong forum. Our petitioner did not misfile in court. His 2001 suit alleges discrimination and retaliation; his filing with the Commissioner asserts procedural violations in the evaluation and non-renewal process. The latter claims are distinct and the District had no notice of these until petitioner filed his March 2004 motion to amend the Superior Court complaint.

Petitioner also believes that the Superior Court should have transferred his title 18A action to the Commissioner under the Court Rules, who would receive it as if filed in August 2001. This misreads the discussion of the subject in Kacmarek, and Townsend, supra. R1:13-4 governs case transfers within the court system and to administrative agencies, when a filing is made in a forum that lacks jurisdiction. In that circumstance a transfer to the correct court or agency defeats any time bar that has accrued as a result of the misfiling because the original filing date is used. This is not our situation. Here the Superior Court had jurisdiction to hear, and did hear, the constitutional and statutory claims filed by petitioner in August 2001. The ninety day limitations period had long run by March 2004 when petitioner sought to amend his complaint to add title 18A claims. As indicated the original suit dealt primarily with allegations of discrimination and retaliation; the proposed amendment addressed alleged procedural flaws in the evaluation and non-renewal process. Petitioner must conflate these to come within the transfer rule.

Finally, Ms. Boyd submitted certifications stating that she was not an expert in employment litigation and therefore only discerned petitioner's title 18A rights during discovery in the Superior Court action. I perceive little merit in this assertion; counsel's unfamiliarity with the subject matter is between her and her client. The steps taken by respondent to evaluate petitioner's performance during his contract term and then not to renew his contract, were either known or readily discernable in 2001. Relaxation of time bar rules for newly discovered claims is for plaintiff's who unearth facts that could not previously have been known with reasonable diligence, Lynch v. Rubacky, 85 N.J. 65 (1981).

Based on the foregoing, it is **ORDERED** that summary decision be granted in favor of respondent and that this petition be dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/2/07
DATE

SOLOMON A. METZGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1/2/07
DATE

Mailed to Parties:

JAN 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

63-07

OAL DKT. NO. EDU 5789-06
AGENCY DKT. NO. 129-3/06

L.M., on behalf of minor children, J.M., J.M. and J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the parties by OAL on January 9, 2007, providing petitioner thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/14/07
Date of Mailing: 2/15/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

64-07

#64-07

IN THE MATTER OF THE SUSPENSION OF THE CERTIFICATION OF LYNNE C. EINHORN, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In October 2006, the petitioning school district served an Order to Show Cause upon respondent – a non-tenured school social worker – requiring respondent to show cause why an order should not be entered suspending her certificate, pursuant to *N.J.S.A.* 18A:26-10, for resigning without providing the amount of notice required by her contract with petitioner. The respondent failed to answer the order, but submitted a note in December 2006 stating that she was unable to return to work due to "health concerns," and had retained counsel. Respondent's attorney requested an extension to December 30 to respond to the order to show cause, but no answer has been filed to date. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and are sufficient to justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

February 16, 2007

AGENCY DKT. NO. 368-10/06

IN THE MATTER OF THE SUSPENSION OF THE CERTIFICATION OF LYNNE C. EINHORN, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Wilentz, Goldman & Spitzer

For Respondent, Barbara Einhorn, Esq.

This matter was opened before the Commissioner of Education on October 12, 2006 by way of an Order to Show Cause served by petitioner, Edison Board of Education, upon respondent, Lynne C. Einhorn, requiring respondent to show cause why an order should not be entered suspending her certificate – pursuant to *N.J.S.A.* 18A:26-10 – for resigning without providing the amount of notice required by her contract with petitioner. By notice dated October 12, 2006, the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the order to show cause within twenty days. By amended notice dated October 24, 2006, the Bureau directed respondent – via regular and certified mail – to file an answer to the order to show cause within twenty days. The notice sent by certified mail was returned unclaimed, but the notice sent by regular mail was not.

On November 22, 2006, the Bureau sent respondent a final notice – via regular and certified mail – directing respondent to file an answer within ten days. The final notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified notice was returned to the Commissioner unclaimed, but the notice sent by regular mail was not.

On December 5, 2006, respondent faxed to the Bureau a two-sentence note advising that she was unable to return to work due to unspecified "health concerns" and that she had retained counsel, who had requested an adjournment. Attached to respondent's note was a doctor's note that had been written four months earlier, on August 15, 2006, stating that respondent was "currently suffering from a medical condition which can be directly related to her current work environment," and recommending that respondent "find a new work situation for the sake of her health . . . where she should have no difficulty working at her usual work level."

Respondent's attorney, Barbara Einhorn, faxed the Bureau a letter on December 7, 2006, asking for an extension to December 30, 2006, to respond to the order to show cause. On December 8, 2006, attorney Einhorn obtained the consent of her adversary to the extension, and same was granted. No answer having been received by December 30, 2006, the Bureau sent respondent's attorney a final notice, dated January 19, 2007, via regular and certified mail. Proof of delivery of the certified mail, with respondent's attorney's signature dated January 23, 2007, was returned to the Bureau on January 25, 2007. No answer to the order to show cause has been filed as of this date.

As stated above, the first communications from the Bureau to respondent clearly provided respondent with notice that she was required to file an answer within 20 days from receipt of the order to show cause. The final notices to respondent and to respondent's attorney clearly advised that if an answer was not filed within ten days of receipt of same, each allegation in the papers supporting the order to show cause would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Bureau has received neither an

answer to the order to show cause from the respondent nor an answer from respondent's attorney.

The Commissioner now concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order suspending respondent's certification. Accordingly,

IT IS THEREFORE ORDERED that summary decision is granted to petitioner, and respondent's certification is suspended pursuant to *N.J.S.A.*18A:26-10 for a period of one year from the date of filing of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/16/07

Date of Mailing: 2/20/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

66-07

#66-07

OAL DKT. NO. EDU 8017-05
AGENCY DKT. NO. 188-8/05

ARTHUR DRUMMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Resignation from Employment/Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law – pursuant to *N.J.A.C.* 1:1-19.1 – have been reviewed. It is noted that the parties propose a "global" settlement agreement to resolve two matters currently before the Commissioner, *i.e.*, the instant matter and a case involving tenure charges filed against respondent, *In the Matter of the Tenure Hearing of Arthur Drummond, School District of the City of Atlantic City, Atlantic County*, OAL Dkt. No. EDU 8243-06, Agency Dkt. No. 345-9/06[1] [2]

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

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/07

Date of Mailing: 2/21/07

[1] This matter, along with another copy of the proposed agreement, was submitted to the Commissioner by way of a separate OAL decision. The adequacy of the proposed agreement to resolve these tenure charges will be ruled on by the Commissioner in a separate decision.

[2] The "global" agreement additionally purports to resolve a pending grievance filed by Mr. Drummond alleging a monetary loss for the Board's failure to recognize his black seal license and pay him a stipend related thereto which is outside the jurisdictional purview of the Commissioner.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8017-05
AGENCY DKT. NO. 188/8/05

ARTHUR DRUMMOND,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Emily A. Buonadonna, Esq., for petitioner, School District if the City of Atlantic City (Capizola, Fineman & Lapham, attorneys)

Ned P. Rogovoy, Esq., for respondent, Arthur Drummond

Record Closed: January 23, 2007 Decided: January 31, 2007

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

This matter was transmitted to the Office of Administrative Law on September 30, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

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

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

January 31, 2007
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

2/2/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RESIGNATION FROM EMPLOYMENT
SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Resignation from Employment, Settlement Agreement and General Release (the "Agreement"), is entered into this _____ day of _____, 2006, by and between Arthur Drummond ("Mr. Drummond") and the Atlantic City Board of Education, Atlantic County (the "Board") (collectively, the "Parties"). For purposes of this Agreement , the term the "Board" shall mean and include the Atlantic City Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Mr. Drummond" shall mean and include Arthur Drummond and any and all of his heirs, executors, administrators, successors, predecessors, assigns, agents, representatives and privies. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. Drummond's employment by the board, the termination of his employment and any claims or actions he has brought or could have brought against the Board.

WITNESSETH:

WHEREAS, Mr. Drummond filed a Petition before the Commissioner of Education against the Board under Agency Docket No. 188-8/05, OAL DKT No. EDU8017-2005 on or about July, 2005 which requests monetary relief in payments of salary withheld and additionally, for the reimbursement of legal expenses totaling approximately $96,000.00 which is currently pending. ("The Petition");

WHEREAS, Mr. Drummond, by and through the Atlantic City Education Association (ACEA) filed a grievance, AR No. 2006-434, on July 27, 2005 alleging a monetary loss for the Board's failure to recognize his black seal license and pay him a stipend related thereto which is currently pending ("Black Seal Grievance");

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming against Mr. Drummond pursuant to N.J.S.A. 18A:6-11 and said charges were certified and are pending under Agency Docket No. 345-9/06 and OAL DKT No. 8243-06; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally resolve and dismiss Mr. Drummond's charge and to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Mr. Drummond may have against the Board; and

WHEREAS, Mr. Drummond acknowledges and agrees that his agreement to resign and voluntarily dismiss, waive and withdraw any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board is provided as consideration for a lump sum payment from the Board and the Board's agreement to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges with prejudice;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) In consideration for Mr. Drummond's execution of this Agreement and the promises and covenants contained herein, the Board commits that it shall issue and remit to Ned Rogovoy, Esquire, (Mr. Drummond's "Counsel") a check payable to Arthur Drummond in the gross amount of Forty Thousand Dollars ($40,000.00). The Board will report the payment to the taxing authorities via an IRS Form 1099. The check will be sent to Mr. Drummond's Counsel after (I) this Agreement is executed, (II) the Stipulation of Dismissal with Prejudice attached to this Agreement as **Appendix A** is signed and (III) Mr. Drummond resigns by executing Appendix B.

(B) In the event that it is subsequently determined that either party owes any employment taxes with respect to this payment, Mr. Drummond expressly acknowledges and agrees that he and/or his heirs, executors, administrators and assigns, and not the Board, will be responsible for the payment of any such taxes, liabilities, payments or costs, interest and penalties. Mr. Drummond agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments or costs, interest and penalties, which may be assessed against the Board in connection with any payment made to or on behalf of Mr. Drummond hereunder, however, it is acknowledged by all Parties that this is a lump sum settlement for the consideration of Mr. Drummond resigning his position and for him to dismiss all of his matters including the Petition for back wages and counsel fee, his grievance, and the Board agrees to dismiss with Prejudice the tenure charges against Mr. Drummond and Mr. Drummond agrees to execute his resignation.

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

(a) Mr. Drummond agrees that by signing this Agreement and by signing his resignation, which is attached hereto as **Appendix B**, he is <u>irrevocably</u> resigning his employment with the Board effective upon the execution of this Agreement, which causes forfeiture of tenure.

(b) Mr. Drummond irrevocably and unconditionally remises,

releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. Drummond has ever had or now has against the Board in connection with his employment with the Board, the resignation of his employment, compensation and/or benefits with the board and the charges. Mr. Drummond further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the board, including, but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment, discrimination; employee benefits; collective bargaining agreement; and the termination of employment and any other claim arising from or relating to Mr. Drummond's employment. Mr. Drummond understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. Drummond knows about and those he may not know about, except for claims (I) that may arise after the date Mr. Drummond executes this Agreement; (II) for a breach of this Agreement; or (III) with respect to any benefits in which Mr. Drummond has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Mr. Drummond further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims he has given up, released or waived. Any substantial or material breach of this agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of reasonable attorney's fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

(c) Mr. Drummond agrees to dismiss with prejudice the Petition bearing Agency DKT. No. 188-8/05 having an OAL DKT. No. EDU8017-2005, in that regard, Mr. Drummond's counsel in that matter, being Cristal Holmes-

Bowie, Esquire, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneously with the execution of this Agreement, execute the Stipulation of dismissal with Prejudice attached to this Agreement as **Appendix A**, dismissing the case with Prejudice for the reason of the settlement reached by the Parties. It is further acknowledged that Mr. Drummond by and through the President of the Atlantic City Education Association, Marcia Genova, will cause a cancellation and dismissal of the "black seal grievance" forthwith. In any event, this document and its signing by Mr. Drummond shall cause by its very nature a dismissal of the grievance.

(d) The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 345-9/06, OAL Docket No. 8243-06, with prejudice in light of Mr. Drummond's Agreement to resign and voluntarily dismiss, waive and withdraw any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board as consideration for a lump sum payment from the Board. In executing this agreement, Mr. Drummond understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and that notwithstanding the commissioner's decision with regard to the tenure charges, the remaining promises and covenants between the parties that are contained in this Agreement are enforceable upon the execution of the Agreement.

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

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

3. (a) Mr. Drummond agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Mr. Drummond may discuss or disclose this Agreement (I) with his immediate family; (II) with his attorney or tax advisor; and (III) in response to inquiries from, any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities Mr. Drummond or the Board.

(b) Mr. Drummond may disclose, make public or discuss his resignation from the district only to the extent as set forth in the Joint Statement. A copy of said Joint Statement is annexed as **Appendix C.**

4. (a) Mr. Drummond agrees that he shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the Board or which encourages any adverse action, provided that Mr. Drummond is permitted to testify truthfully under oath pursuant to a subpoena.

(b) With respect to any inquiries directed to the Atlantic City School Board's Department of Human Resources regarding Mr. Drummond, the Board shall have the responsibility only as provided below; provided that the Board and Board employees are permitted to testify truthfully under oath pursuant to a subpoena. If any inquiries are made, there will be a neutral reference and **Appendix C** shall be read to the inquiring party.

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

6. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any

future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the Board.

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

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

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Atlantic.

9. Mr. Drummond agrees that he shall be responsible for his own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

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

11. In executing this Agreement, Mr. Drummond has had an opportunity to speak to his attorneys and to the President of the Atlantic City Education Association and has relied upon the legal advice of his attorneys as to the terms of this Agreement, which have been completely read by him and explained by his attorneys, and those terms are fully understood and voluntarily accepted.

12. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Mr. Drummond and the Board.

13. This Agreement shall become effective immediately following the execution by Mr. Drummond and the Board.

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

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

AGREED AND ACCEPTED:

Arthur Drummond Date: 12/26/06

Arthur Drummond

Subscribed and sworn to before me
this 27th day of December, 2006

Notary Public
Attorney at Law

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

Date: 1/16/07

, Board President

Witness:

, Business Administrator/
Board Secretary

APPENDIX A

Stipulation of Dismissal With Prejudice

Law Office of Michael A. Armstrong
79 Mainbridge Lane
Willingboro, New Jersey 08046
(609) 877-5511
Attorney for Respondent, Arthur Drummond

ARTHUR DRUMMOND Petitioner vs. ATLANTIC CITY BOARD OF EDUCATION Respondent	)	BEFORE THE COMMISSIONER OF EDUCATION DOCKET NO. EDU-8017-05 AGENCY DKT NO. 188-8/05 ***STIPULATION OF DISMISSAL WITH PREJUDICE***

WHEREAS, Petitioner, Arthur Drummond, and Respondent, Atlantic City Board of Education, Atlantic County, (together, the "Parties") have entered into a Settlement Agreement and General Release which includes a release of the above claim in above captioned matter;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by the Parties, that the Verified Petition filed is herein withdrawn with prejudice and that this matter shall be dismissed with prejudice and on the merits, without costs to either Party.

Dated: 12/26/06 By: Arthur Drummond
Arthur Drummond

Law Office of Michael A. Armstrong

Dated: _____ By: _____
Cristal Holmes-Bowie

APPENDIX B

Resignation of Arthur Drummond

To the Atlantic City Board of Education:

I, Arthur Drummond, hereby resign my employment with the Atlantic City Board of Education, effective 1/16/07.

Arthur Drummond

Arthur Drummond

Subscribed and sworn to before me
this 21th day of December, 2006

Notary Public

Attorney

APPENDIX C

Joint Statement of
Atlantic City School District and Mr. Drummond

Mr. Drummond has tendered his resignation as a custodian with the Atlantic City School District. The Board and Mr. Drummond have agreed that it is in the best interest of both parties that an amicable conclusion be reached as to the ending of the employment relationship.

RESOLUTION

WHEREAS, there are various actions or claims pending between Arthur Drummond and the Atlantic City Board of Education (the "Board") before the Commissioner of Education and/or the Public Employment Relations Commission, namely OAL Dkt. No. EDU 8017-05, OAL Dkt. No. EDU 8243-06 and AR No. 2006-434; and

WHEREAS, the parties desire to fully and finally settle and resolve any and all actions of any kind between them including the above-referenced matters; and

WHEREAS, the parties have drafted a Settlement Agreement and General Release which fully and finally settles and resolves any and all actions of any kind between them including the above-referenced matters; and

WHEREAS, the Settlement Agreement provides, in part, that in consideration for Arthur Drummond's agreement to dismiss his action(s) or claim(s) against the Board and tender his resignation, the Board shall request that the Commissioner of Education dismiss its action(s) or claim(s) against Mr. Drummond and issue a check to Mr. Drummond's attorney payable Mr. Drummond in the gross amount of $40,000.00; and

WHEREAS, an executive session meeting of the Board was held on Tuesday, January 16, 2006 at 5:30 p.m. at 1300 Atlantic Avenue, Atlantic City, New Jersey where the Board reviewed and considered the Settlement Agreement and General Release; and

WHEREAS, during open session the Board determined by a recorded vote of a majority of the entire membership of the Board with 12 members voting in favor, 0 members voting against, and 0 members abstaining, to approve the Settlement Agreement and accept Arthur Drummond's resignation;

NOW BE IT RESOLVED, that the Board hereby accepts the Settlement Agreement which will fully and finally settle and resolve any and all actions of any kind between the parties including the above-referenced matters and authorizes a lump sum payment to Arthur Drummond in the amount of $40,000; and

BE IT FURTHER RESOLVED, that the Board hereby accepts Arthur Drummond's resignation effective January 16, 2007.

ADOPTED this 16 day of January, 2007.

Witness or Attested to:

Angela Brown
Angela Brown, Board Secretary

BOARD OF EDUCATION OF THE ATLANTIC CITY SCHOOL DISTRICT

By: _____
RaShun Stewart, President

CERTIFICATION

I, **Angela Brown**, secretary of the Board of Education of the Atlantic City School District, **CERTIFY** that the foregoing is a true copy of the Resolution as it appears in the records of the Board of Education of the Atlantic City School District and as was duly and legally adopted at a meeting of the Board held on January 16, 2007 pursuant to and in accordance with the laws of the State of New Jersey by a recorded vote of a majority of the entire membership of the Board of Education and that it has not been modified, amended or rescinded and is in full force and effect as of the date hereof.

Date: January 16, 2007

Angela Brown

Angela Brown, Board Secretary

#67-07

OAL DKT. NO. EDU 8243-06
AGENCY DKT NO. 345-9/06

IN THE MATTER OF THE TENURE	:	
HEARING OF ARTHUR DRUMMOND,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY	:	

The record, Resignation from Employment/Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law (OAL) – pursuant to *N.J.A.C.* 1:1-19.1 – have been reviewed. It is noted that the parties propose a "global" settlement agreement to resolve two matters currently before the Commissioner, *i.e.*, the instant tenure charges against respondent, a tenured custodian, and a case entitled *Arthur Drummond v. Board of Education of the City of Atlantic City, Atlantic County*, OAL Dkt. No. EDU 8017-05, Agency Dkt. No. 188-8/05.[1] [2]

The instant matter seeks – as a consequence of the parties' agreement, which encompasses respondent's resignation from his position as of January 16, 2007 – the Commissioner's approval of the Board's withdrawal of tenure charges against respondent. In this regard, the Commissioner recognizes that the purpose of tenure charges is to provide a mechanism for the dismissal from employment, or the reduction in compensation, of a tenured individual who is found guilty of the charges proffered. The maximum penalty, therefore, that

[1] This matter, along with another copy of the proposed agreement, was submitted to the Commissioner by way of a separate OAL decision. The adequacy of the proposed agreement to resolve this separate controversy will be ruled on by the Commissioner in a subsequent decision.

[2] The "global" agreement additionally purports to resolve a pending grievance filed by Mr. Drummond alleging a monetary loss for the Board's failure to recognize his black seal license and pay him a stipend related thereto which is outside the jurisdictional purview of the Commissioner.

could be imposed on respondent as a result of these proceedings – if the charges are proven to be true – would be the loss of respondent's right to employment in the Atlantic City School District, a right that he has voluntarily relinquished by his resignation. As such, the Commissioner concludes that the instant tenure charges have been rendered moot.

Accordingly, the proposed settlement agreement – calling for respondent's resignation from his position effective January 16, 2007 – is approved and, consequently, the instant tenure charges are hereby dismissed as moot.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/07

Date of Mailing: 2/21/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8243-06
AGENCY DKT. NO. 345-9/06

IN THE MATTER OF THE TENURE HEARING OF ARTHUR DRUMMOND, SCHOOL DISTRICT OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY

Emily A. Buonadonna, Esq., for petitioner, School District if the City of Atlantic City (Capizola, Fineman & Lapham, attorneys)

Ned P. Rogovoy, Esq., for respondent, Arthur Drummond

Record Closed: January 23, 2007 Decided: January 31, 2007

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

This matter was transmitted to the Office of Administrative Law on October 13, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

January 31, 2007
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

2/2/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RESIGNATION FROM EMPLOYMENT
SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Resignation from Employment, Settlement Agreement and General Release (the "Agreement"), is entered into this _____ day of _____, 2006, by and between Arthur Drummond ("Mr. Drummond") and the Atlantic City Board of Education, Atlantic County (the "Board") (collectively, the "Parties"). For purposes of this Agreement , the term the "Board" shall mean and include the Atlantic City Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Mr. Drummond" shall mean and include Arthur Drummond and any and all of his heirs, executors, administrators, successors, predecessors, assigns, agents, representatives and privies. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. Drummond's employment by the board, the termination of his employment and any claims or actions he has brought or could have brought against the Board.

WITNESSETH:

WHEREAS, Mr. Drummond filed a Petition before the Commissioner of Education against the Board under Agency Docket No. 188-8/05, OAL DKT No. EDU8017-2005 on or about July, 2005 which requests monetary relief in payments of salary withheld and additionally, for the reimbursement of legal expenses totaling approximately $96,000.00 which is currently pending. ("The Petition");

WHEREAS, Mr. Drummond, by and through the Atlantic City Education Association (ACEA) filed a grievance, AR No. 2006-434, on July 27, 2005 alleging a monetary loss for the Board's failure to recognize his black seal license and pay him a stipend related thereto which is currently pending ("Black Seal Grievance");

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming against Mr. Drummond pursuant to N.J.S.A. 18A:6-11 and said charges were certified and are pending under Agency Docket No. 345-9/06 and OAL DKT No. 8243-06; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally resolve and dismiss Mr. Drummond's charge and to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Mr. Drummond may have against the Board; and

WHEREAS, Mr. Drummond acknowledges and agrees that his agreement to resign and voluntarily dismiss, waive and withdraw any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board is provided as consideration for a lump sum payment from the Board and the Board's agreement to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges with prejudice;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) In consideration for Mr. Drummond's execution of this Agreement and the promises and covenants contained herein, the Board commits that it shall issue and remit to Ned Rogovoy, Esquire, (Mr. Drummond's "Counsel") a check payable to Arthur Drummond in the gross amount of Forty Thousand Dollars ($40,000.00). The Board will report the payment to the taxing authorities via an IRS Form 1099. The check will be sent to Mr. Drummond's Counsel after (I) this Agreement is executed, (II) the Stipulation of Dismissal with Prejudice attached to this Agreement as **Appendix A** is signed and (III) Mr. Drummond resigns by executing Appendix B.

(B) In the event that it is subsequently determined that either party owes any employment taxes with respect to this payment, Mr. Drummond expressly acknowledges and agrees that he and/or his heirs, executors, administrators and assigns, and not the Board, will be responsible for the payment of any such taxes, liabilities, payments or costs, interest and penalties. Mr. Drummond agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments or costs, interest and penalties, which may be assessed against the Board in connection with any payment made to or on behalf of Mr. Drummond hereunder, however, it is acknowledged by all Parties that this is a lump sum settlement for the consideration of Mr. Drummond resigning his position and for him to dismiss all of his matters including the Petition for back wages and counsel fee, his grievance, and the Board agrees to dismiss with Prejudice the tenure charges against Mr. Drummond and Mr. Drummond agrees to execute his resignation.

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

(a) Mr. Drummond agrees that by signing this Agreement and by signing his resignation, which is attached hereto as **Appendix B**, he is <u>irrevocably</u> resigning his employment with the Board effective upon the execution of this Agreement, which causes forfeiture of tenure.

(b) Mr. Drummond irrevocably and unconditionally remises,

releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. Drummond has ever had or now has against the Board in connection with his employment with the Board, the resignation of his employment, compensation and/or benefits with the board and the charges. Mr. Drummond further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the board, including, but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment, discrimination; employee benefits; collective bargaining agreement; and the termination of employment and any other claim arising from or relating to Mr. Drummond's employment. Mr. Drummond understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. Drummond knows about and those he may not know about, except for claims (I) that may arise after the date Mr. Drummond executes this Agreement; (II) for a breach of this Agreement; or (III) with respect to any benefits in which Mr. Drummond has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Mr. Drummond further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims he has given up, released or waived. Any substantial or material breach of this agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of reasonable attorney's fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

(c) Mr. Drummond agrees to dismiss with prejudice the Petition bearing Agency DKT. No. 188-8/05 having an OAL DKT. No. EDU8017-2005, in that regard, Mr. Drummond's counsel in that matter, being Cristal Holmes-

Bowie, Esquire, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneously with the execution of this Agreement, execute the Stipulation of dismissal with Prejudice attached to this Agreement as **Appendix A**, dismissing the case with Prejudice for the reason of the settlement reached by the Parties. It is further acknowledged that Mr. Drummond by and through the President of the Atlantic City Education Association, Marcia Genova, will cause a cancellation and dismissal of the "black seal grievance" forthwith. In any event, this document and its signing by Mr. Drummond shall cause by its very nature a dismissal of the grievance.

(d) The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 345-9/06, OAL Docket No. 8243-06, with prejudice in light of Mr. Drummond's Agreement to resign and voluntarily dismiss, waive and withdraw any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board as consideration for a lump sum payment from the Board. In executing this agreement, Mr. Drummond understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and that notwithstanding the commissioner's decision with regard to the tenure charges, the remaining promises and covenants between the parties that are contained in this Agreement are enforceable upon the execution of the Agreement.

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

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

3. (a) Mr. Drummond agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Mr. Drummond may discuss or disclose this Agreement (I) with his immediate family; (II) with his attorney or tax advisor; and (III) in response to inquiries from, any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities Mr. Drummond or the Board.

(b) Mr. Drummond may disclose, make public or discuss his resignation from the district only to the extent as set forth in the Joint Statement. A copy of said Joint Statement is annexed as **Appendix C.**

4. (a) Mr. Drummond agrees that he shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the Board or which encourages any adverse action, provided that Mr. Drummond is permitted to testify truthfully under oath pursuant to a subpoena.

(b) With respect to any inquiries directed to the Atlantic City School Board's Department of Human Resources regarding Mr. Drummond, the Board shall have the responsibility only as provided below; provided that the Board and Board employees are permitted to testify truthfully under oath pursuant to a subpoena. If any inquiries are made, there will be a neutral reference and **Appendix C** shall be read to the inquiring party.

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

6. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any

future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the Board.

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

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

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Atlantic.

9. Mr. Drummond agrees that he shall be responsible for his own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

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

11. In executing this Agreement, Mr. Drummond has had an opportunity to speak to his attorneys and to the President of the Atlantic City Education Association and has relied upon the legal advice of his attorneys as to the terms of this Agreement, which have been completely read by him and explained by his attorneys, and those terms are fully understood and voluntarily accepted.

12. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Mr. Drummond and the Board.

APPENDIX A

Stipulation of Dismissal With Prejudice

Law Office of Michael A. Armstrong
79 Mainbridge Lane
Willingboro, New Jersey 08046
(609) 877-5511
Attorney for Respondent, Arthur Drummond

ARTHUR DRUMMOND Petitioner vs. ATLANTIC CITY BOARD OF EDUCATION Respondent	)	BEFORE THE COMMISSIONER OF EDUCATION DOCKET NO. EDU-8017-05 AGENCY DKT NO. 188-8/05 ***STIPULATION OF DISMISSAL WITH PREJUDICE***

WHEREAS, Petitioner, Arthur Drummond, and Respondent, Atlantic City Board of Education, Atlantic County, (together, the "Parties") have entered into a Settlement Agreement and General Release which includes a release of the above claim in above captioned matter;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by the Parties, that the Verified Petition filed is herein withdrawn with prejudice and that this matter shall be dismissed with prejudice and on the merits, without costs to either Party.

Dated: 12/26/06 By: Arthur Drummond
Arthur Drummond

Law Office of Michael A. Armstrong

Dated: _____ By: _____
Cristal Holmes-Bowie

APPENDIX B

Resignation of Arthur Drummond

To the Atlantic City Board of Education:

I, Arthur Drummond, hereby resign my employment with the Atlantic City Board of Education, effective 1/16/07.

Arthur Drummond

Arthur Drummond

Subscribed and sworn to before me
this 21th day of December, 2006

Notary Public

Attorney

APPENDIX C

Joint Statement of
Atlantic City School District and Mr. Drummond

Mr. Drummond has tendered his resignation as a custodian with the Atlantic City School District. The Board and Mr. Drummond have agreed that it is in the best interest of both parties that an amicable conclusion be reached as to the ending of the employment relationship.

RESOLUTION

WHEREAS, there are various actions or claims pending between Arthur Drummond and the Atlantic City Board of Education (the "Board") before the Commissioner of Education and/or the Public Employment Relations Commission, namely OAL Dkt. No. EDU 8017-05, OAL Dkt. No. EDU 8243-06 and AR No. 2006-434; and

WHEREAS, the parties desire to fully and finally settle and resolve any and all actions of any kind between them including the above-referenced matters; and

WHEREAS, the parties have drafted a Settlement Agreement and General Release which fully and finally settles and resolves any and all actions of any kind between them including the above-referenced matters; and

WHEREAS, the Settlement Agreement provides, in part, that in consideration for Arthur Drummond's agreement to dismiss his action(s) or claim(s) against the Board and tender his resignation, the Board shall request that the Commissioner of Education dismiss its action(s) or claim(s) against Mr. Drummond and issue a check to Mr. Drummond's attorney payable Mr. Drummond in the gross amount of $40,000.00; and

WHEREAS, an executive session meeting of the Board was held on Tuesday, January 16, 2006 at 5:30 p.m. at 1300 Atlantic Avenue, Atlantic City, New Jersey where the Board reviewed and considered the Settlement Agreement and General Release; and

WHEREAS, during open session the Board determined by a recorded vote of a majority of the entire membership of the Board with 12 members voting in favor, 0 members voting against, and 0 members abstaining, to approve the Settlement Agreement and accept Arthur Drummond's resignation;

NOW BE IT RESOLVED, that the Board hereby accepts the Settlement Agreement which will fully and finally settle and resolve any and all actions of any kind between the parties including the above-referenced matters and authorizes a lump sum payment to Arthur Drummond in the amount of $40,000; and

BE IT FURTHER RESOLVED, that the Board hereby accepts Arthur Drummond's resignation effective January 16, 2007.

ADOPTED this 16 day of January, 2007.

Witness or Attested to:

Angela Brown
Angela Brown, Board Secretary

BOARD OF EDUCATION OF THE ATLANTIC CITY SCHOOL DISTRICT

By: _____
RaShun Stewart, President

CERTIFICATION

I, **Angela Brown**, secretary of the Board of Education of the Atlantic City School District, **CERTIFY** that the foregoing is a true copy of the Resolution as it appears in the records of the Board of Education of the Atlantic City School District and as was duly and legally adopted at a meeting of the Board held on January 16, 2007 pursuant to and in accordance with the laws of the State of New Jersey by a recorded vote of a majority of the entire membership of the Board of Education and that it has not been modified, amended or rescinded and is in full force and effect as of the date hereof.

Date: January 16, 2007

Angela Brown

Angela Brown, Board Secretary

CAPIZOLA, BAKER
LAPHAM & FRALINGER

A Professional Corporation
ATTORNEYS AT LAW

Michael D. Capizola
Theodore E. Baker*
Certified Civil Trial Attorney
Barbara R. Lapham
Michael P. Fralinger
Anne Graziano Krell
Marian E. Haag*
Rebecca J. Bertram*
Emily A. Buonadonna
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Facsimile - 856-451-2029

19 Newton Avenue
P.O. Box 734
Woodbury, NJ 08096
Telephone - 856-384-6446
Facsimile - 856-384-9393

Please Reply To: **Vineland**

January 22, 2007

RECEIVED
2007 JAN 23 A 10:47
STATE OF NEW JERSEY

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

Re: Atlantic City Board of Education v. Arthur Drummond
OAL Dkt. No. EDU 08243-2006

Arthur Drummond v. Atlantic City Board of Education
OAL Dkt. No. EDU 8017-2005

Dear Judge Gorman:

This office represents the Atlantic City Board of Education with regard to the above-referenced matters. Enclosed please find a Settlement Agreement and General Release executed by Arthur Drummond and the Atlantic City Board of Education. Also enclosed is the original Resolution of the Atlantic City Board of Education approving the Settlement Agreement. The Agreement provides that in consideration for Mr. Drummond's agreement to dismiss his claims against the Board and tender his resignation, the Board agrees to ask the Commissioner of Education to dismiss the tenure charges and issue a check to Mr. Drummond in the gross amount of $40,000.00.

As you will see, Mr. Drummond tendered his resignation, which the Board approved, effective January 16, 2007. Under separate cover, I forwarded to Ned Rogovoy, Esq. a check from the Board payable to Arthur Drummond in the amount of $40,000.00.

Upon receipt of the check, Mr. Rogovoy will ask Cristal Holmes-Bowie, Esq. to file a a Stipulation of Dismissal dismissing Mr. Drummond's action against the Board, OAL Docket No. EDU 8017-2005. In addition, Mr. Rogovoy will ask Marsha Genova, President of the Atlantic City Education Association, to withdraw or dismiss Arthur Drummond's pending grievance against the Board, AR-2006-434. If the Court requires, I will likewise submit a Stipulation of Dismissal requesting that the Commissioner of Education dismiss the tenure charges pending against Mr. Drummond.

Thank you for Your Honor's courtesies as the attorneys worked towards a settlement in these matters. If Your Honor has any questions or concerns, please contact counsel.

Respectfully submitted,

Emily A. Buonadonna
EAB/sg (dm)

Enc.

cc: Ned P. Rogovoy, Esq. w/o Enc.
Cristal Holmes-Bowie, Esq. w/o Enc.

74-07

AGENCY DKT. NO. 457-12/06

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, INC. AND MARCO MORCOS,	:	
PETITIONERS,	:	
V.	:	
NJSIAA,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
-- and--	:	DECISION ON APPLICATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN,	:	FOR EMERGENT RELIEF
INTERVENOR.	:	

This matter was opened by way of a petition filed on December 8, 2006, challenging a decision by the NJSIAA Executive Committee that had been made three months earlier (on September 13, 2006), affirming the determination by the NJSIAA Controversies Committee that LEAP Academy University Charter School (LEAP) had violated Article V, Section 4D of the NJSIAA bylaws, which prohibits the recruitment of students for athletic purposes. The penalties imposed for the violations were two-year probationary periods for both the basketball program and the coach, the submission of a corrective action plan, and disqualification from the 2007 and 2008 post-season tournaments.

Respondent's answer and statement of items comprising the record were submitted on December 20, 2006. On December 28, 2006, the Pennsauken Board of Education

Faxed: 2/23/07
Mail 2/26/07

moved to intervene. On January 4, 2007, the record was filed with the Commissioner. After considering all parties' submissions regarding the intervention motion, the Commissioner granted same on January 12, 2007, and set a schedule for the remaining briefs. All papers allowed by the briefing schedule were received as of February 1, 2007. Two weeks later, on February 15, 2007, petitioners filed the instant motion for emergent relief.

Mindful of the imminence of the tournament in which petitioners seek to participate, the Commissioner will refer to the facts which the parties have presented in the course of the legal discussion, in lieu of setting forth a separate factual background.

Pursuant to *N.J.A.C.* 6A:3-7.4, petitioners' application for emergent relief must conform to *N.J.A.C.* 6A:3-1.6(b) and meet the substantive standards articulated therein. The four standards are:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> (Emphasis added.) *See also, Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Since the standards are conjunctive, petitioners must prevail on all four.

Regarding the first standard, *i.e.,* irreparable harm, the Commissioner does not find respondent's arguments to be helpful. The fact that participation in sports is a privilege rather than a right is not determinative of whether a prohibition against competing in a specific

tournament may result in irreparable harm. Clearly, loss of the opportunity to play in a tournament has an impact for the athletes that cannot be reversed after the fact. Petitioners satisfy the first prong of the test for emergent relief.

The second standard does not mitigate for or against petitioners. The gravamen of petitioners' claim is that the facts of this controversy do not support respondent's ruling that a violation of NJSIAA Bylaw Article V, Section 4D was perpetrated by petitioners. The legal right that petitioners invoke is the right to relief in the event that the NJSIAA's decision was arbitrary, capricious or unreasonable. That is a settled right, but petitioners cannot claim it for themselves in this case unless they can show that the NJSIAA's decision is contrary to the facts of this matter.

The third standard requires petitioners to make a showing that they are likely to prevail on the merits. The Commissioner cannot so conclude. The record includes proof that the parents of three outstanding basketball players from three different states, New York, Maryland and Georgia, appeared in Pennsauken within three months of each other and bestowed guardianship of their sons on two individuals connected to the LEAP basketball program. Those individuals, in turn, immediately transferred the students From Pennsauken High School to LEAP, where two of them immediately joined the basketball team.[1] There was no showing of any prior connection or relationship between the two "guardians" and the out-of-state students or their families. Two of the three athletes, who had been declared ineligible to play basketball in

[1] The student from New York and his mother met with LEAP coach Morcos at the Pennsauken High School on January 25, 2006. Subsequent to the meeting, Morcos took the student to lunch and the mother registered her son in Pennsauken and gave guardianship to Robert Davis, an individual known to assist with the LEAP basketball team. Davis transferred the student to LEAP two days later. Four days after that, staff members at Pennsauken High School brought these facts to the attention of the NJSIAA, and the NJSIAA notified LEAP that it may have violated recruitment rules as to that student. A few days later the student went back to New York.

their states of origin, were subsequently described in New Jersey newspapers as the players that were most responsible for LEAP's tournament wins.

Respondents have provided facts which strongly support an inference that the reason for the three students' registration in Pennsauken and immediate transfer to LEAP was athletics, in violation of NJSIAA's bylaws. Petitioners' only direct response to that important point has been a general assertion that students are attracted to charter schools. This is not enough for the Commissioner to find that petitioners have shown a likelihood of prevailing on the merits of the underlying claim.

As to the last standard, balancing of the equities, the Commissioner cannot conclude that the harm that would befall petitioners if emergent relief is not granted is greater that the harm that would ensue upon the granting of the relief. It is undisputed that the first games of the tournament begin tomorrow, February 24, 2007. Although not submitted in evidentiary form, respondents and the intervenor have provided information about the implementation of tournaments that cannot be ignored. More specifically, teams are seeded and game schedules are set far before the first day of a tournament. Adding an extra team at this late date would create a burdensome disruption to the tournament. Moreover, should the LEAP team enter the tournament, one must inquire whether another team would have to be eliminated, irreversibly depriving it of an opportunity for success. Further, if the LEAP team were to finish the tournament with a title and subsequently be found to have violated the recruitment bylaws, another competing team would have been irrevocably stripped of its chance for a championship. Finally, it appears that the LEAP team still contains at least one of the students whose admission to the team is in question.

In summary, the Commissioner finds that petitioners have not met the required standards for obtaining emergent relief. Their application is denied.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: Feb. 23, 2007

Date of Mailing: February 26, 2007

Faxed: February 23, 2007

[2] This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

61-07

OAL DKT. NO. EDU 10843-06
AGENCY DKT. NO. 328-9/06

S.M., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by the OAL on January 19, 2007, providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/21/07

Date of Mailing: 2/21/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

82-07

OAL DKT. NO. EDU 1711-07
AGENCY DKT. NO. 29-1/07

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

PETITIONER,

V.

JOHN A. BLEVIS,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON

APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law, along with the recommended Order of the Administrative Law Judge(ALJ) – has been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ's determination – for the reasons stated in her oral ruling from the bench – that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most specifically, the existence of irreparable harm.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits as soon as practicable as contemplated by the ALJ and the parties.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/07

Date of Mailing: 3/01/07

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

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Attorneys for Respondent
John A. Blevis

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

LYNDHURST BOARD OF EDUCATION, Petitioner, vs. JOHN A BLEVIS, Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **OAL DOCKET NO: EDU OR 01711-2007N** **AGENCY REF. NO.: 29-1/07** **ORDER**

THIS MATTER having been presented to the Office of Administrative Law on application of Francis J. DeVito, P.A., attorneys for Petitioner, the Lyndhurst Board of Education, for emergent relief, and it appearing that notice has been given to Respondent and Respondent's counsel, and the Honorable Carol I. Cohen having considered the arguments of counsel, the Affidavits and Briefs on file, and for good cause having been shown:

IT IS on this 22nd day of February 2007;

ORDERED AND ADJUDGED that Petitioner Lyndhurst Board of Education's motion for emergent relief is denied as the threshold requirement of irreparable harm has not been met. The Administrative Law Judge made the following findings:

1. The disruption and harm alleged by Petitioner does not rise to the level of irreparable harm, particularly since the Petitioner suspended Respondent with pay on January 22, 2007.

2. The applicable statute and case law provide that a Board of Education may request a teacher to undergo physical and psychiatric examinations when the teacher deviates from normal, physical or mental health in a

manner that imposes a danger of harm to students. As such, there is not a reasonable probability that Petitioner will succeed on the merits in this matter.

3. As to balancing of the equities, Respondent himself has put in issue his psychiatric well being by his filing of the Federal action which balances against any harm to his reputation. And it is further

ORDERED AND ADJUDGED that limited discovery be exchanged; including the tapes referenced and maintained by Respondent be produced to Petitioner; and it is further

ORDERED AND ADJUDGED that the matter will proceed to hearing tentatively scheduled for March 12 or 13, 2007.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. IF the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Dated: February 23, 2007

Carol I. Cohen, ALJ

78-07

OAL DKT. NO. EDU 1709-07
AGENCY DKT. NO. 34-2/07

R.C., on behalf of minor child, P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION ON
RESPONDENT.	:	APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on February 13, 2006, along with the recommended order of the Administrative Law Judge (ALJ) have been reviewed.

It must be noted that – notwithstanding that the hearing in this matter took place on February 13, 2007 – the recommended Order of the ALJ and the hearing tape were not received by the agency until Thursday, February 22, 2007. Because the ALJ's Order contemplated P.B.'s return to his regular school setting on this very date – absent a hearing by the Board no later than 5 P.M. February 21, 2007 – upon receipt of the instant Order, the Director of the Bureau of Controversies and Disputes initiated a conference call with the parties to ascertain the current status of this matter. The parties reported that they have agreed between themselves that P.B. should be returned to his regular classes pending resolution of the criminal charges against him, and that he has, in fact, returned to school. Consequently, the Commissioner finds and concludes that this emergent application has been rendered moot.

Accordingly, petitioner's application for emergent relief is hereby dismissed. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.[1]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/27/07

Date of Mailing: 2/27/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

84-07

#84-07E

OAL DKT. NO. EDU 1412-07
AGENCY DKT. NO. 12-1/07

L.B., ON BEHALF OF MINOR CHILD, A.B., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION

FOR EMERGENT RELIEF

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner concurs with the ALJ, for the reasons orally set forth on the record at the conclusion of OAL proceedings, that petitioner in this matter has not met the standard for grant of emergent relief. *Crowe v. DeGioia, supra*; *N.J.A.C.* 6A:3-1.6.

Accordingly, the Order of the OAL – denying petitioner's application for immediate return to the wrestling team pending adjudication of the felony charges underlying his suspension – is adopted for the reasons expressed by the ALJ. Because no further issues remain and no further relief was sought by petitioner (ALJ's Order at 2), this matter is dismissed and the Clerk of the OAL is requested to return the file to the Department pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/28/07

Date of Mailing: 3/01/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 01412-07

AGENCY DKT. NO. 12-1/07

L.B. ON BEHALF OF MINOR CHILD A.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

Respondent.

Leslie Stolbof Sinemus, Esq., for petitioner

Jennifer Mazawey, Esq., for respondent (Genova, Burns & Vernoia, attorneys)

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

This matter having been opened on the filing of a petition for emergent relief, submitted by petitioner, L.B. o/b/o A.B., Leslie Stolbof Sinemus, Esq. appearing, and respondent, Board of Education of the Township of Montclair, Essex County having been represented by Genova Burns & Vernoia, Jennifer Mazawey, Esq. appearing, and the undersigned having considered the moving papers, Certification and exhibits submitted by the petitioner, and opposition papers, Certification and exhibits submitted by respondent and having heard the arguments of counsel, and for good cause shown, and

The undersigned having further determined from the proofs as more particularly set forth in the oral decision rendered on January 25, 2007, that petitioner has failed to meet the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1986), that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

IT IS therefore on this 20th day of February, 2007,

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

No issues remain and no further relief was being sought.

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

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this

recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

February 20, 2007
DATE

LESLIE Z. CELENTANO, ALJ

da

83-07

OAL DKT. NO. EDU 1710-07
AGENCY DKT. NO. 30-1/07

M.B.S. and P.B.S., on behalf of minor child, C.B.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY, AND JOHN KAZMARK, SUPERINTENDENT	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law, along with the recommended Order of the Administrative Law Judge (ALJ) – has been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ – for the reasons given in his oral decision from the bench – that petitioners have failed to satisfy *any* of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits as contemplated by the ALJ and the parties.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/07

Date of Mailing: 3/01/07

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 01710-07
AGENCY DKT. NO. 30-1/07

M.B.S. AND P.B.S. ON BEHALF OF MINOR CHILD C.B.S,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES AND JOHN KAZMARK, SUPERINTENDENT, MORRIS COUNTY,
Respondent.

Robert M. Tosti, Esq., for petitioner (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys)

Michael Rowan, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

THIS MATTER having been opened to the Court upon application by Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys for Petitioners, and the Court having read and reviewed the moving papers and opposition thereto; and the Court having heard oral argument; and the Court having found that Petitioners failed to

demonstrate irreparable harm, a likelihood of success of the merits, that the legal right underlying their claim is not unsettled, and that the relative hardships to the parties weight in their favor; and for good cause having been shown;

It is on this 23rd day of February, 2007,

ORDERED that Petitioner's application for emergent relief is hereby **DENIED**; and it is further

ORDERED that a copy of this Order shall be served upon all counsel within five (5) days from the day of entry.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

BARRY E. MOSCOWITZ, ALJ

/da

85-07

#85-07

MICAH RASMUSSEN, DANIEL ZOROVICH, GERALD NATHANSON AND DIANE STERNER,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners sought to set aside the results of a bond referendum held during a special election of the respondent school district, held on December 14, 2004. The referendum sought voter approval for a school facilities renovation and expansion project, and was passed by a majority vote. Petitioners contended that the Board's failure to disclose to voters the presence of environmental contamination on the proposed school site denied voters the right to make an informed decision on the referendum.

The ALJ found, *inter alia*, that: the petition was filed well outside of the 20-day statutory deadline for challenging the results of a bond election (*N.J.S.A.* 18A:24-65), and, therefore, even if petitioners' allegations were deemed true, the result of the referendum cannot now be challenged; additional arguments put forth by the petitioners were insufficient to disregard the clear mandate of *N.J.S.A.* 18A:24-65; and the petition must be dismissed as a matter of law. Subsequent to the issuance of the OAL's Initial Decision, the Board authorized a new referendum and petitioners sought to withdraw their appeal as moot. The Board opposed petitioners' request, contending it was entitled by law to a final agency decision on a matter it had litigated to conclusion at the OAL.

The Commissioner declined to permit withdrawal of the petition, but rejected the Initial Decision. Although the Commissioner concurred with the ALJ's dismissal of the petition, she did so for reasons of jurisdiction and mootness rather than for the reasons expressed by the ALJ. Noting that Commissioner of Education jurisdiction over the dispute had not been determined, the Commissioner declined to reach the merits of the dispute and explained that remanding the matter to the OAL for the a jurisdictional determination at this juncture would serve no purpose since the matter has been mooted by the Board's decision to hold a new election, effectively granting the sole relief sought by petitioners.

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

February 28, 2007

OAL DKT. NO. EDU 8171-06
AGENCY DKT. NO. 336-9/06

MICAH RASMUSSEN, DANIEL ZOROVICH, GERALD NATHANSON AND DIANE STERNER,	:	
PETITIONERS,[1]	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

A few days after expiration of the time frame for submission of exceptions,[2] however, petitioners' administrative designee advised that he and his fellow petitioners wished to withdraw their appeal based upon action taken by the Board of Education the preceding evening:

> Last night, the Upper Freehold Regional Board of Education authorized a new middle school referendum, which for the first time gives the voters the opportunity to make a fully informed decision on this project. In light of this development, the [present] petition is no longer necessary. Please consider it withdrawn, effective immediately. (Letter dated February 8, 2007,[3] from Micah Rasmussen to Commissioner Davy c/o Director, Bureau of Controversies and Disputes)

[1] In a communication dated January 11, 2007 and forwarded to the Commissioner on January 23, 2007 by petitioner Rasmussen – whom petitioners had designated as their administrative agent for this matter pursuant to *N.J.A.C.* 6A:3-1.3(a)1 – Marc Covitz withdrew as a petitioner.

[2] Exceptions were due on February 2, 2007 pursuant to *N.J.A.C.* 1:1-18.4, the Initial Decision having been mailed to the parties on January 22, 2007.

[3] On February 15, 2007, Mr. Rasmussen submitted, at the Department's request, a confirming letter individually signed by all remaining petitioners (see Note 1 above).

The Board objected to petitioners' request to withdraw their petition, arguing that the matter had been litigated at the OAL to the point of an Initial Decision, which the Commissioner was now obliged by law to accept, modify or reject.[4] The Board urged that the Initial Decision be adopted, contending that its findings, conclusions and recommendation granting the entirety of the Board's Motion to Dismiss were fully correct.[5] (Letter dated February 20, 2007, from Board Counsel to Director, Bureau of Controversies and Disputes)

Upon consideration, for the reason set forth below, the Commissioner declines to permit withdrawal of the petition without issuance of a final agency decision, but rejects the Initial Decision of the OAL.

In scrutinizing the petition on its initial filing – notwithstanding that the Board raised no objection to the forum in which petitioners chose to file – the Department was concerned that the Commissioner might not have jurisdiction over the parties' dispute given that the sole relief sought by petitioners was the voiding of an election.[6] Consequently, in transmitting the matter to the OAL, the Department requested that the

[4] The Board mistakes the date of the ALJ's decision (January 16, 2007) with the date of its receipt by the Department of Education (January 17, 2007), resulting in the erroneous conclusion that the Commissioner's final decision is due on March 2, 2007, rather than March 5, 2007.

[5] The Board's position on exception is consistent with its stance in response to petitioners' December 14, 2006 attempt to resolve this matter prior to issuance of an Initial Decision. In declining petitioners' proposal at that time, the Board maintained that its arguments were meritorious and that it was "entitled to a decision dismissing the petition as a matter of law." (Letter dated January 16, 2007, from Board Counsel to Micah Rasmussen)

[6] The Department's reservations were rooted in 1) the absence of any State statute expressly conferring such authority upon the Commissioner of Education, and 2) the fact that *P.L.* 1995, *c.* 278 had repealed in their entirety the school election statutes long codified in State education law (Title 18A), concomitantly enacting new statutes – codified in State election law (Title 19) – largely conforming school election procedures to those of general elections and transferring disputes arising from the administration and application of the school election process from the Commissioner of Education to the Superior Court. See *N.J.S.A.* 19:60-1 et seq., *N.J.S.A.* 19:29-1 *et seq.*, and *George Saunders v. Toms River Regional Schools Board of Education*, 289 *N.J. Super.* 225 (March 27, 1996).

question of Commissioner jurisdiction be decided by the Administrative Law Judge (ALJ) as a threshold matter in light of the relief sought by petitioners.

Although the ALJ was clearly aware of the agency's direction – as evidenced by the Initial Decision's procedural recitation (at 2) – neither he nor the parties addressed the requested determination, instead (apparently) equating it with resolution of the arguments embodied in the Board's Motion to Dismiss. As a result, the Commissioner is now confronted with the existence of a well-reasoned OAL recommendation in a matter she may not, in fact, have the jurisdiction to hear.

Given the circumstances and status of this matter, the Commissioner believes that closure through a final agency ruling adopting, modifying or rejecting the Initial Decision of the OAL is appropriate, and, for this reason, declines petitioners' request to withdraw their petition. However, neither can the Commissioner, in good conscience, rule on the merits of a matter when she is uncertain of her authority to do so.

Ordinarily, the Commissioner would resolve a dilemma of this type by remanding the matter to the OAL for the necessary threshold determination, deferring any ruling on the substantive findings and conclusions of the Initial Decision – if appropriate – until resolution of the underlying jurisdictional question.[7] In the present instance, however, no useful purpose would be served by compelling further proceedings, since the election petitioners seek to void has been rendered a nullity by the Board's decision to hold a new election – granting, in effect, the very relief sought by petitioners.

[7] See, for example, *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on March 21, 2006; *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on April 25, 2006; and *Board of Education of the West Windsor-Plainsboro Regional School District v. New Jersey State Department of Education*, decided by the Commissioner on May 2, 2006.

Accordingly, the Commissioner being loath to decide the merits of a matter over which her jurisdiction is in question and petitioners' dispute having been mooted by the Board's own actions, the Initial Decision of the OAL is rejected and the Petition of Appeal dismissed for reasons set forth herein.

IT IS SO ORDERED.[8]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/28/07

Date of Mailing: 3/01/07

[8]This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION TO DISMISS

OAL DKT. NO. EDU 8171-06

AGENCY DKT. NO. 336-9/06

MICAH RASMUSSEN, DANIEL ZOROVICH, GERALD NATHANSON, DIANE STERNER AND MARC COVITZ,

Petitioners,

v.

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Micah Rasmussen, Daniel Zorovich, Gerald Nathanson, Diane Sterner, and **Marc Covitz,** petitioners, pro se

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

Record closed: November 29, 2006 Decided: January 16, 2007

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Micah Rasmussen, Daniel Zorovich, Gerald Nathanson, Diane Sterner and Marc Covitz filed a Petition of Appeal (P-1) seeking to set aside and not further consider the results of a bond referendum held during a special election of the

respondent school district on December 14, 2004. Respondent Upper Freehold Regional Board of Education has submitted a Motion to Dismiss the Petition of Appeal in Lieu of an Answer (R-1) pursuant to N.J.A.C. 6A:3-l.5(g), contending that the Petition of Appeal must be dismissed in view of the mandate of N.J.S.A. 18A:24-65. N.J.S.A. 18A:24-65 requires that all challenges to the election results of a bond referendum proposal must be commenced within 20 days of the election. Because the Petition of Appeal in this matter was filed more than 20 months after that date, respondent contends that the Petition must be dismissed as a matter of law.

This matter was transmitted to the Office of Administrative Law (OAL) on October 11, 2006, for hearing as a contested case. In the transmittal, the Department of Education requested that a threshold determination be made on the jurisdiction of the Commissioner. Accordingly, a schedule for the submission of legal arguments on respondent's motion to dismiss was established and, after such submissions were received from the parties, the record closed on November 29, 2006.

FACTUAL DISCUSSION

Petitioners are residents of either the Borough of Allentown or the Township of Upper Freehold, New Jersey. As is stated in the Certification of Dr. Robert E. Smith, respondent's Interim Superintendent, in Support of Motion to Dismiss the Petition of Appeal in Lieu of an Answer dated October 3, 2006, ¶2 (R-2), these municipalities collectively make up the school district which is governed by the Board of Education.

It is undisputed that on December 14, 2004, a special election was held before the legal voters of the school district with respect to a referendum proposal. (R-2, ¶3). The proposal sought the voters' determination as to whether or not the Board of Education should:

> * * * undertake an enrollment driven, school facilities renovation and expansion project entailing (1) the construction of a new grades 5-8 middle school on an approximate 40-acre site on Ellisdale Road in Upper

> Freehold Township to be purchased by the Board of Education, and (2) the construction of physical plant and educational renovations at the existing elementary school and the programmatic conversion thereof from a grades pre K-8 to a grades pre K-4 school. (R-2, ¶4, Exhibit A).

As part of the proposal it was explained to the voters that:

> * * * [t]he State has awarded the project a $6,412,705 State grant, representing 16.5% of the overall project cost. The School District "local share" is $32,586,196, representing the remaining 83.5% of the project cost. Assuming voter approval of the project, the Board of Education intends to finance the "local share" through a long-term school bond financing.

As indicated in the Certification of Dr. Smith (R-2), ¶5, Exhibit B, on December 14, 2004, the voters approved the referendum proposal by a vote of 1,118 to 986. Pursuant to N.J.S.A. 18A:24-65, the voters had 20 days until January 3, 2005, to contest the results of the election before the vote was "conclusively presumed to be due authorization for the issuance of bonds." Notwithstanding the fact that the 20-day statutory deadline for challenging the results of the election has long-since passed, petitioners filed their Petition of Appeal on September 13, 2006, to "request that the results of the referendum be set aside." The Petition was filed more than 20 months beyond the statutory deadline.

In the Petition it is alleged that during a public meeting on June 28, 2006, school district officials acknowledged that prior to the election the school district was aware of but failed to disclose to voters the presence of dieldrin contamination on the proposed school site. The public records concerning the referendum reveals no disclosure of the school district's knowledge of this contamination. The petitioners contend that this failure to disclose a serious material defect of the site denied voters the right to make an informed decision on the referendum and disenfranchised them from their right to cast an informed vote. Despite this deficiency and several requests for a new referendum, school district officials have declined to authorize a new referendum.

Petitioners contend that the voters and taxpayers of the school district have no present responsibility and/or liability for the contamination and/or remediation of the site, but are being obligated to assume both without their informed consent. Petitioners argue that since the site has not yet been acquired and since remediation has not yet begun, setting aside the referendum would prevent the taxpayers from being exposed to responsibility and/or liability for this remediation without their informed consent.

In a subsequent document filed with the OAL on November 17, 2006 (P-2), the petitioners sought to make additions to their pleadings. In that document, the petitioners further contend that: (1) the free exercise of voters was effectively denied by the school district's nondisclosure of its knowledge of the material defects of the land it was seeking voter approval to acquire; (2) the school district's nondisclosure constituted a contrivance that impeded, prevented and interfered with the free exercise of voters elect the franchise; (3) since the referendum in question referred solely to land acquisition and construction, environmental remediation and acquisition of contaminated land are not true purposes of the matter voted upon; (4) environmental remediation and acquisition of contaminated land are both "new purposes" that require a new approval by the voters and the Department of Education in accordance with N.J.S.A. 18A:18A-16; (5) school district taxpayers are being denied equal protection of the laws because of the school district's failure to conform to N.J.A.C. 6A:26-7.1; (6) funds should be withheld from the school district by the Department of Education because the Department's approvals were granted based upon erroneous and incomplete information.

LEGAL DISCUSSION AND ANALYSIS

Respondent first argues that the Petition should be dismissed pursuant to N.J.A.C. 6A:3-1.5(g) because petitioners have "advanced no cause of action even if [their] factual allegations are accepted as true. N.J.A.C. 6A:3-1.10(a). Procedurally, such a dismissal is similar to that granted in response to a motion to dismiss under Rule 4:6-2(e) of the Rules Governing the Courts of the State of New Jersey for "failure to state a claim upon which relief can be granted."

In order to determine the legal sufficiency of the facts alleged on the face of any initial pleading for the purposes of Rule 4:6-2(e), the pleading must be analyzed "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Printing Mart-Morristown v. Sharp Electronics, Corp., et al., 116 N.J. 739, 746 (1989). Where an initial pleading states no basis for relief, dismissal is appropriate. See Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224 (Law Div. 1993) (dismissing complaint under R. 4:6-2(e) as complaint was void of any factual and/or legal support).

Similarly, a petition filed before the Commissioner of Education, which fails to state a claim, must also be dismissed as a matter of law. Sloan ex rel. Sloan v. Klagholtz, 342 N.J. Super. 385, 394 (App. Div. 2001).

Respondent contends that the petitioners in this matter make a series of claims, without any basis in fact or law. Yet, even if petitioners' allegations are true and supported by facts, the claim they make is barred by N.J.S.A. 18A:24-65 and, thus, must fail as a matter of law for that reason alone.

I consider respondent's motion to be a straightforward motion to dismiss based on the petitioners' failure to comply with the statutory deadline for challenging the validity of the December 14, 2004, special election. I will first consider N.J.S.A. 18A:24-65 which provides:

> No action to contest the validity of any proceeding or election authorizing the issuance of any bonds, held in connection with any such authorization, or the application of the proceeds of any such issue to a purpose other than those for which the bonds were issued, shall be commenced after the expiration of 20 days from the date of the institution of such proceedings or the holding of such election or the action in connection therewith forming the subject matter of such contest. Thereafter, the proceedings shall be conclusively presumed to be due authorization for the issuance of the bonds.

The basis for the requirement that actions to contest the validity of a public question must commence within 20 days after the date of the election is that "[t]he legislature has deemed it advantageous to the public welfare to limit reasonably the time within which the validity of school district elections authorizing the issuance of bonds can be controverted." See, Welsh v. Board of Education of Tewksbury Tp. et al., 7 N.J. Super. 141, 143 (App. Div. 1950), referring to N.J.S.A. 18:7-89 (repealed), the predecessor statute to N.J.S.A. 18A:24-65. By establishing this requirement, the Legislature has provided certainty in the enforceability of any debt issued pursuant to an approved ballot. By establishing this time limit the Legislature recognized the importance of ensuring that purchasers of bonds know that the debt authorization will not be revoked subsequent to the making of the loan.

The referendum was approved by the voters of the school district in an election held on December 14, 2004. (R-2, ¶5 and Exhibit B). Thus, under the statute, any challenge to contest the validity of the referendum must have been filed on or before Monday, January 3, 2005, which is 20 days after the election. N.J.S.A. 18A:24-65. The petition in this matter, filed on September 13, 2006, more than 20 months after the statutory deadline for challenging the results of the referendum, "request[s] that the results of the referendum be set aside and not further considered. . ." I **CONCLUDE** that application of the statute requires that, even if each of the allegations stated in the Petition are deemed true, the result of the referendum cannot not now be challenged. See, Hardy v. Ruhnke, 47 N.J. 10, 20 (1966) (Referendum cannot be challenged 18 months after the election).

I will now consider the additional arguments made by the petitioners to determine if there is any basis for disregarding the clear requirement of N.J.S.A. 18A:24-65. Petitioners argue that the referendum vote of December 14, 2004, should be set aside, and rely on N.J.S.A. 18A:24-84 stating that the Act authorizing the issuance of bonds by boards of education, Laws of 1971, Chapter 36, "shall be liberally construed." However, this language does not support their position. The rule is settled in this State that election laws are to be liberally construed to effectuate their purpose. Dreamer v. Jones, 42 N.J. 516, 521 (1964). The purpose of the Act that should be effectuated may

be discerned from the balance of the provision relied upon by petitioners. It provides:

> This act shall be liberally construed. Its provisions shall be deemed severable in any case where such severability will not tend to defeat its purpose. No defect, error or omission in any matter of form or substance shall in any way affect the validity and binding obligation of any bond issued hereunder, and the Division of Local Finance is authorized, in any such case, to issue an order validating any bonds to be issued after the discovery thereof, in any respect in which there may be such defect, error or omission, if it is satisfied that the same is not substantial or prejudicial, or upon a curing or correction of the defect, error or omission. [N.J.S.A. 18A:24-84]"

Thus, the purpose of the Act is not to defeat the validity of an election, but to protect the validity and binding obligation of any bonds issued pursuant to an election held under the Act, and to authorize the validation of any such bonds from any defects, errors or omissions that are not substantial or prejudicial or that are cured. Id. This purpose is entirely consistent with and supportive of the language found at N.J.S.A. 18A:24-65 which requires that any action to contest the validity of the election be filed within 20 days, and thereafter. Therefore, I **FIND** that the mandate for liberal construction of the Act does not support petitioners' claims.

I likewise **FIND** that the cases cited by petitioners do not support their position. The Court in Sharroch v. Borough of Keansburg, 15 N.J. Super. 11 (App. Div. 1951), refused to invalidate a referendum election even though the county clerk failed to include on the ballot the explanatory statement required by the statute. The Court refused to overthrow the express will of the voters who voted in favor of the proposal. Id. at 19-20. Also, in In re Atlantic County Bd. of Education, 117 N.J. Super. 244, (App. Div. 1971), the Court refused to invalidate the results of an election for technical reasons. The point of these cases is that election results will not be overturned lightly since they express the will of the voters.

Petitioners make the further argument that the expenditure of bond proceeds for site cleanup and remediation are "new purposes" and that N.J.S.A. 18A:24-51 requires

a new referendum and other approvals. However, I agree with respondent that this provision does not require a new referendum, and I so **FIND**. Rather, it authorizes a board of education to conduct such a referendum if the board "shall determine, by resolution, that all or any part of the proceeds of school bonds...are not necessary for the purpose or purposes for which the bonds were issued..." If the board makes no such determination, a referendum need not be held.

I also **FIND** that the language of the referendum proposal in question for "construction" of a new grades 5-8 middle school on a site "to be purchased" is sufficient to encompass site cleanup and remediation incidental to such construction as an improvement of the site. See N.J.S.A. 18A:24-5.a. which specifically includes the improvement of the site for the acquisition or construction of buildings as a project for which bonds may be issued. In addition, while I have been unable to find any court or administrative decisions which are on point, and while the Local Bond Law has no applicability to the present proceeding, its provisions found at N.J.S.A. 40A:2-12 are of some assistance. Under that law, municipalities and counties of this State are authorized to adopt bond ordinances appropriating funds for capital improvements and to issue bonds for such funding. N.J.S.A. 40A:2-12 requires the bond ordinance to contain in substance, "a. an authorization . . . stating in brief and general terms sufficient for reasonable identification the purpose or purposes for which the obligations are to be issued. . ." Dolan v. Borough of Tenafly, 75 N.J. 163, 170-171 (1977). So, in Matlack v. Burlington Cnty. Freeholder Bd., 191 N.J. Super. 236, 252-253 (Law Div. 1983), a bond ordinance authorizing the purchase of conservation easements was construed to allow the purchase of Pineland Development Credits (PDCs) as incidental to and derivative from the acquisition of conservation easements, even though PDCs are not mentioned in the bond ordinance. Based on this additional guidance, I **FIND** that the referendum proposal in this matter is sufficient as a brief and general statement of the purpose for which the obligations are to be issued and is properly construed to encompass site cleanup and remediation.

I have reviewed the provisions of N.J.A.C. 6A:26-7.1 (b)1.vii, and I agree with respondent and **FIND** that it is not applicable in this matter. This only applies to a

district required to use the New Jersey Economic Development Authority for school construction. Since respondent school district is not required by N.J.S.A. 18A:7G-5(a) to use the Authority, this provision is not applicable to support any alleged equal protection violation claim.

Finally, petitioners make a general assertion that the respondent school district provided erroneous and incomplete information to the Department of Education. Petitioners assert that respondent incorrectly indicated that the land is designated for growth under the State Development and Redevelopment Plan, that the area is consistent with local wastewater management plans and that it is not subject to other environmental laws or regulations. Respondent contends that the petitioners claim must fail because they have not alleged noncompliance with the regulations as required by N.J.A.C. 6A:26-14.1(a).

Even if petitioners' assertions are true, I **FIND** that the providing of erroneous and incomplete information to the Department of Education has no effect on the validity of the referendum vote of December 14, 2004. I **FIND** that the only method available to attack the validity of the approval of the Department of Education based on the allegations that respondent provided erroneous and incomplete information is to challenge the Department's approval. I **FIND** that there are no factual allegations supporting this assertion and it must fail on that additional basis.

Based upon the foregoing, I **CONCLUDE** that the additional arguments put forth by the petitioners are insufficient to disregard the clear mandate of N.J.S.A. 18A:24-65, and that the Petition of Appeal must be dismissed as a matter of law.

DECISION AND ORDER

Based on the discussion stated above, I hereby **ORDER** that respondent's motion to dismiss the Petition of Appeal is hereby **GRANTED,** and the Petition of Appeal is hereby **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 16, 2007
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1-17-07
DATE

JAN 22

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

mph

LIST OF EXHIBITS:

For Petitioner:

P-1 Petition filed with the Commissioner of Education on September 15, 2006

P-2 List of additions to pleadings, received by OAL on November 17, 2006

For Respondent:

R-1 Notice of Motion to Dismiss Petition, filed with the Commissioner of Education on October 3, 2006

R-2 Certification of Dr. Robert E. Smith in Support of Motion to Dismiss Appeal in lieu of an Answer with attachments

R-3 Brief on behalf of Respondent in Support of Motion to Dismiss

R-4 Reply Brief on behalf of Respondent and Supporting Motion to Dismiss

88-07

OAL DKT. NO. EDU 11480-06
AGENCY DKT. NO. 346-9/06

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND K.P.,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/06/07

Date of Mailing: 3/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11480-06
AGENCY DKT. NO. 346-9/06

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION AND K.P.,

Respondents.

Stephen J. Christiano, Esq., for petitioner

Cynthia Ann Raymond, Deputy Attorney General, for respondent, New Jersey Department of Education (Stuart Rabner, Attorney General of New Jersey, attorney)

Richard Rosenblatt, Esq., for respondent, K.P. (Morgan, Lewis & Bockius, attorneys)

Record Closed: January 30, 2007 Decided: January 30, 2007

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

This matter was transmitted to the Office of Administrative Law on November 20, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for January 30, 2007. The parties appeared and agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

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

1-30-07
DATE

J. HOWARD SOLOMON, ALJ

Receipt Acknowledged:

2/2/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 15 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

VOLLEY re: DATED AT CONCLUSION OF THE
EDC- 11481-06 TOWNSHIP OF WEST ORANGE v NJ STATE
AGENCY DEPT. OF EDUCATION AND K.P.
NO:
346/9/06

The parties hereby stipulate as follows:

1. Petitioner withdraws its amended petition of appeal.

2. Respondent Pasley must establish a bona fide residence in West Orange by January 1, 2008. Otherwise, T.P.S. will be disenrolled and respondent and T.P.S. will no longer be considered "homeless."

3. Petitioner's obligation to transport T.P.S. will cease at the time the Commissioner approves this settlement, unless respondent obtains employment that conflicts with her ability to transport T.P.S. to and from school. Respondent must provide proof of said employment to petitioner.

4. [redacted] settlement is subject to BOE approval.

5. [redacted] waives reimbursement of all tuition and transportation expenses.

Stephen T. Christian
Stephen T. Christian,
Atty for Petitioner

Jerry P. Tarnoff
JERRY P. TARNOFF, FOR PETITIONER
SUP'T OF SCHOOLS

Cynthia Raymond
Deputy Attorney General
Attorney for Respondent NJDOE

DATE: 1/30/07

Kimberly Pasley
Respondent, Kimberly Pasley

Encl. J-1

Richard Rosenblatt
Richard Rosenblatt, Attorney For K. Pasley

DOCKET NO: EDU-11480-06
AGENCY NO: 346/9/06

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE v NJ STATE DEPT. OF EDUCATION AND K.P.

The parties hereby stipulate as follows:

1. Petitioner withdraws its amended petition of appeal.

2. Respondent Pasley must establish a bona fide residence in West Orange by January 1, 2008. Otherwise, T.P.S. will be disenrolled and respondent and T.P.S. will no longer be considered "homeless."

3. Petitioner's obligation to transport T.P.S. will cease at the time the Commissioner approves this settlement, unless respondent obtains employment that conflicts with her ability to transport T.P.S. to and from school. Respondent must provide proof of said employment to petitioner.

4. This settlement is subject to BOE approval.

5. Petitioner waives reimbursement of all tuition and transportation expenses.

Stephen T. Christiano
Stephen T. Christiano, Atty for Petitioner

Jerry P. Tarnoff
JERRY P. TARNOFF, FOR PETITIONER
SUP'T OF SCHOOLS

Cynthia Raymond
Deputy Attorney General
Attorney for Respondent, NJDOE

DATE: 1/30/07

Kimberley Pasley
Respondent, Kimberley Pasley

Encl. J-1

Richard Rosenblatt, Attorney For K. Pasley

95-07

OAL DKT. NO. EDU 10845-06
AGENCY DKT. NO. 337-9/06

M.D., on behalf of minor children, K.D. and K.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/07/07

Date of Mailing: 3/07/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10845-06
AGENCY DKT. NO. 337-9/06

M.D. ON BEHALF OF MINOR
CHILD, K.D. AND K.D.,
Petitioner,
v.

BOARD OF EDUCATION OF THE
TOWN OF PHILLIPSBURG,
WARREN COUNTY,
Respondent.

M.D., pro se

Donald W. Morrow, Esq., for respondent
(Morrow & Morrow, attorneys)

Record Closed: January 30, 2007 Decided: February 2, 2007

BEFORE **RICHARD McGILL,** ALJ:

M.D. filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Town of Phillipsburg (respondent) in

regard to his children, K.D. and K.D. The matter was transmitted to the Office of Administrative Law on October 27, 2006, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement. A letter from respondent's attorney indicates that the Phillipsburg Board of Education approved the settlement at its meeting on December 18, 2006.

Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Feb. 2, 2007
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

2/7/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 8 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
JAN 30 2007

MORROW & MORROW
1734 Route 31 North, P.O. Box 4992
Clinton, New Jersey 08809
Tel. (908) 735-7191
Attorneys for Respondent,
Phillipsburg Board of Education

OFFICE OF ADMINISTRATIVE LAW

M.D. ON BEHALF OF MINOR CHILD KD AND KD,

Petitioner,

vs.

TOWN OF PHILLIPSBURG, BOE, WARREN COUNTY.

Defendants.

OAL Docket No. EDUOS 18045-2006N
AGENCY REF. NO.: 337-9/06

STIPULATION OF SETTLEMENT

WHEREAS, Michael Donaher appealed the decision of the Board of Education of the Town of Phillipsburg, dated, August 24, 2006, concluding that the children KD and KD were not entitled to a free education during the 2004-2005 and 2005-2006 school year; and,

WHEREAS, the total tuition for both children was a sum in the amount of $13,242.00; and,

WHEREAS, the parties have engaged in good faith negotiations regarding a settlement of the Appeal; and,

WHEREAS, Michael Donaher has agreed to pay to the Board of Education of the Town of Phillipsburg, Warren County, New Jersey, a sum in the amount of $5,000.00 on or before March 31, 2007.

NOW, THEREFORE, the parties have agreed as follows:

1. The Board of Education of the Town of Phillipsburg agrees to accept the sum

of $5,000.00 in full settlement for all claims it may have against Michael Donaher for tuition reimbursement for 2004-2005 and 2005-2006.

2. Michael Donaher agrees to release and give up any and all claims and rights which he may have against the Town of Phillipsburg, Board of Education.

3. Michael Donaher agrees to pay the amount of $5,000.00 on or before March 31, 2007.

4. In the event that Michael Donaher shall fail to make the $5,000.00 payment on or before March 31, 2007, the Board shall have the right to pursue payment of the full tuition in the amount of $13,242.00.

IN WITNESS WHEREOF, the parties hereto set their hands this 2nd day of January, 2007.

MORROW & MORROW
Attorneys for Respondent,
Phillipsburg Board of
Education

MICHAEL DONAHER, Pro Se
Petitioner

DONALD W. MORROW, ESQ.

94-07

THE DERON SCHOOL OF NEW JERSEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning private school for the disabled appealed the Department's determination to disallow the cost of increased pension benefits – paid under the school's Social Security Integration Pension Benefit plan – from its final approved tuition rate for the 2002-2003 fiscal year. The Department acted on audit findings showing that benefits paid to four of petitioner's employees – totaling $8,778 – did not meet the equitable standard of distribution required by *N.J.A.C.* 6A:23-4.5(a)23. Petitioner argued that these benefits had been fully disclosed in previous audit reports over many years, and the Department's failure to disallow them previously was relied upon as tacit approval that the integrated pension plan conformed to the regulations.

The ALJ concluded, *inter alia*, that: the Social Security Integration Pension Benefit is a non-allowable expense because it is not equitably distributed; the Department did not use its power to interpret its own regulations as a means for amending the regulations; laxity in enforcement of a regulation does not prevent subsequent enforcement; and equitable estoppel can only be invoked against a public entity to prevent manifest injustice. Accordingly, the ALJ affirmed the Department's disallowance of $8,778 from petitioner's final approved tuition rate for 2002-2003.

The Commissioner concurred with the ALJ's analysis and conclusions; adopted the Initial Decision of the OAL for the reasons clearly stated therein; and dismissed the instant petition.

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

March 7, 2007

OAL DKT. NO. EDU 3367-05
AGENCY DKT. NO. 6-1/05

THE DERON SCHOOL OF NEW JERSEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions essentially recast and reiterate arguments advanced below with respect to its contention that the respondent should be equitably estopped from enforcing *N.J.A.C.* 6A:23-4.5(a)23 against it to preclude costs associated with the school's Social Security Integration Pension Benefit. It is determined that petitioner's exception submission raises no credible expostulation which could serve to call into question the Administrative Law Judge's (ALJ) thorough Initial Decision examination and discussion in this regard and, therefore, further presentation of and elaboration on petitioner's proffered arguments is unnecessary.[1]

[1] It is noted that petitioner's exceptions additionally charge that this matter was inappropriately decided on summary decision as there are "disputed issues of material fact that must be resolved prior to the entry of a summary decision." (Petitioner's Exceptions at 1) Such a position, at this point in time, is – at the very least – curious, given that this matter was decided on *cross* motions for summary decision. As pointed out by respondent – "instead of opposing the Department's Motion for Summary Decision altogether by arguing that factual disputes in this matter required disposition via an evidentiary hearing, the School only filed a cross-motion arguing its case as a matter of law." (Respondent's Reply Exceptions at 5)

Upon careful and independent review, the Commissioner concurs with the ALJ's Initial Decision analysis and conclusions. She, therefore, finds that the $8,778 in Social Security Integration Pension Benefits paid by petitioner to its employees during the 2002-03 school year is a non-allowable fringe benefit pursuant to *N.J.A.C.* 6A:23-4.5(a)23 which must be excluded from the calculation of the school's certified actual cost per pupil for that period.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/07/07

Date of Mailing: 3/07/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ON MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 3367-05

AGENCY DKT. NO. 6-1/05

IN THE MATTER OF THE DERON SCHOOL OF NEW JERSEY

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,

Respondent.

Scott Reynolds, Esq., for petitioner
(Riker, Dazig, Scherer, Highland & Peretti, LLP, attorneys)

Melanie M. Brooks, Deputy Attorney General, for respondent
(Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: December 1, 2006 Decided: January 19, 2007

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Deron School of New Jersey Inc. II (the "Deron School" or "School") is a state-approved private school for learning disabled and handicapped children. The Deron School's costs, plus a 2.5% profit, are reimbursed by the State. To be more

precise, a private school for the disabled receives tuition payments from the sending school's board of education. N.J.A.C. 6A:23-4.2.

Approximately twenty-five years ago, the Deron School's Board of Directors adopted a pension plan that was integrated with Social Security. As a result, those employees' whose annual salaries exceeded the "integration level" received increased pension benefits. This benefit is known as a social security integration pension benefit.

For at least seven years, the Deron School disclosed its social security integration pension benefits to the Department of Education (the "DOE") in its audited financial statements. In letters dated from 1998 to 2004 and signed by James Verner, the Section Supervisor of the Office of Fiscal Policy and Planning of the DOE accepted and approved the Deron School's audited financial statements.

On July 6, 2004, Anthony Hearn, Manager of the DOE's Office of Compliance Investigations, issued a fiscal monitoring report for the period beginning July 1, 2002 through June 30, 2003. Subsequently, the DOE found that the Deron School's use of social security integration was improper. In the Findings and Recommendations section of its report, the DOE found that due to the social security integration, the pension contributions calculation of four of the Deron School's directors exceeded the same benefit made available to all other full-time employees by 5.7% of their earnings, and did not conform to the requirements of N.J.A.C. 6A:23-4.5(a)23. The DOE stated that N.J.A.C. 6A:23-4.5(a)23 requires an equitable standard of distribution that is attainable for all full-time employees in order for a fringe benefit to be considered an allowable cost in the calculation of the actual cost per pupil. The audit determined that the $8,778 paid to those employees who received the benefit must be excluded from the calculation of the July 1, 2002 to June 30, 2003 certified actual cost per pupil.

On or about August 11, 2004, the Deron School appealed the July 6, 2004 fiscal monitoring report to the Director of the Office of Compliance Investigations. On or about September 16, 2004, the Deron School also appealed the fiscal monitoring report to the Deputy Commissioner of the DOE of Education. Both appeals were denied. Now, the Deron School appeals the DOE's finding that its social security integration

pension benefits are non-allowable fringe benefits under N.J.A.C. 6A:23-4.5(a)23. The Deron School further contends that the DOE's new interpretation of N.J.A.C. 6A:23-4.5(a)23 constitutes new rulemaking, which required the DOE to comply with the public notice and comment requirements of the Administrative Procedure Act ("APA"). In addition, the Deron School asserts that the DOE should be estopped from disallowing the cost of the school's use of social security integration pension benefit in light of its history of permitting the practice for more than two decades.

NON-ALLOWABLE FRINGE BENEFITS

Petitioner argues that the Department erroneously characterized the social security integration pension benefits cost as a non-allowable "fringe benefit".

The section which petitioner contends has been misconstrued is N.J.A.C. 6A:23-4.5(a)(23) which in the years 2002 to 2003 read as follows:

> (A) Costs that are not allowable in the calculation of the certified actual cost per student include the follow:
>
> i. When the benefits are determined in an arbitrary or capricious manner rather than on an existing written uniform policy based on an equity standard of distribution, such as years of service or education; and
>
> ii. When the fringe benefit has not been adopted by the School Board of Directors at a Board meeting prior to the implementation of the benefit documented in the Board minutes and the employers are not made aware the policy;

Petitioner argues that the rules of construction used to interpret statues requires that the two subsections above which are separated by the conjunctive word "and" should be read to require all of the elements of (i) and (ii). The petitioner argues as follows:

> Thus, in order for a cost to be considered a nonallowable, fringe benefit, N.J.A.C. 6A:23-4.5(a)(23)(in effect during the

> 2002-2003 school year) requires the presence of the following five elements:
>
> > (1) The benefit be determined in an arbitrary or capricious manner: (2) the benefit is not an uniform policy based on an equitable standard of distribution; (3) the benefit was not adopted by the school Board of Directors prior to its implementation; (4) the adoption of the benefit was not recorded and (5) the employers are not aware of the policy.

Petitioner contends that since the Deron School's Social Security Integration Pension Plan does not meet all five of the requirements, it can not be a non-allowable fringe benefit. The DOE contends that the interpretation propounded by petitioner would render an illogical result not contemplated by the State Board of Education. Construing the Administrative Code provision pursuant to the argument of petitioner would lead to a conclusion that a school could have a benefit that is determined in an arbitrary or capricious manner and then have it adopted by the School Board's Directors at a meeting prior to the implementation of the benefit and documented in the Board minutes thereby qualifying it for treatment as a allowable cost. This interpretation defeats the purpose of the provision. The Court in Bergen Commercial Bank v. Sissler, 307 N.J.Super 333 (App. Div. 1998) Aff'd. 157 N.J. 188 (1999) aptly recognizes the dilemma:

> We are mindful of the twin and sometimes conflicting principles of statutory interpretation. First, we have a duty to apply the Legislative intent as expressed in the statute's language, and . . . not presume that the Legislature intended something other than what it expressed by its plain language. Another principle is that the surest way to misread a rule or statute is to read it literally while ignoring the overall Legislative intent. Accordingly, we tried to read the statute reasonably.

A reading of this code provision "reasonably" a reading which is in fact fortified by a subsequent amendment eliminating the "and" between the clauses leads to the inescapable conclusion that benefits which are determined in an arbitrary or capricious manner are fringe benefits that are not allowable.

Petitioner rejects the case of Y.A.L.E. School North Inc. v. New Jersey Department of Education, Office of Compliance Investigation, EDU 4356-04, Initial Decision (April 1, 2005), Adopted Comm'r. of Educ. (May 18, 2005) in which the Commissioner Education determined that higher pension contributions to higher earning employees did not conform to the requirements of N.J.A.C. 6A:23-4.5(a)23(i) and are to be disallowed from the calculation of the actual certified cost per pupil charged to public schools sending students to Y.A.L.E. The Y.A.L.E. decision was decided after the amendment eliminating the "and" from the code provision but its pronouncements by the Commissioner are dispositive. The Commissioner's pronouncement in Y.A.L.E. is compelling and controlling. The Commissioner agreed with the ALJ that Y.A.L.E.'s pension plan was a non-allowable expense since it failed to meet the "equitable standard of distribution" requirement of N.J.A.C. 6A:23-4.5(a)(23)(i) because of the manner in which employees of different salary levels were treated with respect to employer pension contributions. The Commissioner stated that Y.A.L.E.'s plan, which is quite similar to Deron's plan, ". . . clearly had the effect of favoring a small number of highly paid employees". The Commissioner elaborated by saying that such a disparity did not meet the requirements for equitable distribution and that disallowing its inclusion in the tuition costs is consistent.

THE DEPARTMENT OF EDUCATION INTERPERTATION OF THE CODE PROVISION IN QUESTION CONSTITUTED NEW RULE MAKING

Petitioner argues that the Department's non-allowable costs determination is null and void because it is the product of unauthorized rulemaking in violation of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. (APA). Petitioner argues that the Department's action falls within the six factors used to determine whether an Agency's action constitutes Administrative Rulemaking thus requiring compliance with the procedures set forth in the APA citing MetroMedia Inc. v. Director of the Division of Taxation, 97 N.J. 313, 331-332 (1984).

Generally, a state agency has the authority to amend, change, or repeal its regulations, especially in response to changing conditions. County of Hudson v. Dep't of Corrections, 152 N.J. 60, 72 (1997). See Dougherty v. Dep't of Human Servs., 91

N.J. 1, 10 (1982) ("[T]he Legislature has delegated to the agencies the authority to adopt, revise and enforce implementing regulations . . . ."). The APA, N.J.S.A. 52:14B-1 to - 25, provides the way in which an agency can amend existing regulations. Thus, under the APA, a state agency may amend or change an existing regulation by following the same notice and comment procedures that it used to adopt the regulation in the first place. N.J.S.A. 52:14B-4. As a result, "[a]n agency may not use its power to interpret its own regulations as a means of amending those regulations or adopting new regulations." Bessler & Company v. Bradley, 361 N.J.Super. 168, 173 (App. Div. 2003) (quoting Venuti v. Cape May County Constr. Bd. of Appeals, 231 N.J.Super. 546, 554 (App. Div. 1989)). See also 37 New Jersey Practice, Administrative Law and Practice § 3.25, at 158 (Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty) (2d ed. 2000) (footnotes and citations omitted) ("An agency may not interpret its rules in such a way as to amend those rules without complying with the Administrative Procedure Act.").

The evidence presented by Deron establishes that for at least of period of 25 years, the school had included social security integration pension benefits in its cost per pupil calculation. Deron argues that since the cost was never questioned by the Department, the School had the right to reasonably rely on what they considered the school's interpretation of social security integration benefit as an allowable cost. By not allowing the cost, it is argued that the Department has departed from its previous interpretation of the code provision which violates the APA.

The Department contends that although it failed to discover the instances of noncompliance during the reasonable course of its monitoring of the school, it does not prevent them from making this finding once it is discovered. Intertwined with the argument concerning rulemaking is the contention that the doctrine of "equitable estoppel" should be applied even if there was no new rulemaking.

The doctrine of equitable estoppel provides that "one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so has detrimentally relied thereon." Anske v. Borough of Palisades Park, 139 N.J.Super. 342, 348 (App. Div. 1976) (citations omitted). The general elements required to invoke an equitable estoppel defense

require the party to "show that the alleged conduct was done, or representation made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment." Miller v. Miller, 97 N.J. 154, 163 (1984) (citations omitted).

New Jersey law holds, however, that the defense of equitable estoppel should rarely be invoked against public entities. Cipriano v. Dep't of Civil Serv., 151 N.J. Super 86, 91 (App. Div. 1977). Furthermore, equitable estoppel may only be invoked against a public entity to prevent manifest injustice. W.V. Pangborne & Co. v. N.J. Dep't of Transportation, 116 N.J. 543, 554 (1989); Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954).

In New Jersey, cases have been brought against municipalities and counties when they have attempted to enforce a residency requirement against public employees, who for years have worked for these public entities while residing outside of the required area.[1] The common thread that runs through these cases is the principle that a public entity will be estopped from enforcing an ordinance where the court finds evidence of the public entity's "studied policy not to enforce" the ordinance. Communications Workers of America v. Treffinger, 291 N.J. Super. 336, 359 (Law Div. 1996). The court found a "studied policy not to enforce" exists where there is evidence of the public entity's official knowledge of violations of the ordinance coupled with its non-enforcement of the ordinance. Id. at 336.

"Laxity" in enforcement, however, is insufficient to warrant a finding of a "studied policy not to enforce" an ordinance or regulation. Newark Council No. 21 v. James, 318 N.J.Super. 208, 217 (App. Div. 1999) (citation omitted). Therefore, a public entity's lax enforcement of ordinances and regulations does not give rise to an equitable estoppel defense. For example, in Holy Name Hospital v. Division of Medical Assistance and Health Servs., 92 N.J.A.R.2d (DMAHS) 36, ALJ Masin found that the alleged lax enforcement of a regulation did not suggest equitable estoppel should apply to a state

[1] These cases include Kennedy v. City of Newark, 29 N.J. 178 (1959); Abrahams v. Civil Serv. Comm'n, 65 N.J. 61 (1974); Trainor v. City of Newark, 145 N.J.Super. 466 (App. Div. 1976); and The Matter of the City of Newark v. PBA Local 3, 272 N.J.Super. 31 (App. Div. 1994), cert. denied, 137 N.J. 315 (1994).

agency:

> [T]he circumstances of this case, which involves claims for services by a provider which filed late in contravention of the already existing regulation, purportedly in part due to the lax enforcement by the agency of the rule, does not rise to the level of such extreme circumstances as would suggest [equitable estoppel] should be applicable here.
>
> [Ibid.]

Here, the Deron School contends that the DOE should be estopped from disallowing the cost of the school's use of social security integration pension benefits in light of its history of permitting the practice for more than two decades. The Deron School disclosed its social security integration pension benefits to the DOE in its audited financial statements, and from 1998 to 2004 the DOE accepted and approved the Deron School's financial statements. As indicated by the School, it was not until the DOE's Office of Compliance Investigations issued a fiscal monitoring report for the 2002-2003 school year that the DOE informed the Deron School that its use of social security integration was improper.

For all intents and purposes, the Deron School estoppel argument mirrors the estoppel argument set out in the residency requirement cases. In the residency cases, the public employees asserted the municipalities and counties should not be able to terminate them because they had been allowed to work for a number of years without the requirement being enforced against them. Nevertheless, despite the municipalities' or counties' lax enforcement of the existing ordinance, equitable estoppel was found to be inapplicable to the situation.

Equitable estoppel may only be invoked against a public entity to prevent manifest injustice. Here, it would appear that barring the School from passing on the cost of its social security integration pension benefits to the sending school districts is not a "manifest injustice" because the School was not induced to integrate its pension system with Social Security because of some action or statement made by the DOE.

In actual fact, the Deron School's board of directors adopted a pension plan that was integrated with social security almost twenty-five years ago. The regulation

(formerly N.J.A.C. 6:20-4.4, now N.J.A.C. 6A:23-4.5), which set forth that certain fringe benefits and pension costs were not allowable costs in the calculation of tuition, became effective on September 4, 1984 years after the Deron School's board of directors adopted its integrated pension plan. 16 N.J.R. 2358 (September 4, 1984). In addition, it was not until December 17, 1990 that the regulation was amended to require fringe benefits to be rooted in "an existing written uniform policy based on an equitable standard of distribution" so that they were reimbursable as tuition. 22 N.J.R. 3739 (December 17, 1990). Accordingly, the School's equitable estoppel argument should fail because it has not "detrimentally relied" on the DOE's purported non-enforcement of the regulation. Instead, the School had its integrated pension benefits system in place years before the DOE even proposed N.J.A.C. 6A:23-4.5(a)23.

CONCLUSION

The social security integration pension benefit is a non-allowable expense because it is not equitably distributed.

The State Board of Education did not use its power to interpret its own regulations as a means for amending the regulations or adopting new regulations but had been "lax" in the enforcement of the regulation which does not prevent subsequent enforcement.

Equitable estoppel does not apply because the Agency never failed to enforce the regulation though they knew it was violated preventing the doctrine from being applied. Equitable estoppel can only be invoked against a public entity to prevent manifest injustice. Not allowing the school to pass on the cost of its social security integration pension benefit does not equal a "manifest injustice".

ORDER

It is **ORDERED** that the State Board's Motion for Summary Decision is hereby **GRANTED** and that the Board's direction to Deron to exclude $8,778 in Social Security Integration Pension Benefits from the certified actual cost per pupil for the physical year ending June 2003 is **AFFIRMED**.

It is further **ORDERED** that petitioner's Cross Motion for Summary Decision is hereby **DENIED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 19, 2007

DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

JAN 24 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

89-07

OAL DKT. NO. EDU 8869-06
AGENCY DKT. NO. 399-11/06

S.M.P., on behalf of minor child, J.T.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Grace Roa
COMMISSIONER OF EDUCATION

Date of Decision: 3/06/07

Date of Mailing: 3/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8869-06

AGENCY DKT. NO. 399-11/06

S.M.P., ON BEHALF OF MINOR CHILD,

J.T.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF FRANKLIN, GLOUCESTER COUNTY,

Respondent.

S.M.P., petitioner, pro se

B. Michael Borelli, Esq., for respondent

Record Closed: February 1, 2007 Decided: February 1, 2007

BEFORE **JAMES W. FAISON, III,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 22, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

Feb. 2, 2007
DATE

JAMES W. FAISON, III, ALJ

Receipt Acknowledged:

2-6-07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

B. MICHAEL BORELLI, ESQUIRE
40 North Woodbury-Glassboro Road
Pitman, New Jersey 08071
(856) 582-8288
Attorney for Respondent,
Board of Education of
Franklin Township, Gloucester County

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

S.M.P., ON BEHALF OF MINOR CHILD, J.T.P.,	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Petitioner,	:	AGENCY DOCKET NO.: 399-11/06
vs.	:	RESIDENCY APPEAL
BOARD OF EDUCATION OF FRANKLIN TOWNSHIP, GLOUCESTER COUNTY	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

The parties having appeared before Judge James W. Faison, III for a pre-hearing conference on January 3, 2007, the Petitioners appearing pro se and B. Michael Borelli, Esquire appearing on behalf of the Respondent and the parties having discussed the outstanding issues, the parties hereby agree as follows:

1. The Petitioner shall be responsible for the payment of tuition for thirty-six (36) school days beginning on September 6, 2006 through and including October 26, 2006 at the rate of $45.00 per day for a total of $1,620.00. Payment shall be made by way of six (6) equal monthly installments in the sum of $270.00 beginning on January 15, 2007 with the last payment due on June 15, 2007.

2. Beginning October 27, 2006 the child shall be entitled to attend the Township of Franklin Schools free of charge based upon residency with his parents at 1100 Main Road, Franklin Township. The child's eligibility shall continue so long as residence is maintained at that location or any other location in the Township of Franklin.

3. The above entitled action shall be dismissed without the payment of costs or counsel fees by either party.

Stephanie M. Pace, Petitioner

Robert Pace, Petitioner

On behalf of Respondent
Franklin Township Board of Education

Stanley Evans, President

Amy Capriotti, Board Secretary

TOWNSHIP OF FRANKLIN
BOARD OF EDUCATION

RESIDENCY APPEAL

RESOLUTION

RE: S.M.P. on behalf of minor child J.T.P. v. Township of Franklin Board of Education Residency Appeal Docket No.: 399-11/06

WHEREAS, The Township of Franklin Board of Education is a party to the above referenced Residency Appeal; and

WHEREAS, as the result of a pre-hearing conference, the parties have reached an agreement to resolve all outstanding issues and conclude the litigation, the terms of agreement being set forth in the attached Agreement.

NOW, THEREFORE, BE IT RESOLVED, by the Township of Franklin Board of Education on this 10th day of January, 2007 as follows:

1. The Board hereby authorizes acceptance of the terms of Stipulation of Settlement as attached hereto.

January 10, 2007
Date

Stanley Evans, Board President

January 10, 2007
Date

Amy Capriotti, SBA/BS

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

96-07

96-07

OAL DKT. NO. EDU 7092-06
AGENCY DKT. NO. 172-5/06

MICHELLE T. CLANTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon an independent and comprehensive review, the Commissioner concurs with the Administrative Law Judge – for the reasons presented in her decision – that petitioner's claim here is time-barred pursuant to *N.J.A.C.* 6A:3-1.3(i). She further agrees with the ALJ that even assuming, *arguendo*, that the instant Petition of Appeal had been timely filed, at no time during her service as a vice-principal in various District schools from September 18, 2000 through June 30, 2004 – the last day she served as an administrator in the District – did petitioner possess the requisite certification "in full force and effect" to achieve credit towards tenure in that position.[1] (*N.J.S.A.* 18A:28-5)

Accordingly, the recommended decision of the OAL granting summary decision to the District is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 3/12/07
Date of Mailing: 3/13/07

[1] It is noted that the Commissioner has previously specifically held that an individual's time served under a Certificate of Eligibility to seek provisional employment cannot be tacked and counted towards tenure accrual. *See William Davis v. Board of Education of the City of Englewood, Bergen County*, decided by the Commissioner December 8, 2006.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#98-07

MICHELLE T. CLANTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner claims tenure in the position of vice-principal and contends that the Board terminated her employment in violation of the law. Respondent Board filed a motion for summary decision, based on petitioner's failure to timely file her petition.

The ALJ found, *inter alia*, that: petitioner's appeal, filed in May 2005, is time barred by *N.J.A.C.* 6A:3-1.3(i); an August 2004 letter from the Board rescinding petitioner's contract provided adequate notice to petitioner that her right to tenure as a vice-principal was in dispute; petitioner offered no reasonable explanation why her appeal was untimely filed. Further, the ALJ found that petitioner did not hold the appropriate certification, during the time that she worked as a vice-principal, to obtain tenure in that position. The ALJ concluded that there is no material issue of fact that would require a hearing in this matter, and granted the respondent's motion to dismiss the petition.

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in her decision – that petitioner's claim is time-barred, and that petitioner did not at any time during her service as vice-principal possess the requisite certification "in full force and effect" to obtain tenure in that position. The Initial Decision of the OAL is adopted as the final decision in this matter.

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

March 12, 2007

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT.NO. EDU 07092-06

AGENCY DKT. NO. 172-5/06

MICHELLE T. CLANTON,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,

Respondent.

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

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

Record Closed: January 23, 2007 Decided: February 2, 2007

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

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On May 10, 2006 the petitioner, (Michelle T. Clanton or Ms. Clanton), filed a petition with the Department of Education alleging that her tenure rights had been violated. After requesting an extension of time to file its response, the respondent, (the

State-operated School District of the City of Newark or Newark), filed its answer on June 2, 2006. The matter was forwarded to the Office of Administrative Law (OAL) on June 9, 2006. It was scheduled for a hearing on December 5, 2006. However, after discussions with the parties, it was decided that the respondent would file a motion for Summary Decision on December 21, 2006. The petitioner filed her brief in opposition to the petitioner's motion on January 22, 2007. The respondent filed its reply brief on January 23, 2007.

ISSUES

1. Can the matter be decided on Summary Decision?
2. Did the petitioner obtain tenure?
3. Did the petitioner file her petition in time?
4. Did the respondent violate the petitioner's tenure rights?

STATEMENT OF FACTS

1. Michelle Clanton began working as an elementary school teacher for Newark in September, 1998. She continued in this position until May 1, 2000, when she was appointed as a Resource Teacher Coordinator.
2. On September 18, 2000 Ms. Clanton was appointed Interim Vice-Principal at Gladys-Hillman-Jones Middle School. She served in this position until May 1, 2001.
3. On May 16, 2001 she was appointed as Vice Principal at the school. She worked there for the 2001-2002 school-year.
4. On or about August 6, 2002 the petitioner was transferred to Roberto Clemente School as Vice Principal. She served in that position for the 2002-2003 school-year.
5. On July 30, 2003 Ms. Clanton was told that she was reassigned as Vice Principal of the McKinley School.
6. On August 7, 2003 she was advised that the July 30 letter was rescinded and that she would remain at the Roberto Clemente School for the 2003-2004 school-year.

7. On or about August 21, 2003 Ms. Clanton was advised that she was transferred to the position of Vice Principal at the McKinley School. She served in that position for the 2003-2004 school-year.
8. On May 14, 2004 Newark sent Ms. Clanton a letter stating that her employment contract for 2004-2005 would not be renewed.
9. On May 25, 2004 the respondent sent another letter to Ms. Clanton informing her that the non-renewal letter had been rescinded and that she should return to her position as Vice Principal.
10. On May 28, 2004 the petitioner and respondent entered into a contract effective May 1, 2004 for the period August 11, 2004-June 30, 2005.
11. On August 5, 2004 Ms. Clanton was informed by the respondent that her contract as Vice Principal was rescinded due to excessive absenteeism and tardiness. She was offered an assignment of Resource Teacher/Coordinator or Elementary Teacher.
12. In September 1998 Ms. Clanton was issued a Certificate of Eligibility as Principal/Supervisor.
13. In June 2004 the Petitioner acquired a Provisional Certificate as a Principal/Supervisor.
14. In July 2004 Ms. Clanton was issued a Standard Certificate to serve as a Principal.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

In accordance with the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.12.5, any party may move for summary decision upon all or any of the substantive issues in a case at any time after a case is deemed contested. To grant a motion for summary decision, it must be examined whether "the papers and discovery...together with the affidavits...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

A motion for summary decision is similar to summary judgment found at R. 4:46-2. The motion for summary judgment "shall be served with briefs, a statement of material facts, with or without supporting affidavits." R. 4:46-2(a). "The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue, together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." Ibid.

The Supreme Court has held that, when deciding a motion for summary judgment:

> [a] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
>
> Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). Thus, the critical question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533.

II. Filing of Petition

There are specific regulations that have been promulgated regarding the process for initiating a contested case before the Commissioner of Education.

N.J.A.C. 6A:3-1.3(i) specifically addresses the time in which a petitioner must file a petition of appeal:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal. Id.

The ninety-day requirement has been strictly construed. See Riely v. Board of Ed. of Hunterdon Central Regional High School Dist., 173 N.J. Super. 109 (App. Div. 1980).

The purpose of the limitations period is two fold. First, it "[s]timulates" litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims." Kaprow v. Board of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (citing Ochs v. Federal Ins. Co., 90 N.J. 108, 112 (1982)). "The second purpose is 'to penalize dilatoriness and serve as a measure of repose' by giving security and stability to human affairs." Kaprow, 131 N.J. at 587 (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)).

Decisions addressing N.J.A.C. 6A:3-1.3(i) and its predecessor, N.J.A.C., 6:24-1.2(c), have held that the regulation is mandatory and that the ninety-day time period begins to run on the date notice is received of the action taken. McCrea v. Upper Saddle River Board of Education, 96 N.J.A.R. 2d (EDU) 817 (1995). The New Jersey Supreme Court has stated that the notice provided must be adequate. Kaprow, 131 N.J. at 587. "[A]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Id. Additionally, "adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period." Id.

The petitioner has argued that the "District's August 5, 2004 letter was not a 'final order, ruling, or other action' sufficient enough to provide notice to Ms. Clanton that the District was rescinding her position as Vice Principal **due to a denial of tenure."** Ms.

Clanton asserted that the recession, according to the plain terms of the District's letter, had nothing to do with a final determination as to Ms. Clanton's tenure rights, but rather was based upon excessive absenteeism and tardiness.

The petitioner's argument is not reasonable. If Ms. Clanton had obtained tenure, as she contends, then Newark could not strip her of tenure simply by writing her a letter. She had to have realized that it was Newark's position that she did not have tenure and therefore they could remove her from the vice-principal's position and place her back in the classroom. Certainly, Ms. Clanton had adequate notice from the August 5, 2004 that her right to tenure as a principal was in dispute. As Newark pointed out, Ms. Clanton received no other notice from Newark regarding this issue. Eventually, it was on the basis of that August 5 letter that Ms. Clanton filed her petition.

The petitioner has given no reason why she delayed until May 2005 to file her petition. Instead she argued that N.J.A.C. 6A:3-1.16 provides:

> the rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary and may result in injustice.

Ms. Clanton equates her situation to that of the petitioner in Eisenberg v. Board of Education of the Borough of Fort Lee, 2003 WL 23643569 (N.J. Adm.2003). Eisenberg was a case in which the petitioner alleged that, at the time he received his notice that his contract would not be renewed, he did not know that he might have a claim for intentional wrongdoing on the part of the Board. The information, alerting him to the existence of such alleged facts, was not known to him until three months later. The facts in this case are not analogous to Eisenberg. A litigant has a certain responsibility to determine if her rights have been violated. Certainly, the August letter was sufficient to alert her that she might have a cause of action and that she should

investigate the matter. Inexplicably she waited eighteen months to file a petition. Therefore, I **CONCLUDE** that the petitioner's claims are time-barred.

While this disposes of the claim, it is important that the issue of Ms. Clanton's right to tenure should also be explored.

II. Acquisition of Tenure

Teachers and other related staff including principals in New Jersey have a statutory right to tenure provided they meet certain requirement. Zimmerman v. Newark Board of Education, 38 N.J. 65, 70-72 (1962), cert. den. 371 U.S. 956 (1963). The criteria under which teachers achieve tenure are outlined in N.J.S.A. 18A:28-5 which provides:

> The services of all teaching staff members ... which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, **excepting those who are not the holder of a proper certificate in full forced and effect**, shall be under tenure during good behavior and efficiency . . . after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years . . .
>
> [Emphasis added]

A "teaching staff member" is defined at N.J.S.A. 18A:1-1 as:

> . . . a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualification, for such office, position or employment, require him to hold **a valid and effective standard, provisional or emergency certificate**, appropriate to his office,

> position or employment, issued by the state board of examiners and includes a school nurse. [Emphasis added].[1]

In order to achieve tenure, the petitioner must meet the following conditions: (1) work in a position for which a principal's certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 73 (1982). As the respondent pointed out, the petitioner did not possess, during the period of service as a vice-principal, the requisite certification "in full force and effect" to achieve credit towards tenure. Ms. Clanton did not acquire a Provisional Certificate until June 2004 and was not issued her Standard Certificate as a Principal/Supervisor until July 2004. Ms. Clanton argued that it was necessary to take testimony to determine why a mentor was not assigned to her upon her receipt of a Certificate of Eligibility and what measures the District undertook to allow Ms. Clanton to complete the program that was necessary in order for her to obtain a provisional certificate. If Ms. Clanton believed that she should have been assigned a mentor earlier, then she had a responsibility to pursue that at that time. The language of the statute is plain regarding eligibility for tenure and Ms. Clanton did not hold the appropriate certificate, during the time that she worked as a vice-principal, to obtain tenure.

The petitioner further argued that:

> the years in which Ms. Clanton served as a vice principal with her Certificate of Eligibility should be tacked and counted towards tenure since her service during those years was in the same area of endorsement as the standard certificate issued in July 2004. In this respect, a teaching staff member who has obtained a Certificate of Eligibility should be treated the same as someone who possesses an emergency certificate.

However, there is nothing in the statute or case law that supports this position. As the court pointed out in Zimmerman, supra, 38 N.J. at 72: In order to acquire tenure, "a

[1] A standard certificate is a "permanent certificate issued to candidates who have met all requirements for State certification." N.J.A.C. 6:11-4.1. A provisional certificate is "a temporary one-year certificate issued to candidates who have met requirements for initial employment as part of a State approved district training program or residency leading to standard certification." N.J.A.C. 6:11-4.2. An emergency certificate is "a substandard one-year certificate issued only in the field of educational services, teacher of the handicapped, teacher of the blind and partially sighted, and teacher of the deaf and hard of hearing." N.J.A.C. 6:11-4.3.

teacher must comply with the precise conditions articulated in the statute." Based on this standard, the ALJ in Joanne McAneney v. Board of Education of the School District of the Chathams, 92 N.J.A.R. 2d (EDU) 208 (1991) found that a teacher, who taught for 13 years, but did not have the proper instructional certificate, had not attained tenure. The decision was affirmed by the Commissioner who concurred that "the petitioner did not possess the appropriate certificate for service as a supplemental teacher and, therefore, did not meet the precise requirements for acquiring tenure set forth in Spiewak, supra. See also Jennings v. Board of Education of the Borough of Highland Park, 1989 S.L.D. (St. Bd. Feb. 28, 1989) in which an athletic trainer who taught health courses without the proper health education endorsement was denied tenure. The qualifications for an emergency certificate are clearly spelled out in N.J.A.C. 6:11-4.3. Ms. Clanton does not meet the qualifications for an Emergency Certificate and therefore her Certificate of Eligibility does not allow her to count time served in a position before she obtained her Standard Certificate.

CONCLUSION AND ORDER

Based on the briefs, exhibits and certifications submitted, I **CONCLUDE** that there is no material issue of fact that would require a hearing. Therefore, the matter can be decided on Summary Decision.

I further **CONCLUDE** that Ms. Clanton's claim is barred by N.J.A.C. 6A:3-1.3(i).

Finally, I **CONCLUDE** that the petitioner has not acquired tenure under the terms of the statute.

I therefore **ORDER,** that the Ms. Clanton's petition for relief be denied.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/2/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/2/07
DATE

Mailed to Parties:

FEB 5 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 8530-06
AGENCY DKT. NO. 359-10/06

P.R.R., on behalf of minor child, S.M.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge that this matter is moot and should be marked withdrawn.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby accepted as withdrawn.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 3/12/07

Date of Mailing: 3/13/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 08530-06S
AGENCY DKT. NO. 359-10/06

P.R.R. ON BEHALF OF MINOR CHILD S.M.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,,
Respondent.

P.R.R., petitioner, pro se

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Record Closed: February 22, 2007 Decided: February 22, 2007

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

P.R.R., on behalf of her minor child, S.M.R., ("petitioner") filed a residency appeal to the Commissioner of Education for the removal of the enrollment of S.M.R. in the Neptune Township Middle School by the Neptune Township School District. The matter was transferred from the Department of Education to the Office of Administrative Law ("OAL") on November 1, 2006, for a hearing pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

A hearing was scheduled before the undersigned judge for January 31, 2007. On January 29, 2007, counsel for the respondent filed a motion seeking dismissal of this appeal as moot. On January 29, 2007, P.R.R. orally advised this office that she was withdrawing her appeal and would send a letter confirming the withdrawal. This office never received her written confirmation of withdrawal. Based upon her oral representation, I **FIND** that this case is now moot since there are no outstanding issues, and the matter should be withdrawn.

It is therefore **ORDERED** that the case be **WITHDRAWN.**

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

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

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

February 22, 2007
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 2 . 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

#107-07E

OAL DKT. NO. EDU 798-07
AGENCY DKT. NO. 37-1/07

L.H., ON BEHALF OF MINOR CHILD, D.E.H., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ), have been reviewed. [1]

Upon such review, the Commissioner concurs with the ALJ – for the reasons fully set forth in the recommended Order – that petitioner in this matter has not met the standard for grant of emergent relief. *Crowe v. DeGioia, supra*; *N.J.A.C.* 6A:3-1.6.

Accordingly, the Order of the OAL – denying petitioner's application for immediate removal of D.E.H. from the math class to which she has been assigned without otherwise altering her class schedule – is adopted for the reasons expressed by the ALJ. The underlying appeal on the merits, should petitioner wish to pursue it, shall proceed at the OAL as determined by the ALJ.

IT IS SO ORDERED.[2]

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 3/22/07
Date of Mailing: 3/23/07

[1] It is noted that, although petitioner filed her initial appeal papers on February 5, 2007 as indicated in the ALJ's Order (at 2), such papers were materially deficient and petitioner was so notified that day by letter and phone. The identified deficiencies were corrected by submission faxed to the Department on February 23, 2007, whereupon the matter was forthwith transmitted to the OAL.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 798-07

AGENCY DKT. NO. 37-2/07

L.H., on behalf of minor child,
D.E.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Respondent.

Alan W. Lesso, Esq., for petitioner (South Jersey Legal Services, Inc.)

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

BEFORE **JAMES W. FAISON, III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner seeks to compel respondent (hereafter "BOE") to remove her daughter from her currently assigned mathematics class due to alleged incompatibility with the teacher and misconduct of included students in the class.

Petitioner states that her daughter has lost honor status, is depressed and has expressed suicide ideation.

Petitioner submitted a Petition to the Commissioner of Education, undated, but received February 5, 2007, seeking emergent relief in this matter. The matter was transmitted without an answer to the Office of Administrative Law (OAL) for hearing as a contested case on February 23, 2007. March 1, 2007, oral argument was held and some limited testimony was taken. At the conclusion of the hearing, the record remained open to permit opposing counsel to file closing briefs with respect to the application for emergent relief.

FACTUAL DISCUSSION

For the purposes of deciding the application for emergent relief, the following facts are deemed to be undisputed.

D.E.H. is twelve years old and a sixth grade student at Memorial Upper Elementary School (Memorial) in the Willingboro School District. This is her first year at Memorial. Prior to her attendance at Memorial, she had been enrolled in the Program for Academically Talented Students (PATS). She is no longer enrolled in that program.

At the commencement of the school year, D.E.H. was assigned to a class that also contained "included" (classified) students. D.E.H. complained to petitioner that her grades were declining due to the inability of her mathematics instructor to properly convey the educational material and the misconduct of the included students in the class. D.E.H. is not classified.

Because of concerns regarding her daughter's health and education, petitioner requested BOE to remove D.E.H. from the mathematics class only.

Contrary to the Petition filed by petitioner, BOE has not refused to move D.E.H. Memorial utilizes a "team" process. The students in a class remain together and

Contrary to the Petition filed by petitioner, BOE has not refused to move D.E.H. Memorial utilizes a "team" process. The students in a class remain together and circulate to different classrooms for instruction. BOE agreed to move D.E.H. to a different team or a different homeroom. Petitioner rejected BOE's offer because she wanted the mathematics class only changed. She wants D.E.H. to remain with her other teachers. Petitioner objects that D.E.H. would be required to attend class with other included students if moved as offered by BOE. She wants D.E.H. in a class that does not have included students.

Not as part of the undisputed facts, BOE contends that D.E.H. is having trouble in other classes with other teachers.

Petition states that D.E.H. is undergoing therapy. However, that is inaccurate. D.E.H. is on a waiting list for therapy and the type of therapy is not specified, although the Petition alleges that D.E.H. is depressed and has talked about suicide.

DISCUSSION AND ANALYSIS

Petitioner claims that D.E.H. is suffering damage that will result in irreparable harm if some relief is not granted. In support of her claim for emergent relief, she cites standards set by the New Jersey Constitution (art. VIII, § 4, ¶ 1), the federal Individuals with Disabilities Improvement Act of 2004 (20 U.S.C. § 1400 et seq. [IDEA]) and the holding in Hamel v. State, 321 N.J. Super. 67 (A.D. 1999).

Both parties acknowledge that the standard for determination of an application for emergent relief is found in Crowe v. DeGioia, 90 N.J. 126 (1982).

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. In such circumstances, emergent relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief

may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia (*supra*). These legal principles may be summarized as follows:

(1) Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be addressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or the right of the affected.

(2) Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

(3) Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

(4) The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

Petitioner's letter to the state Department of Education, Bureau of Controversies and Disputes, states, ". . . my child has become depressed with thoughts of suicide. She is in therapy." Petitioner's Request for an Emergency Relief Hearing states, "She (D.E.H.) had become frustrated with this situation, but has now gone into depression. My daughter has had thoughts of suicide from this ordeal." There is no doubt that a twelve year old in depression and verbalizing thoughts of suicide could lead to irreparable harm if the child is maintained in the same condition that gave rise to those circumstances. If attendance in her present mathematics class is the cause, then change is warranted.

However, petitioner sends mixed signals. D.E.H. is not in therapy, as stated in the Petition, but on a waiting list. More than six weeks prior to the date of hearing, BOE offered to move D.E.H. from the math class and particular included students that petitioner finds offending. If petitioner prevented BOE from moving D.E.H. out of the circumstance which caused thoughts of suicide, question arises as to the credibility of petitioner's assertions. Attendance at therapy was misstated and, although a treating doctor is referenced, no medical opinion as to depression was provided. That is not to say that a parent's observation of changed behavior in a child should be disregarded, but the overstated assertions by petitioner cause concern that she maybe utilizing elevated rhetoric to attain her goal to have D.E.H. moved to another mathematics class.

Whether clinical depression and/or suicide ideation are health concerns for D.E.H. require a broader hearing to determine the factual and medical circumstances. In the absence of such factual determination, I **FIND** that petitioner has failed to establish the requirement of irreparable harm in this matter.

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient education to of all children residing in its school district. N.J. Const. (1947), art. VIII, § 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1c and d, to adopt rules for the management of the public schools of the district and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

The primary legal considerations in this matter are very much couched in settled law. That settled law does not favor the request of the petitioner.

(1) D.E.H. is not a classified student and BOE does not need parental consent to move her to another class.

(2) Petitioner's effort to have D.E.H. removed from any class that has included students is contrary to the law of this state and federal circuit. BOE has delayed removing D.E.H. from her current class only because of the objection of petitioner and the pendency of the hearing for emergent relief. That delay (restraint) was not required and the move cannot be prohibited by petitioner absent good cause.

Further, petitioner's challenge of the use of the "TEAM" system is her mere assessment. She has not provided professional and/or expert opinion that the educational concept is inappropriate. In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions are unlawful, arbitrary, capricious or unreasonable. Schuster v. Bd. of Educ. of Montgomery Township, 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Township, 73 N.J. Super. 40 (App. Div. 1962)). The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey Courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an

> administrative or legislative body if there is substantial evidence to support the ruling.
>
> [Piccoli v. Bd. of Educ. of Ramapo Indian Hills Regional School District, OAL DKT. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dept. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the Board of Education. Massaro v. Bd. of Educ. of Boro of Begenfield, 1965 S.L.D. 84, 85. In Kopera v. Board of Education v. West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "the well established rule that action of the local board which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives." See also G.M. v. Roselle Park Boro Bd. of Educ., 95 N.J.A.R.2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to the board action, the ALJ stated, "It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, a board's action should be upheld. In the G.M. case, supra, the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority.

Based upon the foregoing, I **FIND** that the right underlying petitioner's claim is settled against the petitioner's position. Therefore, I **FIND** that petitioner has failed to establish the right to relief in the absence of a full evidentiary hearing showing that the action of respondent is arbitrary, capricious and unreasonable.

The third factor is the most difficult requirement for a moving party to establish in order to show entitlement to emergency relief. In order to prevail on the application for emergency relief, the party requesting the relief, the parent in this matter, must make a

preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition of the final decision as when this matter began, it must be established by the moving party that she will probably win on the merits. It is with respect to this that petitioner has the greatest difficulty.

Petitioner must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. However, petitioner's claim can only be established after a full hearing because of the presumption that respondent's actions are correct. Petitioner must show that respondent's actions violated petitioner's rights by failing to remove D.E.H. from her current mathematics class into a class that contains no included students. However, petitioner has not shown such a settled right and, in fact, the settled law does not favor petitioner's demand. Therefore, I **FIND** that petitioner has failed to show the likelihood of prevailing on the merits.

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying the relief in order to preserve the status quo pending a full hearing on the merits. While neither party specifically addressed this factor, it appears clear that any hardship which may result will fall upon petitioner and D.E.H. rather than upon respondent school district. I so **FIND**.

CONCLUSION

Based upon the foregoing, for the purposes of deciding this application for emergency relief, petitioner has failed to establish the existence of irreparable harm, that petitioner's claim is based upon a settled right or that petitioner is likely to prevail on the merits. In view of the fact that petitioner has failed to establish three of the four requirements for emergency relief, I **CONCLUDE** that petitioner's request should be **DENIED**.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief seeking to compel BOE to transfer D.E.H. into class that does not contain included students is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 15, 2007
DATE

JAMES W. FAISON, III, ALJ

jh

114-07

OAL DKT. NO. EDU 454-06
AGENCY DKT. NO. 7-1/06

ATLANTIC CITY EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the joint request for approval of a settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the Final Decision in this case.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/2/07

Date of Mailing: 4/2/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 454-06

AGENCY DKT. NO. 7-1/06

ATLANTIC CITY EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

Respondent.

Steven R. Cohen, Esq., for petitioner (Selikoff & Cohen, PA, attorneys)

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

Record Closed: February 8, 2007 Decided: February 13, 2007

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 9, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Joint Request for Approval of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

February 13, 2007
DATE

STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

2-16-07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 21 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Petitioner,
Atlantic City Education Association

RECEIVED
2007 FEB -8 A 11: 25
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Atlantic City Education Association,
on behalf of the bargaining unit represents,

Petitioner,

v.

Board of Education of the City
of Atlantic City, County of Atlantic,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF THE
STATE OF NEW JERSEY

OAL DKT. NO. EDUOT 00454-2006S
AGENCY REF. NO. 7-1/06

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF PETITION OF APPEAL

WHEREAS, the Atlantic City Education Association ("Association") is a "majority representative" within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), *N.J.S.A.* 34:13A-1 *et seq.*, of a bargaining unit for collective negotiations consisting of teaching and support personnel employed by the Atlantic City Board of Education ("Board"); and

WHEREAS, the Board is a body corporate and politic of the State of New Jersey charged with the administration and supervision of the school district of the City of Atlantic City, Atlantic County, is a "public employer" within the meaning of the Act, and is the employer of all employees represented by the Association ; and

WHEREAS, on January 5, 2006, the Association filed a petition of appeal with the Commissioner of Education, OAL Docket No. EDUOT 00454-2006S, Agency Ref. No.: 7-1/06, alleging that the Board had failed to maintain the proper student-teacher ratio at the Atlantic City Alternative School (also known as the Viking Academy) as required by *N.J.A.C.* 6A:16-9.2(a)(1); and

WHEREAS, on January 26, 2006, the Board filed an answer to the Association's petition of appeal denying the allegations contained therein; and

WHEREAS, the Board and the Association agreed to amicably adjust and resolve this dispute, and to put an end to this litigation; and

WHEREAS, on August 29, 2006, the Board, in furtherance of the parties' settlement, passed Resolution No. 06 8B 6 to the following effect:

> **Resolution No. 06 8B 6:** On motion made by Mrs. Salway and seconded by Ms. Jones, the Atlantic City Board of Education voted unanimously to approve the following:
>
> > **Whereas**, a Petition of Appeal was filed on or about January 4, 2006 in the matter of Atlantic City Education Association vs. Atlantic City Board of Education, Docket No. 7-1/06; and
> >
> > **Whereas**, all parties have agreed to settle this matter in an amicable fashion;
>
> **Now Therefore Be It Resolved**, that the Atlantic City Board of Education agrees to maintain a maximum student - teacher ratio of 12:1 for all classes at the Atlantic City Alternative High School (also known as the Viking Academy) pursuant to *N.J.A.C.* 6A16-9.2(a)(1) effective immediately; and

WHEREAS, in furtherance of the parties' settlement, the Board promulgated teachers' schedules which meet the maximum 12:1 student - teacher ratio; and

WHEREAS, the Board has maintained the 12:1 ratio at its Alternative High School since passing its Resolution; and

WHEREAS, the Board and the Association desire to enter into a settlement for the purpose of resolving and ending the present litigation, pursuant to *N.J.A.C.* 1:1-19.1;

NOW, THEREFORE, on this _____ day of January, 2007, the Atlantic City Education Association and the Atlantic City Board of Education agree that:

1. A maximum student - teacher ratio of 12:1 will be maintained for all classes at the Atlantic City Alternative High School (also known as the Viking Academy) pursuant to *N.J.A.C.* 6A16-9.2(a)(1); and

2. This Settlement Agreement shall be presented to the Honorable Stephanie M. Wauters, ALJ, for her review and approval in the form of an initial decision, pursuant to *N.J.A.C.* 1:1-19.1.

Respectfully submitted,

SELIKOFF & COHEN, P.A.
Counsel for Petitioner,
Atlantic City Education Association

BY: Steven R. Cohen
STEVEN R. COHEN

Dated: Jan. 30, 2007

Tuohy & Tuohy, P.C.
Counsel for Respondent,
Atlantic City Board of Education

BY: Dennis M. Tuohy
DENNIS M. TUOHY

Dated: February 1, 2007

118-07

OAL DKT. NO. EDU 1035-06
AGENCY DKT. NO. 255-9/05

DR. ROBERT MORGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille Eday

COMMISSIONER OF EDUCATION

Date of Decision: 4/03/07

Date of Mailing: 4/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01035-06
AGENCY DKT. NO. 255-9/05

DR. ROBERT MORGAN,
Petitioner,
v.
CITY OF EAST ORANGE BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., for petitioner
Marc H. Zitomer, Esq., Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys)

Record Closed: March 6, 2007 Decided: March 7 , 2007

BEFORE **DIANA C. SUKOVICH,** ALJ:

On September 27, 2005, petitioner, a Principal employed by respondent, filed a petition with the State Department of Education (DOE) contesting action by respondent withholding an increment for the 2005-20006 school year. Subsequent to an extension, respondent filed an answer on November 9, 2005. The DOE transmitted the matter to the Office of Administrative Law on January 3, 2006 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

Scheduled hearing dates were adjourned at the requests of the parties for various reasons, the matter was reassigned to this judge, during the proceedings, and telephone and settlement conferences were conducted throughout the proceedings. The parties ultimately reached a resolution of the matter. An executed Stipulation of Settlement and Release (Stipulation) was initially filed on January 31, 2007. Subsequent to communications in that respect, a certified copy of a Resolution issued by respondent approving the Stipulaiton was filed on on Februry 7, 2007; and a newly executed Stipulation, on March 6, 2007, on which date the record was closed. Attached herewith are copies of the latter two documents.

Having reviewed the terms of the Stiuplation, I FIND that the parties voluntarily have agreed to the terms and conditions of the settlement, as evidenced by the signatures contained thereon, and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the Stipulation and that these proceedings be and are hereby **CONCLUDED**.

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

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

March 7, 2007
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3-12-07
DATE

UPS
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 12 2007
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tbj

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for East Orange
Board of Education

DR. ROBERT MORGAN,

Petitioner,

vs.

EAST ORANGE BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY REF. NO: 255-9/05
OAL DOCKET NO. EDUOA 01095-2006N

ADMINISTRATIVE ACTION

STIPULATION OF SETTLEMENT AND RELEASE

RECEIVED
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STATE OF N.J.
OFFICE OF ADMIN. LAW

WHEREAS, the East Orange Board of Education ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the East Orange School District; and

WHEREAS, Dr. Robert Morgan currently is employed by the Board as Principal on Special Assignment; and

WHEREAS, on or about June 28, 2005, the Board withheld Dr. Morgan's employment and adjustment increment for the 2005-06 school year; and

WHEREAS, on or about September 26, 2005, Dr. Morgan filed a Petition of Appeal with the Commissioner of Education challenging the increment withholding; and

WHEREAS, on or about November 7, 2005, an Answer and Affirmative Defenses was filed on behalf of the Board; and

WHEREAS, on or about November 10, 2005, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Diana C. Sukovich; and

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

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. **Increment to be Restored**

On or about June 28, 2005, the Board acted to withhold Dr. Morgan's employment and adjustment increment for the 2005-06 school year. Commencing July 1, 2007, Dr. Morgan will be placed on the appropriate step of the salary guide as if the aforesaid increment withholding had not taken place so long as Dr. Morgan receives satisfactory evaluations during 2005-06 and 2006-07 school years and no further complaints by students, staff or parents are substantiated against him.

2. **Release**

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

2. Withdrawal of Litigation

Upon approval of this agreement by the Board, Dr. Morgan agrees to withdraw with prejudice the above captioned litigation.

3. Board Approval

The Board President is authorized to execute this Agreement on behalf of the Board of Education.

4. Assent to Terms

Respondent hereby acknowledges that he entered into this agreement with a full understanding of his rights and that he was fully informed of the implications of this agreement by his counsel. Respondent also enters into without duress of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Stephen J. Edelstein, Esq., 10 James Street, Florham Park, New Jersey 07932. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will not be entitled the entire consideration described herein.

5. Entire Agreement

This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.

6. Severablility

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

7. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Robert B. Morgan
DR. ROBERT MORGAN

Date: 2/26/07

WITNESS:

/s/

Date: 2/26/07

FOR THE EAST ORANGE BOARD OF EDUCATION:

MARC H. ZITOMER, ESQ., BOARD COUNSEL

Date: 2/13/07

ATTEST:

Virginia D'Pete

Date: 2/13/07

VIRGINIA D'PETE
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 10/28/2011

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Monday, January 8, 2007 at 6:08 p.m.

The following members of the Board were present:

Ms. Theresa Combs, Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mr. Arthur Wright, and Mrs. Bibi Stewart Garvin

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mr. Reginald Davis, and adopted by the Board of Education:

RESOLUTION

RESOLVED, that the Board hereby approves the Stipulation of Settlement and Release in the matter captioned Dr. Robert Morgan vs. East Orange Board of Education bearing Agency Reference #255-9/05 and OAL Docket #EDUOA 010135-2006N, in accordance with the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED, that a copy of the Agreement shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSENT: 2

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Mark Kramer, Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Monday, January 8, 2007 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 5th day of February 2007.

Mark Kramer

Mark Kramer, CPA, Board Secretary

115-07

M.P. and D.P. on behalf of minor child, N.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's residency determination that their nephew, N.P., was not eligible for a free education in the Morris Hills Regional School District. N.P. has resided with his aunt and uncle since the fifth grade. His parents, however, reside in India, where his father is in business.

The ALJ found that N.P.'s parents do not have a permanent home in the district, and neither D.P. nor M.P. is the legal guardian of N.P. Therefore, this situation does not meet the eligibility criteria set forth in *N.J.A.C.* 6A:22-3.1; nor does it satisfy the requirements of *N.J.A.C.* 6A:22-3.2(a)1.i, as the petitioners have not claimed or established any family or economic hardship and have not set forth competent evidence that N.P. is residing with them for any reason other than receiving a free public education. The ALJ concluded that N.P. is ineligible to attend respondent's schools, and that respondent is entitled to reimbursement for the cost of tuition from September 14, 2006 through the date of issuance of the final decision, at the rate of $78.23 per day, together with post-judgment interest pursuant to *N.J.A.C.* 6A:3-1.17.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusions set forth by the ALJ. The Initial Decision of the OAL is adopted as the final decision in this matter, and M.P. and D.P. are directed to reimburse the Board for tuition as set forth therein. The Commissioner noted that a request for post-judgment interest is premature, as the timeline for the granting of such begins subsequent to the issuance of this decision.

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

April 2, 2007

OAL DKT. NO. EDU 10975-06
AGENCY DKT. NO. 325-9/06

M.P. and D.P. on behalf of minor child, N.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were received from the parties.

For the reasons expressed therein, the Commissioner adopts the Initial Decision as the Final Decision. The Commissioner agrees that N.P. is ineligible to receive a free public education in respondent's district, and that respondent is due from petitioners a tuition reimbursement for the days that N.P. has attended school in its district - *i.e.,* from September 14, 2006, through the date of the issuance of this decision - at the rate set forth in the Initial Decision, $78.23. Any request for post-judgment interest is premature, as the 60-day timeline relative to the granting of this interest does not even begin to run until the Commissioner renders her decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)2).

IT IS SO ORDERED.[1]

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/02/07
Date of Mailing: 4/02/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10975-06
AGENCY DKT. NO. 325-9/06

M.P AND D.P., ON BEHALF OF MINOR CHILD, N.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

M.P. and **D.P.,** pro se

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

Record Closed: February 14, 2007 Decided: February 20, 2007

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

STATEMENT OF THE CASE

N.P., who resides with his aunt and uncle M.P. and D.P. (petitioners), contends that he is entitled to attend school within the Morris Hills Regional School District (District) because M.P. and D.P. are domiciled in the District and are his legal guardians. The school residency law in New Jersey, N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1 and 3.2, provides that public schools shall be free for a student who is living

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10975-06
AGENCY DKT. NO. 325-9/06

M.P AND D.P., ON BEHALF OF MINOR CHILD, N.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

M.P. and **D.P.,** pro se

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

Record Closed: February 14, 2007 Decided: February 20, 2007

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

STATEMENT OF THE CASE

N.P., who resides with his aunt and uncle M.P. and D.P. (petitioners), contends that he is entitled to attend school within the Morris Hills Regional School District (District) because M.P. and D.P. are domiciled in the District and are his legal guardians. The school residency law in New Jersey, N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1 and 3.2, provides that public schools shall be free for a student who is living

with a parent or guardian whose permanent home is located within the school district; **or** for a student kept in the home of a person other than the student's parent or legal guardian (1) where that person is domiciled in the district, and (2) where the parent or guardian has sworn that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with other persons solely for the purpose of receiving a free public education. The District denied the request for admission of N.P. because of the failure to satisfy either of these requirements, and petitioners appeal. The issues in petitioners' appeal are whether N.P. has met either eligibility requirement so as to entitle him to admission in the District's high school. I conclude that he has not, and, therefore, the District is entitled to tuition.

PROCEDURAL HISTORY

On September 12, 2006 petitioners filed a pro se residency appeal with the Commissioner of Education ("Commissioner") from the District's September 6, 2006 denial of the request for admission of N.P. Following the filing of the District's Answer and Counterclaim on October 10, 2006, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The OAL filed it for hearing and determination as a contested case on November 8, 2006. I heard the matter on January 30, 2007 and closed the record on February 14 upon the receipt of briefs and after giving petitioners an opportunity to respond to additional information provided by the District after the conclusion of the hearing.

FINDINGS OF FACT

Background

D.P. and M.P. testified as well as Manuel E. Deus, Business Administrator and Board Secretary for the District. The following background facts are undisputed, and I **FIND** them to be **FACTS** of this case:

The District operates two regional high schools for students from four constituent elementary school districts that have their own elementary and middle school programs. One year ago the District began to require residency information from all entering ninth graders regardless of how they were treated in elementary school.

M.P. and D.P. are the uncle and aunt of N.P., who has entered the ninth grade in the District. N.P. has resided with them since the fifth grade in their home in Dover, New Jersey, which is within the District. N.P.'s parents, P.P. and R.P., reside in Navsari, India where the father is in business. Although N.P. was born in the United States, his family moved back to India when N.P. was six-months old, where he resided until the fifth grade.

N.P. began attending the District's high school on September 14, 2006, six days after the start of the school year. The annual tuition rate for 2006-07 is $14,083 or $78.23 per day.

Factual discussion

On June 15, 2006 M.P. and D.P. submitted an "Affidavit of Resident" to the District on behalf of N.P. where they made the following representations: D.P. was identified as N.P.'s "legal guardian;" N.P. is not living with his parents "because parents live in India and he desires to study here, also because of his health condition;" neither parent is capable of caring for or providing support for N.P. and N.P. will be residing with M.P. and D.P. "due to family business they live in India"; N.P. will not be residing with M.P. and D.P. for the sole purpose of receiving a free public education in the District; his parents do not currently pay any of the costs of maintaining him; no one will claim N.P. as a dependent for federal income tax purposes.

On August 26, 2006 N.P.'s parent P.P. submitted an "Affidavit of Parent/Guardian" to the District where he made the following representations on behalf of both parents: D.P. and M.P. are N.P.'s legal guardians; N.P. is not living with his parents "because he desires to study at USA, also his health condition is better in USA"; they are not capable of supporting or providing care for N.P. due to family or economic

hardship, because "his health in India, does not stay healthy"; N.P. lives with his parents "every other year" for "4 to 5 weeks" per year; none of his expenses are paid by any charitable agency. N.P. provided no home or work telephone number as requested on the form. He also failed to answer the questions as to whether N.P. will or will not be residing with D.P. and M.P. for the sole purpose of receiving a free public education in the District and whether the parents would be paying any of the costs of maintaining N.P. while he resides with his aunt and uncle.

Petitioners submitted a document to the District entitled "Declaration For Guardianship" signed by parents R.P. and P.P. in India and notarized by an advocate and notary. In this document, R.P. and P.P. represent that they are the parents of N.P. who lives in Dover, New Jersey. They also represent. "We hereby give full guardianship of our son [N.R.P.] to [S.M.N.P.] and [D.M.P.] who are residing at New Jersey in America. They are ready and willing to accept the guardianship of our son for his further studies." D.P. testified that this document does not confer legal guardianship of N.P. to him and M.P. under Indian law because it was only notarized and never presented to a judge or endorsed by a judge. An Indian judge would have entertained the guardianship application only if D.P. and M.P. and the child had been present, which they were not. D.P. further acknowledged that no guardianship proceeding has occurred in the United States. He also reiterated the answers on the two Affidavits.

As to the issue of N.P.'s health condition mentioned in the Affidavits, D.P. testified that, whereas N.P. suffered from asthma in India from vehicular pollution, he has not encountered this problem in the United States and is not currently under treatment. He presented no medical verification of this condition or of a preclusion from N.P. living in India. To the contrary, N.P.'s elementary school health history and appraisal record of October 8, 2002, taken upon N.P.'s arrival, reflects that there is no disease history for Asthma. In an Athletic Pre-Participation Physical Examination Form signed on November 11, 2006, D.P. answers "no" regarding N.P. to the question, "Have you had or do you currently have ... a chronic or ongoing illness (such as diabetes or asthma)?" These documents are an exception to the hearsay rule in that they constitute

admissions against interest as well as statements of then existing physical condition and statements for the purposes of medical diagnosis or treatment.[1]

D.P. had provided the District with a copy of the NJ FamilyCare Eligibility Card for N.P. reflecting health insurance coverage he had obtained for N.P. through the State of New Jersey. He indicated that N.P. could not be covered under his insurance, because N.P. is not his child, but that he could have covered him if he had had court-ordered guardianship of N.P., which he did not. The card instructs that "You (or your Parent, Legal Guardian, or Representative) must sign this card on the line above Beneficiary's Signature." Deus had contacted a representative of NJ FamilyCare and inquired whether only a parent or legal guardian could procure such insurance. He learned that anyone could obtain the coverage so long as premiums were paid. D.P. testified however that the State, rather than he, pays the premiums. D.P.'s testimony is inconsistent with the statement on the parents' affidavit that none of N.P.'s expenses are paid by any charitable agency. This Eligibility Card is not competent evidence of guardianship. The hearsay statement of the NJ FamilyCare employee corroborates the card itself, which allows a "representative" in addition to a "parent" or "guardian" to procure it. Moreover, D.P.'s own testimony reveals that he had to obtain this type of health coverage for N.P. because he lacked the proper guardian status for eligibility under his own insurance.

Based upon a review of the totality of the evidence, and having had the opportunity to assess the demeanor and credibility of the witnesses, I make the following additional **FINDINGS** of **FACT**:

[1] The District presented these documents after the conclusion of the hearing but before the record closed. Petitioner declined to respond to the District's request that I consider these documents, despite being afforded an opportunity to do so. As these documents are relative to the issues in dispute, I have made them part of the record.

The Declaration For Guardianship presented by the parents, by D.P.'s own admission, does not confer legal guardianship on D.P. and M.P. under either Indian or New Jersey Law. D.P. and M.P. accordingly are not the legal guardians of N.P.[2] N.P.'s parents are not incapable of providing care for N.P. due to a family or economic hardship. They claim no such hardships in their Affidavit. Indeed, R.P. is in business in India. There is no competent evidence that N.P. is medically unable to reside in India with his parents. N.P. is living with D.P. and M.P. solely for the purpose of receiving a free public education within the District. This purpose is evident from the parents' own Affidavit For Guardianship which recites that the aunt and uncle are "willing to accept the guardianship of our son for his further studies [emphasis added]." It is also telling that the Declaration For Guardianship is silent as to any medical basis for D.P. and M.P. undertaking the care of N.P.

LEGAL ANALYSIS AND CONCLUSIONS

In New Jersey public schools are free for children so long as they meet certain residency requirements.

N.J.S.A. 18A:38-1 provides eligibility in two alternative ways as follows in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and

[2] Guardianship is conferred upon application to a County surrogate. N.J.S.A. 3B:12-12-23. The application process must be in accordance with New Jersey Court Rule 4:81. Neither D.P. or M.P. nor the parents of N.P. have initiated guardianship proceedings in accordance with New Jersey law or the rules of court, and no Letters of Guardianship meeting the requirements of law have been presented in this proceeding. See N.J.A.C. 6A:22-3.4(a)(3) and (8) requiring the production of court orders.

> support the child gratuitously for a longer time than merely through the school term, ... and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. ... If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. ... If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. ...

For the purpose of applying subsection (a) of the statute, the regulations of the Department of Education provide that a student is domiciled in the school district when he is with a parent or legal guardian whose permanent home is located within the school district. N.J.A.C. 6A:22-3.1. Since N.P.'s parents do not have a permanent home within the district, and, since neither D.P. nor M.P. is the legal guardian of N.P., I **CONCLUDE** that he is not entitled to a free public education in the District under subsection (a).

Subsection (b) of the statute entitles a free education under certain circumstances to a student living with someone domiciled in a district other than a parent or guardian if that other person is supporting the student without remuneration as if the student were his or her own child. N.J.A.C. 6A:22-3.2. However, such eligibility does not exist where the parties fail to validly establish that the parent or guardian is not capable of supporting or providing care for the student due to family or economic hardship, and that the student is not residing with the other person solely for the purpose of receiving a free public education. N.J.A.C. 6A:22-3.2(a)1.i. I **CONCLUDE** that N.P. is not entitled to a free public education from the District under subsection (b)

because there is neither a claim nor proof of a family or economic hardship. To the contrary, the reason stated on the parents' "Declaration of Guardianship" for having N.P. live with D.P. and M.P. was "for his further studies."

As petitioners have not provided any other basis whereby N.P. would be entitled to a free public education in the District, I **CONCLUDE** that N.P. has been, and continues to be, ineligible to attend a District school, since the beginning of the 2006-07 school year. I further **CONCLUDE** therefore that the District is entitled to reimbursement for those days that N.P. has attended the District's school from September 14, 2006 until the Commissioner issues her Final Decision at a rate of $78.23 per day.

ORDER

It is hereby **ORDERED** that the petition is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that the District's counterclaim for tuition is **GRANTED** and that petitioners shall pay to the District tuition for the 2006-07 school year at a rate of $78.23 per school day starting from September 14, 2006, together with post judgment interest pursuant to N.J.A.C. 6A:3-1.17.

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

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

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

February 20, 2007
DATE

JESSE H. STRAUSS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/20/07
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 21 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

For Petitioners:

D.P.

M.P.

For District:

Manuel E. Deus

Exhibits

For Petitioners:

P-1 Affidavit of Parent/Guardian, August 9, 2006

For District:

R-1 Letter with documents, Palestis to Parents/Guardians, December 5, 2005

R-2 Affidavit of Resident, June 15, 2006

R-3 Declaration For Guardianship, September 5, 2002

R-4 New Jersey FamilyCare Eligibility Card

R-5 Affidavit of Parent/Guardian

R-6 Letter, Deus to D.P. and M.P., September 6, 2006

R-7 Letter, Palestis to Parents, December 5, 2005

R-8 Health History and Appraisal for N.P.

R-9 Athletic Pre-Participation Physical Examination Form for N.P.

120-07

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, INC. AND MARCO MORCOS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION (NJSIAA)	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioners appealed the decision of the NJSIAA Controversies Committee – affirmed by the NJSIAA Executive Committee – which found that petitioners had engaged in athletic recruitment in violation of Article V, Section 4D of the NJSIAA bylaws. As penalty for this violation, petitioners' boys' basketball team and its coach were placed on probation, and disqualified from tournament competition, for a period of two years. The Pennsauken Township Board of Education (Pennsauken) intervened in this controversy as the case involved the transfer of three out-of-state affidavit students into LEAP Academy University High School (LEAP) immediately after their registration in Pennsauken schools. Two of the three students went on to become key players on LEAP Academy University Charter School's boys' basketball team; the third was admitted to LEAP, but never attended after inquiries from Pennsauken's athletic director revealed that the student had been declared academically ineligible and was under suspension from his former high school in New York State. Subsequent inquiries on the two other players revealed that both had been declared academically ineligible in their former states. All three students in question had been enrolled in Pennsauken schools based upon alleged guardianship by two Pennsauken residents who had close ties to the LEAP basketball program.

Petitioners aver: that the NJSIAA Executive Committee based their decision upon findings of fact that are not supported by the record; that the Executive Committee's conclusions are erroneous, that the final NJSIAA decision is arbitrary, capricious and unreasonable; that due process was denied them; and that the NJSIAA inappropriately exceeded its jurisdiction and authority by

requiring a charter school to scrutinize the familial relationships of affidavit students and their legal guardians.

The Commissioner upheld the NJSIAA's findings and conclusions and denied petitioners' appeal, noting, *inter alia,* that: respondent's findings of fact are supported in the record; petitioners' were accorded the process that they were due; NJSIAA did not act in an arbitrary, capricious or unreasonable manner; and the Commissioner may not substitute her judgment for that of NJSIAA where due process has been provided, and where there is adequate basis for the decision finally reached. The Commissioner further found that the penalties imposed upon petitioners were appropriate to the violations found by the NJSIAA Controversies Committee and affirmed by the NJSIAA Executive Committee.

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

April 3, 2007

AGENCY DKT. NO. 457-12/06

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, INC. AND MARCO MORCOS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	
INTERVENOR.	:	

For Petitioner, Genova, Burns & Vernoia

For Respondent, Herbert, Van Ness, Cayci & Goodell

For Intervenor, Quinlan, Dunne & McConnell

This matter was opened by way of a petition filed on December 8, 2006. Respondent's answer and statement of items comprising the record were submitted on December 20, 2006. On December 28, 2006, the Pennsauken Board of Education moved to intervene. On January 4, 2007, the record was filed with the Commissioner. After considering all parties' submissions regarding the intervention motion, the Commissioner granted same on January 12, 2007, and set a schedule for the remaining briefs. All papers allowed by the briefing

schedule were filed as of February 1, 2007.[1] Subsequently, on February 15, 2007, petitioners moved for emergent relief. That motion was denied on February 26, 2007.

BACKGROUND

Petitioner LEAP Academy University Charter School (LEAP) obtained its charter and opened a grammar school in 1997. It expanded in 2004, adding grades nine through twelve. The purpose of the LEAP Academy is set forth in its charter's mission statement:

> The mission of the LEAP Academy University Charter School is to enhance opportunities for the children and families of Camden through the collaborative design, implementation, and integration of education, health and human services programs and through community development.
> (LEAP Academy Charter, page 5, emphasis added)

As counsel for petitioners stated during the hearing before the New Jersey State Interscholastic Athletic Association (NJSIAA) Controversies Committee (the Hearing), the funding for LEAP is provided by the district(s) of residence of its students. Pursuant to *N.J.S.A.* 18A:36A-12, these districts pay to the charter school – for the students who reside in their districts but attend LEAP – 90 % of the program budget per pupil for the specific grade level in the district or 90 % of the maximum T&E amount, whichever is lower.

It is undisputed that in 2004 – the year that LEAP added a high school – it launched a boys' basketball program. A review of exhibits in the record reveals that in the Autumn of the following year – i.e., on October 31, 2005 – an eleventh grader from Maryland, C.G., enrolled in the Pennsauken school district based upon the alleged guardianship of Pennsauken resident Tamara Hidalgo, the mother of a LEAP basketball player. No evidence of any prior close ties between Hidalgo and C.G. has been offered by petitioner. Subsequent

[1] A sur-reply brief filed by petitioners on January 16, 2007 was not considered, as there is no provision in the NJSIAA regulations allowing same.

inquiries by Pennsauken's athletic director, William Wright, established that before C.G. arrived, he had become academically ineligible to compete under Maryland's eligibility rules. One day after enrolling in Pennsauken, C.G. transferred to LEAP. He was accepted despite the fact that he held slot #20 on the waiting list.

About three weeks after C.G. appeared in Pennsauken, another out-of-state student, L.J., registered in Pennsauken. L.J., a twelfth grader from Georgia, was enrolled based upon the alleged guardianship of Pennsauken resident Robert Davis, an individual who consistently attended LEAP team practices and sat on the bench with the LEAP coach at games. Petitioner presented no evidence that there was any prior significant connection between L.J. and Davis. Wright eventually learned that two days before L.J. arrived in Pennsauken, he had been declared ineligible to compete in Georgia. L.J. transferred to LEAP on the same day that he registered in Pennsauken. He was accepted despite the fact that he held slot #9 on the LEAP waiting list.

One month later – on the afternoon of January 25, 2006 – Pennsauken's football coach, Reginald Lawrence, saw the LEAP basketball coach, petitioner Marco Morcos, arrive at the Pennsauken High School by car. Another car arrived shortly thereafter, out of which a tall young male and a woman emerged, and joined Morcos in his car. The woman subsequently left the car and entered the school; Morcos drove away with the young male.

Lawrence related what he saw to the Pennsauken basketball coach and – subsequently – to Wright, the athletic director. Upon checking with the guidance office, Wright learned that D.C., a male student from Rochester, New York, had been registered in Pennsauken by his mother on the day in question, based upon the alleged guardianship of Robert Davis – the same person purported to be L.J.'s guardian. Petitioners have presented no evidence of prior

connection between D.C. and Davis. D.C. transferred out of Pennsauken High School the next day and his application was accepted by LEAP on February 3, 2006.

When Wright called the athletic director of the school D.C. had attended in Rochester, he discovered not only that D.C. had been declared academically ineligible to compete in New York, but that he had also been suspended from school. Wright then sent a letter to the NJSIAA outlining the information about D.C. On February 10, 2006, Robert W. Baly, Assistant Director of the NJSIAA, wrote to LEAP's chief school administrator, Stephanie Branch, Ed.D., advising that there may have been recruitment violations in connection with the enrollment of D.C. at LEAP. Correspondence in the record indicates that within five days of Baly's letter, D.C. backed out of his registration at LEAP and allegedly returned to Rochester.

The LEAP basketball team did very well in the season during which the above referenced students joined it. The record contains articles in the Courier Post that attributed the team's victories to the performances of L.J. and C.G., the youths from Maryland and Georgia. Further, examination of the 2005-2006 LEAP basketball team roster eventually provided to the NJSIAA by the charter school revealed that of 23 basketball players, less than half resided in Camden, the district which LEAP is intended to serve. This is in contrast to LEAP's general student body, eighty-percent of whom reside in Camden.

Although asked to, LEAP did not provide information about any general student body members who had transferred to LEAP from out-of-state. The rationale provided by LEAP was that any out-of-state student would be required to register in a New Jersey district before applying to LEAP. The Commissioner notes, however, that LEAP would have been able to spot out-of-state students by checking the information in their files pertaining to the last school that a

student had actually attended and the institution(s) that would have had to have been contacted to obtain their transcripts.

As referenced above, by way of a letter dated February 10, 2006, LEAP was put on notice by Baly that it may have violated Article V, Section 4D of the NJSIAA bylaws,[2] which addresses athletic recruitment. That provision states:

> The granting of "athletic scholarships," free tuition, or other assistance of monetary value at any level is forbidden when there is evidence that such grant was offered to induce a student to attend a school for athletic reasons.
>
> (1) The total value and dignity of the individual should not only guarantee to all an equal opportunity to participate in athletics, but should also preclude any excessive emphasis on the importance of athletics.
>
> (2) The proselytizing and recruiting of grammar school students for athletic reasons is strictly forbidden.
>
> (3) Such proselytizing and/or recruiting shall be understood as attempting to induce a student to attend a particular school for athletic reasons by means of:
>
> a. Mail, in the form of letters and brochures, news media, comparing high schools and contrived to point out the assets of the sender, and sending district;
>
> b. Proselytizing interviews, initiated by school personnel or associates, and often further aggravated by the offering of an "athletic scholarship" either from the school directly or indirectly through some affiliated body or individual;
>
> c. Recruitment by Student-Athletes to attend a school for athletic reasons, with the knowledge of that school's administration.

The February 10th letter from Baly also asked LEAP to provide the following information by February 24, 2006:

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2 For purposes of this decision, all references to the NJSIAA Handbook will refer to the 2005-2006 Handbook, unless otherwise indicated.

> [A] list of all members of your varsity, junior varsity and freshman basketball teams and an explanation as to why these students came to LEAP Academy, from what school they came, how long they were at the sending district, and how long they have been at LEAP Academy. We also want to know your admissions procedures and whether the admittance of these students violated your "lottery system."

Finally, the letter advised that a hearing by the "Controversies and Disputes Committee" (the Committee) might be required.

On March 17, 2006, the NJSIAA sent notice to LEAP that a hearing before the Committee would take place on March 31, 2006. As of March 21, 2006, LEAP still had not provided the information that NJSIAA had requested on February 10. Eventually LEAP obtained legal representation and the March 31 hearing date was adjourned to allow LEAP's counsel time to review the matter. The hearing was held on May 16, 2006.

At the hearing, the Committee noted with disappointment that Branch – who was LEAP's chief school administrator during the relevant period of time – did not appear. LEAP's counsel stated that Branch's absence was due to her employment status, which was "in question." In Branch's place, LEAP produced Wanda Garcia, a Rutgers employee who served as a liaison between Rutgers and the Chairperson of the LEAP Board of Trustees.

Garcia described the priority system for admitting students into LEAP. In accordance with the LEAP charter, students who are already attending LEAP have first preference, their siblings have second preference, Camden residents on the waiting list are considered next, and students on the non-Camden resident waiting list are considered last. The Committee found Garcia's testimony about the actual application of the admissions process for the 2005-2006 school year to be contradictory. For example, at different points in her testimony she both testified that there was no waiting list for eleventh and twelfth graders, and

that there were waiting lists for all the grades. The Commissioner further notes that exhibits in the record indicate that there were waiting lists for all grades at the LEAP high school.

In describing LEAP admissions in general, Garcia testified:

> We are public schools. So, we got [sic] to take in anyone that [sic] comes in. Once they get into the school, we check their records. If there's something that doesn't seem, you know, right, then [sic] we go back to the sending district and send that student back. (NJSIAA Controversies Committee Hearing Transcript, p. 103[3])

This testimony is in contrast to the record, which lacks evidence that LEAP examined the basketball players' backgrounds with any degree of care.

Finally, Garcia testified that D.C. was never admitted to LEAP. The Committee found, to the contrary, that D.C. was admitted, but declined to enroll.

Petitioner Morcos also testified before the Committee on May 16, 2006. He contended that he was unaware of the three out-of-state players' ineligibility to compete because he was not allowed to check the transcripts of students transferring from different schools. The Committee found this assertion at odds with the NJSIAA procedures for permitting transfer students to compete.

Pages 73-75 of the NJSIAA handbook (the Handbook) discuss the NJSIAA's transfer rules, and the transfer waiver form. That form (an example of which is set forth on page 152 of the Handbook), must be completed by the administrators (including athletic directors) of the "previous" and "present" schools of transferring students. The form requires parents to agree to the submission to the NJSIAA of their child's transcripts and other pertinent school records.

Morcos testified that he filled out this waiver form for his transferring athletes, thereby certifying that he was satisfied that they had not been recruited and had not transferred

[3] The transcript of the NJSIAA Controversies Committee Meeting held on May 16, 2006 will be cited using the format (T page number).

for athletic advantage. Thus, Morcos' claim of ignorance of the students' backgrounds suggests that he either failed to review records which were supposed to be available, or that he knowingly signed forms with false representations.

When asked about his meeting with D.C. and D.C.'s mother at the Pennsauken High School, Morcos acknowledged taking D.C. to lunch while the mother registered the youth. The Committee found this to be highly suggestive of a cooperative effort by Morcos and Davis, the alleged "guardian" of D.C., to "have D.C. enrolled at LEAP Academy as a freshman basketball player, by using Pennsauken High School as a New Jersey 'sending district'." (Committee Decision, p.11) It further concluded that Morcos knew that Davis' professed "guardianship" of two basketball players was not an act of altruism, but rather a means of creating a conduit for moving outstanding out-of-state athletes through Pennsauken and into LEAP's basketball team.

Finally, the Committee found Morcos' credibility to be poor. They found, for example, that he was involved in the application for a Katrina Victim waiver for L.J. (ie: waiver of the waiting period for out-of-state varsity players), even though L.J. had not been living in an area affected by Katrina. They also found, as mentioned above, that he was aware of L.J.'s and C.G.'s ineligibility in their respective states of origin when he let them play.

Before issuing its decision, the Committee asked LEAP for further information, including D.C.'s application documents, and an itemization of the districts of residence of all LEAP students.

The Committee's decision was issued on July 21, 2006. In addition to the facts articulated above, the Committee made the following summative factual and legal findings, respectively:

> The Committee finds that the ratio of basketball players from outside the City of Camden, combined with the action of Marco Morcos on January 27, 2006, and the use of putative guardianships by individuals active in the LEAP basketball program, clearly evidenced a conscience [sic] attempt to gain an improper athletic advantage through impermissible recruitment efforts, in violation of NJSIAA Bylaws and the Interpretive Guidelines concerning athletic eligibility.

and

> The fact that LEAP Academy is a charter school does not absolve that school's administration of its responsibility to verify the eligibility of transferring students. Yet it turned a blind eye toward the questionable use of affidavits to establish residence in Pennsauken High School [sic] for three out-of-state basketball prospects, all of whom were ineligible at their former high schools. (Committee Decision, p. 12)

Based upon the foregoing facts and legal findings, the Committee arrived at six conclusions.

1. When it came to the enrollment of male basketball players, LEAP ignored its responsibility – set forth in its charter and by statute – to give preference to Camden students.
2. Talented male basketball players were granted admission to LEAP because of their athletic ability, rather than their residence or their place on a waiting list, in contravention of *N.J.S.A.* 18A:36A-7.
3. By failing, at the time of admission, to determine the eligibility of three talented basketball players transferring to LEAP from three other states, the LEAP administration failed in its responsibilities to the NJSIAA and other member schools to compete fairly in interscholastic competition.
4. The participation of two of the three out-of-state athletes in the LEAP basketball season "was certainly a contributing factor in that school's basketball team winning the South

Jersey Group I Basketball Championship and qualifying for the Group I Statewide Championship." (Committee Decision, p. 12.)

5. LEAP's supervision of the eligibility of the members of its boys' basketball program was virtually non-existent, in contravention of its obligations to NJSIAA to assure fair competition.
6. The manner in which out-of-district basketball players have been enrolled in LEAP has not only undermined fair competition but has imposed substantial costs upon sending districts who have little, if anything, to do with the student-athletes.

Based upon its findings and conclusions that petitioner Morcos had engaged in athletic recruitment, and failed to "supervise [LEAP's] athletic program to assure adherence to principles of fair athletic eligibility" (Committee Decision, p.13), the Committee recommended the following penalties to the NJSIAA Executive Committee:

- A two-year period of probation for the boys' basketball program, beginning with the 2006-2007 school year, and the submission by the LEAP "Superintendent" of a Corrective Action Plan outlining how compliance with NJSIAA eligibility standards will be assured in the future, and providing for supervision of both the boys' basketball program and its coach.

- Disqualification of the LEAP boys' basketball program from the 2007 and 2008 tournaments.

- A two-year period of probation for petitioner Morcos, coinciding with the probation period for the boys' basketball program, during which time he would be expected to attend appropriate workshops to assure his compliance with the standards which athletic directors and coaches must observe.

Petitioners appealed the Committee's decision to the NJSIAA Executive Committee (the Executive Committee), which heard arguments from the parties on September 13, 2006, and voted – on the same date – to affirm. On December 8, 2006, petitioners filed the present appeal to the Commissioner.

POSITIONS OF THE PARTIES AND COMMISSIONER'S DETERMINATIONS

In the brief supporting their appeal, petitioners make the following five arguments for reversal of the decision below:

I. The NJSIAA Controversies Committee's findings of fact, upon which the NJSIAA Executive Committee relied, are not supported by the record;

II. The NJSIAA Controversies Committee's conclusions, which were adopted by the NJSIAA Executive Committee, are not supported by the record;

III. The NJSIAA Executive Committee's adoption of the Controversies Committee's decision was arbitrary, capricious and/or unreasonable;

IV. Petitioners were denied due process; and

V. The NJSIAA inappropriately exceeded its jurisdiction and authority by requiring a charter school to scrutinize the familial relationships of affidavit students and their legal guardians.

Argument I

Petitioners contend that ten findings of fact in the Controversies Committee's decision were erroneous.

1. Petitioners aver that nothing in the record supports the Committee's finding No. 5 that LEAP did not apply the four-tiered enrollment preference system to the basketball

players – particularly those who did not reside in Camden. They argue that the Commissioner should rely on Garcia's testimony that she felt that no mistakes had been made. However, as respondents point out, the Committee found Garcia's testimony to be contradictory, and provided cites to the record to support that finding. This also justified its finding that Garcia was not credible, at least on that point, and the Commissioner may not disturb that credibility finding. *See, e.g., D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004)

In addition, as set forth above, the record includes documents and testimony which show that the basketball players who are the subject of this controversy – none of whom were Camden residents – were accepted to LEAP right away, notwithstanding that they were numbers 9, 20 and 25 on the waiting lists for their respective grades. Further, documents provided by petitioners themselves showed that over half of the LEAP basketball team members were not Camden residents. Considering these facts as a whole, the Commissioner cannot agree that the Committee's finding No. 5 was unsupported.

2. Petitioners challenge the Committee's finding No. 7, that they failed to carry out their responsibility to carefully review the eligibility – both academic and athletic – of transferring basketball players. Petitioners maintain that the finding relates to ineligibility, an issue that was not included in the NJSIAA's notice of possible violations, and is therefore not germane to the instant controversy. Intervenor Board of Education of the Township of Pennsauken ("Intervenor" or "Pennsauken") suggests that the petitioners' claimed ignorance of the eligibility of the out-of-state students is consistent

with petitioners' design to ensure that the recruited youths would be able to play for LEAP in the 2005-2006 basketball season.

The record shows that on the day D.C.'s mother registered him at Pennsauken High School, petitioner Morcos met with D.C. and his mother and helped them fill out the necessary paperwork. This was not only highly suggestive of a pre-conceived plan to move D.C. to LEAP, but also strongly implied that Morcos knew D.C.'s city and high school of origin. He therefore could have, but allegedly did not, contact same to check on D.C.'s eligibility. In light of his duty to assure the eligibility of transferring affidavit students who are varsity athletes, it would not be arbitrary or unreasonable for the NJSIAA to view Morcos' failure to check with D.C.'s school in Rochester (which school is also supposed to sign the transfer waiver form mentioned above) as a deliberate attempt to protect his recruitment efforts. In fact, given the evidence suggesting Morcos' prior knowledge of D.C., the Commissioner would be hard-pressed to reject as arbitrary or unreasonable the inference that Morcos knew of D.C.'s ineligibility and suspension.

3. Petitioners contend that, contrary to NJSIAA's finding No. 9, Davis was not "an active member of the LEAP basketball coaching contingent." They base this position on Morcos' testimony that Davis was nothing more to the LEAP team than a parent. Respondents point out that there was testimony at the hearing by both Pennsauken's athletic director, William Wright, and Pennsauken's football coach, Reginald Lawrence, that Davis did assist with the coaching of the LEAP team.

   The Commissioner notes that Wright testified that he had known Davis for years as a member of the Pennsauken Youth Athletic Association (T58), and that several months before the hearing Davis had personally told Wright that he was no longer at

Rutgers/Camden – where he had been the assistant coach – but was now an assistant coach at LEAP. (T81) Lawrence testified that his staff and LEAP's staff "hang out" in the same places, and that he had personally observed Davis on the sidelines at LEAP basketball games. (T82) Morcos himself acknowledged that Davis "gives up his time every season, football, baseball, basketball" (T165), and that Davis had warmed-up LEAP players at games and sat on the bench with Morcos. (T168-T169) Petitioners did not present Davis at the hearing to rebut the testimony of Wright and Lawrence.

The Committee is entitled to assign more credibility to the testimony of Wright and Lawrence than to the testimony of Morcos, and the record contains nothing that would allow the Commissioner to reject that credibility determination as capricious. Moreover, the Commissioner finds that bickering over the correct characterization of the relationship between Davis and the LEAP team is unhelpful. What is significant is the fact that Davis indisputably did support the LEAP team, did work in concert with Morcos on the transfer of D.C. from Rochester to LEAP through Pennsauken, and did serve as a guardian to two LEAP basketball-playing, out-of-state transfer students with whom he apparently had no prior ties.

4. The Committee's finding No. 10 – *i.e.,* that Davis and Morcos acted in concert to have D.C. enrolled at Pennsauken and transferred to LEAP as a freshman basketball player – is challenged by petitioners. They argue that since it is Pennsauken's role to make the determination as to whether a student applicant's residency is valid, and the Pennsauken guidance office approved the residency of D.C., Davis and Morcos cannot be assigned responsibility for the fact that Pennsauken became the sending district for a LEAP out-of-state basketball-playing student.

Petitioners do not deny that Morcos worked in concert with Davis by helping D.C. and his mother fill out registration papers for Pennsauken High School, including a form agreeing to make "uncle" Davis a guardian of the six-foot five-inch basketball player. There is no evidence that Morcos assists other students in this manner. Nor did petitioners present any evidence to rebut the strong inference that no familial or significant relationship existed between D.C. and Davis prior to D.C.'s appearance in Pennsauken, and that Davis' "guardianships" of D.C. and L.J. were meant to facilitate the recruitment of athletes.

Further, in the record is a written document submitted to Pennsauken from D.C.'s mother stating that she was giving custody of her son to "my uncle Mr. Davis" for "financial reasons." Before any responsibility is assigned to Pennsauken for approving D.C.'s residency, petitioners should be able to show that the scenario presented to Pennsauken – *i.e.,* that Davis is D.C.'s uncle and that financial hardship brought D.C. from Rochester, N.Y. to Pennsauken, N.J. – was accurate and genuine.

5. Petitioners dispute the NJSIAA's finding No. 13 that D.C. was admitted to LEAP Academy. The Committee made finding No. 13 based upon a letter dated February 16, 2006 from LEAP enrollment coordinator Norma Rosa-Santos to Davis confirming that Davis had – in a telephone conversation of that date – "declined to accept a 9th grade seat for [D.C.] as per the waiting list." The wording of the letter would appear to signify that D.C. was offered admission to LEAP two weeks after he applied. Thus, finding No. 13, which states that D.C. was admitted to LEAP, cannot be characterized as erroneous.

6. Petitioners maintain that the Committee's finding No. 15 is irrelevant to the issue of recruitment which, petitioners assert, is the only issue set forth in the notice of possible violation sent to them by the NJSIAA. The petitioners reason that it would be a violation of due process to rely upon finding No. 15 in the adjudication of the present controversy, because it pertains to the eligibility of L.J. and not to the issue of recruitment.

In finding No. 15, the Committee found that Morcos asked the NJSIAA for a "Katrina waiver" for L.J. A Katrina waiver is a waiver of the 30-day period that varsity athletes must normally wait before they may play in a new school. As the term suggests, this waiver was created for students who were displaced by hurricane Katrina. It is undisputed that the NJSIAA granted the waiver and L.J. immediately began playing basketball for LEAP. It is also undisputed that L.J. had lived in Georgia before arriving in New Jersey, and had not been displaced by Katrina.

Respondent NJSIAA argues that finding No. 15 was not presented as an eligibility determination, but rather as another fact illustrating the lengths to which petitioners were prepared to go to add L.J. to the LEAP basketball team. More specifically, the NJSIAA contends that the "misportrayal of a 'Katrina victim' to gain advantage was part and parcel of Mr. Morcos' disregard of the rules of fair play in his eagerness to establish a basketball powerhouse." Intervenor Pennsauken points out that "acts of recruiting are necessarily almost never acts that come with signed confessions from the Coaches. They are more often findings and conclusions that must be pieced together from the evidence." (Intervenor's Brief, January 22, 2007, p. 9) The Commissioner agrees that the unjustified Katrina waiver request suggests that L.J. was the subject of an affirmative effort to draw

athletes to LEAP. As such, it was a legitimate finding, germane to the subject of this controversy.

7. In its finding No. 16, the NJSIAA referred to the fact that the father of C.G. – an all-state basketball player from Maryland who had been declared ineligible to play in Maryland – named the mother of a LEAP team member as C.G.'s guardian. Petitioners contend that this finding is irrelevant to the NJSIAA' charge that LEAP and Morcos engaged in recruitment violations. They claim – as they did regarding finding No. 15 – that finding No. 16 pertains to the issue of eligibility, which issue was not identified in the notices to them of possible NJSIAA violations. Further, LEAP suggests that C.G. is a child of the Hidalgos, that the Hidalgo's "family composition" is of no concern to LEAP or the NJSIAA, and that in accepting C.G., LEAP was merely fulfilling its duty not to discriminate against families with other than "natural issue" or adopted children.

   Respondent NJSIAA explained that, in the Controversies Committee's view, finding No. 16 was relevant because, aside from athletic recruitment, "there was no plausible explanation given for the transfer of an Allstate basketball player from Maryland to reside in a Pennsauken residence other than the fact that this residence was that of the mother of another player on the basketball team." (Respondent's Reply Brief, p. 26) As respondent pointed out, petitioners did not present Hidalgo, C.G.'s parents or any other witness to explain the reason for the transfer. The Commissioner is also hard pressed to find anything in the record that rebuts the strong inference that the impetus behind C.G.'s appearance in the Hidalgo home was C.G.'s enlistment into the LEAP basketball team.

   In addition, the Commissioner notes that in petitioners' brief certain liberties have been taken with the term "legal guardian." While the respective parents of L.J., C.G. and D.C.

signed school forms or presented notes purporting to give guardianship to Davis and Hidalgo, respectively, those writings did not bestow the status of "legal guardian." That status is defined generally in New Jersey statutes as "the person who exercises continuing control over the person or property, or both, of a child, including any specific right of control over an aspect of the child's upbringing, pursuant to a court order." *See, e.g., N.J.S.A.* 3B:12A-4; *N.J.S.A.* 26:2H-61(b); *N.J.S.A.*26:2H-110; *N.J.S.A.* 44:10-44; *N.J.S.A.* 44:10-57; *N.J.S.A.* 44:10-71. (Emphasis added.) Similarly, in federal statutes such as 42 *U.S.C.A.* 675 (7), the term "legal guardianship" is defined as "a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decisionmaking." (Emphasis added.) In the NJSIAA bylaws themselves, the term "guardian" means a "person who has control over the person and property of a child as established by the order of a court of competent jurisdiction." (Article V, Section 4(K), emphasis added.) In light of the foregoing, the Commissioner is not persuaded that C.G. was nor is the Hidalgo's child. The Commissioner consequently regards petitioners' discussion about avoiding discrimination against families to be a red herring.

8. Petitioners contend that there is no evidence in the record to support the Committee's finding No. 17 that the three out-of-state basketball players were accepted to LEAP without regard to the four-tiered admissions policy that was created to insure that the applications of Camden residents receive preference. They urge the Commissioner to accept Garcia's testimony that LEAP correctly applied its policies to the three out-of-

state students – without mistake. For substantially the same reasons articulated in the Commissioner's discussion of petitioners' challenge to the Controversies Committee's finding No. 5, the Commissioner rejects as meritless petitioner's challenge to the Committee's finding No. 17.

9. Petitioners challenge the Committee's finding No. 18 – *i.e.,* that the high percentage of out-of-district students on the basketball team, combined with putative guardianships by team-related individuals and Morcos' actions on January 25, 2006 – evidenced an intent by petitioners to gain athletic advantage through recruitment. In petitioners' exception to that finding they simply suggest that there may be an alternate explanation for the fact that non-resident basketball players flock to LEAP in much higher proportion than non-basketball playing out-of-district students. Since no "studies" of this phenomenon have been conducted by LEAP or anyone else, petitioners urge the Commissioner to reject finding No.18 as conjecture.

   Petitioners do not refute the facts upon which finding No. 18 is based. Nor do they even discuss two of the three facts which form the basis of the finding. They merely speculate that the disproportionate number of non-Camden residents on the basketball team might be a function of some factor yet to be identified. Such speculation cannot prevail over unrebutted facts. The Commissioner cannot conclude that finding No. 18 is arbitrary or unreasonable.

10. Finally, petitioners challenge the Committee's finding No. 19, that LEAP abdicated its responsibility to verify that its transferring athletes were eligible to play, and turned a blind eye to the glaring fact that three ineligible, out-of-state basketball players arrived

within a span of two months, all by establishing residence with team-related adults in Pennsauken. For the reasons set forth in the discussions of findings No. 7, 10 and 16, the Commissioner rejects petitioners' position.

Argument II

Petitioners maintain that all seven of the Controversies Committee's conclusions were erroneous.

The first and second conclusions both alleged that when it came to talented basketball players, LEAP violated statutory and charter provisions that required enrollment preferences for Camden residents. The documents showing immediate acceptance for the three out-of-state basketball players, together with the high proportion of out-of-district students on the basketball team, support the Committee's conclusion.

The third conclusion was that by failing to check the eligibility of its transferring players, LEAP abdicated its responsibility to the NJSIAA and other member schools to compete fairly. Petitioners ask the Commissioner not to consider Morcos' negligence because the NJSIAA never specifically notified petitioners that they would be charged with violations of eligibility rules. The Commissioner will not compartmentalize the evidence in this case. Morcos' professed ignorance about the out-of-state students' eligibility will not serve as the basis for a determination that petitioners violated NJSIAA rules concerning eligibility. Rather, it will be considered as corroborative of petitioners' zeal to get gifted athletes into its basketball program.

The Committee's fourth conclusion was that the two out-of-state athletes that played on LEAP's basketball team, L.J. and C.G., were contributing factors in the team's

South Jersey Group I Championship. Petitioners challenge the conclusion by asserting that all the team members contributed to its success.

Acknowledgment of the efforts of all the members of a team is appropriate in the stewardship of team morale and the cultivation of good social values. However, for purposes of assessing the significance of the addition of the out-of-state athletes to the LEAP team, the reality is reflected in two newspaper articles that are contained in the record. One article, dated March 8, 2006, named L.J. and C.G. as two of the three players "featured" in a tournament game against Burlington City. L.J. scored 28 of the ninety LEAP points and was responsible for two baskets and two free throws toward the end of the game when the score was close.

Another article, dated March 10, 2006, entitled "J[ ] Lifts LEAP to Final," describes L.J. as the "sensational senior guard," a "driving force" that led LEAP to victory. Petitioner Morcos was quoted as saying that L.J. was the team's "catalyst." C.G. was also named as a "top player." In light of L.J.'s and C.G.'s performances during the tournament, the Commissioner cannot determine that the NJSIAA's conclusion No. 4 is arbitrary or capricious.

The Controversies Committee alleged, in its conclusion No. 5, that LEAP did not monitor the eligibility of its basketball team members and, consequently, breached its duty to assure fair competition. Petitoners suggest that this is irrelevant to the charge of "recruitment" which is the subject of this controversy.

As discussed above, the Commissioner will not compartmentalize the evidence. The facts presented in this matter show, in particular, that the LEAP administration failed to execute its obligation to check its athletes' eligibility before certifying same to the NJSIAA. That was clearly a violation of the NJSIAA Bylaws concerning eligibility and mitigated against

fair competition. However, the evidence as a whole suggests recruitment, *i.e.,* an affirmative pursuit by Morcos and associates of out-of-district talent.

The Controversies Committee reasonably found that a number of measures were taken to facilitate the infusion of such athletes, such as team-related putative guardians and immediate admission to LEAP, notwithstanding waiting list rankings. Morcos testified that he signed the forms that require him to certify to the eligibility of his transferring players, but he also testified that he did not, in fact, check that eligibility. Thus his certifications were misleading and could be reasonably construed as another measure that was taken to facilitate the supplementation of the LEAP basketball team with non-Camden residents.

The Committee's conclusion No. 6 summarized the effect on sending districts of the methods employed by LEAP to add gifted athletes to its basketball team. Petitioners characterize the conclusion as irrelevant to the instant controversy. Respondents contend that the sending districts' tuition payments made on behalf of the out-of-district athletes constitute just the kind of "assistance of monetary value" that, under NJSIAA By-law Article V, Section 4 D may not be "offered to induce a student to attend a school for athletic reasons."

The Commissioner finds that conclusion No. 6 is correct that sending districts that are improperly used as conduits for the recruitment of athletes are unfairly burdened by the costs of tuition for those athletes. However, for the purposes of the instant controversy, that conclusion does not advance respondents' case. Students – including 'affidavit students' – have the right to attend charter schools, for which the districts of residence pay tuition. This "assistance of monetary value" *per se* is not deemed improper under the current school laws. Moreover, by definition, all 'affidavit students' – including, of course, those who attend charter

schools – receive "assistance of monetary value" by virtue of the room, board and other care provided by the affidavit guardian.

It is only when the statutory provisions that allow affidavit students are misused – *e.g.,* as mechanisms to enable athletic recruiting, as opposed to avenues of relief for families experiencing hardship – that the burden on the sending districts to pay tuition becomes unfair. Thus, the sending district's payment of tuition is not an element of proof in the establishment of a recruiting or other violation. Rather, the establishment of a violation is a precondition to a finding that the sending district has been improperly required to pay tuition for the 'affidavit student'.

Moreover, upon review of the record, the Commissioner notes that it is less likely that the three out-of-state athletes – as to whom there was no showing of hardship – were enticed to come to Pennsauken for free tuition and room and board in a stranger's house, and more likely that their motivation to transfer to LEAP was that they had all been declared ineligible to compete in their respective states of origin and expected to be able to play in New Jersey.

In sum, the Commissioner does not regard conclusion No. 6 as directly determinative of whether petitioners violated the NJSIAA bylaws. However, the Commissioner accepts the other factual findings and conclusions set forth in the Committee's decision, finds that they are supported by the record, and affirms respondents' ultimate assessment that petitioners violated the cited rules regarding recruitment.

Consequently, the Commissioner affirms the Committee's conclusion No. 7, which imposes penalties upon petitioners for recruiting and failing to do their part to assure fairness in their competition with other NJSIAA member schools.

Argument III

Petitioners claim that the decision of the Controversies Committee – which was affirmed by the Executive Committee of NJSIAA – was arbitrary and capricious. The grounds for petitioners' claim are as follows.

First, petitioners contend that the Committee's decision was "almost completely devoid of citations to the record and relevant legal authority including NJSIAA rules and bylaws." (Petitioners' Brief, p. 33) Thus, reasoned petitioners, its decision was vague and ambiguous, rendering it arbitrary, capricious and unreasonable.

Second, petitioners aver that the Committee erroneously ignored the legal authority provided by *N.J.S.A.* 18A:38-1 in concluding that there were improprieties related to Davis' and Hidalgo's 'legal guardianships' of the out-of-state basketball players.

Third, petitioners allege that "[w]rongdoing was incorrectly imputed against LEAP Academy based upon Pennsauken's admission of three students into the Pennsauken School District." (*Ibid.*)

Fourth, petitioners assert that the Committee improperly concluded that LEAP had violated its own enrollment procedures.

Respondents do not specifically reply to petitioners' point heading alleging arbitrariness on the part of the Controversies Committee, but rather incorporate in other sections of their briefs positions that counter petitioners' allegations. The Commissioner will refer to respondents' positions as needed.

First it is important to bear in mind that the Commissioner's scope of review in matters involving NJSIAA is appellate in nature. *See N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA,* 92 *N.J.A.R.* 2d (EDU) 182, 183. Thus, the Commissioner may

not overturn an action by NJSIAA absent a finding that NJSIAA acted in a patently arbitrary, capricious or unreasonable manner – nor may she substitute her judgment for that of NJSIAA, even if she would decide differently in a *de novo* hearing – where due process has been provided and where there is adequate basis for the decision finally reached. *B.C. v. Cumberland Regional School District,* 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Dam Jin Koh and Hong Jun Kim v. NJSIAA,* 1987 *S.L.D.* 259. As codified in 2000 to provide notice of this long-held standard to the public and regulated parties:

1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his or her judgment for that of NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.

2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner.
(*N.J.A.C.* 6A:3-7.5(a))

For the reasons set forth in her analysis of petitioners' Argument IV, the Commissioner finds that petitioners were accorded the process that they were due. Consequently, she will only reject the NJSIAA's decision if it is patently arbitrary, capricious and unreasonable.

Turning to petitioners' first contention, the Commissioner agrees that the Controversies Committee's decision did not employ many citations to the record. However, the Commissioner found in the record the factual bases for the Committee's findings. Consequently, the Commissioner will not disturb those findings and cannot characterize them as vague or ambiguous.

In addition, the Commissioner notes that extensive notice was given to petitioners about the rules that would be the subject of the hearing, and the Controversies Committee discussed the relevant NJSIAA bylaws and interpretive comments on pages 9-10 of its decision.

Included in that discussion was Bylaw 4(D)(1), which identifies "excessive emphasis on the importance of athletics" as indicative of recruiting, and Bylaw 4(D)3(c), which states that recruitment includes the attendance of a student-athlete at a school for athletic reasons – with the knowledge of the administration. Given the foregoing, the Commissioner rejects the view that the Committee's decision was invalid for vagueness.[4]

Petitioners' second and third proposed bases for a determination that the Committee's decision was arbitrary and capricious are essentially the same – *i.e.,* that there is no evidence of impropriety related to the purported 'guardianships' of the three out-of-state athletes. The first flaw in petitioner's position is the contention that Davis and Hidalgo were the students' legal guardians. As mentioned above, under New Jersey law and NJSIAA regulations, a court order is required to establish legal guardianship. No proof of any such court orders was presented by petitioners.

The second weakness in petitioners' argument is their statement that Davis and Hidalgo are not "officially" or "formally" associated with LEAP. The Commissioner does not find that this sort of hair-splitting is useful. The individuals purporting to be guardians were clearly invested in the LEAP basketball team, and facilitated the infusion into it of talented athletes, with the knowledge of the LEAP athletic director. Moreover, as set forth above, there was testimony from multiple, first-hand sources that Davis assisted in the coaching of the LEAP team.

Third, the petitioners' explication of *N.J.S.A.* 18A:38-1 does not help them. The evidence in the record created a strong inference, or *prima facie* case, that the underlying reasons

[4] The Commissioner rejects petitioners' argument that the NJSIAA proscriptions against recruitment only apply to primary school students. As mentioned by respondents, other provisions in the bylaws, such as Article V, Section 4K which addresses secondary school transfer students, clearly illustrate that recruiting proscriptions apply to high school student athletes.

for the three athletes' transfers to Pennsauken were not the reasons for which the affidavit-student exception to New Jersey's regular residency rules was created. It was thus encumbent upon petitioners to rebut that strong evidence by offering facts that showed a familial or other longstanding and close relationship between the respective students and Davis and Hidalgo, court orders imposing guardianships upon Davis and Hidalgo, affidavits from the athletes' parents describing genuine financial or other significant family hardship, and/or other forms of evidence to rebut the inference that the guardianships were created to funnel L.J., C.G. and D.C. into the LEAP basketball program.[5] Petitioners failed to do so.

As mentioned above, the remaining reason given for petitioners' assertion that the Controversies Committee's decision was arbitrary and capricious was the Committee's conclusion that LEAP had violated its own enrollment procedures that were intended to give preference to Camden residents. This issue was addressed in the discussion of the Controversies Committee's finding No.5.

As explained in that discussion, the Commissioner will not disturb the Committee's finding that the testimony of petitioners' witness, Garcia, about enrollment procedures was inconsistent and lacked credibility. Further, the Commissioner is satisfied that the Committee's finding about enrollment procedure irregularities is supported by documents and testimony in the record that show that the basketball players who are the subject of this controversy – none of whom were Camden residents – were accepted to LEAP right away, notwithstanding that they were numbers 9, 20 and 25 on the waiting lists for their respective

[5] In the present case it is petitioners and those affiliated with petitioners that are in a superior position to produce the information needed to reveal the nature of the relationships, or lack thereof, between Davis, Hidalgo and the three student athletes. Thus, respondents' presentation of facts adequate to raise a strong inference of recruiting is sufficient to shift the burden of production to petitioners to prove the legitimacy of the guardianships. *See, e.g., Furst v. Einstein Moomjy, Inc.*, 182 *N.J.* 1, 31 (2004) (In shifting the burden of production of evidence to defendants, we acknowledge that the retailer is in a superior position to present proof of the product's market value.)

grades. In addition, the record contains documents provided by petitioners, themselves, showing that over half of the LEAP basketball team members were not Camden residents. Considering these facts as a whole, the Commissioner cannot find that the Committee's conclusion about enrollment irregularities was arbitrary and capricious.

In sum, the Commissioner finds that petitioner's contention that the Controversies Committee's decision was arbitrary and capricious is without merit.

Argument IV

Petitioners maintain that since the NJSIAA identified only one by-law – *i.e.,* Article V, Section 4D, in its numerous notices to LEAP of possible violations, it was an infringement upon petitioners' due process rights to examine, in this proceeding, any other possible violations by petitioners of the NJSIAA rules. More specifically, petitioners suggest that it was improper of the Controversies Committee to consider such facts as the use of Davis and Hidalgo as 'guardians' to establish residency for the out-of-state athletes, and Morcos' failure to check the transferring athletes' eligibility before signing their NJSIAA transfer waiver forms, which forms state that such signature indicates that the transferring student has met all NJSIAA eligibility requirements. These facts, according to petitioners, are not germane to the issue of recruiting.

Petitioners further argue that since the Controversies Committee failed to specifically cite Article V, Section 4D of its by-laws when it concluded that penalties should be imposed upon petitioners, and since the NJSIAA Executive Committee adopted the Controversies Committee's conclusions without offering any clarification, the basis of the penalties cannot be ascertained. Urging that there is no evidence that they committed recruitment violations, and relying on the absence of a specific cite to the recruiting by-law in the

Committee's conclusion No.7 (imposing the penalties), petitioners reason that the penalties must have been imposed because of violations of other by-laws or rules, as to which petitioners received no notice.

Respondent Pennsauken counters that the testimony and documentary evidence in the record describing the guardianships offered to the out-of-state basketball players – and LEAP's certification to the NJSIAA that the players were eligible, when they were, in fact, ineligible in their respective states – was presented to demonstrate a pattern of recruiting, not to expand the scope of the NJSIAA's charges against petitioners. The Commissioner agrees.

The record includes proof that the parents of three outstanding basketball players from three different states – New York, Maryland and Georgia – appeared in Pennsauken within two months of each other and bestowed guardianship of their sons upon two individuals connected to the LEAP basketball program. Those individuals, in turn, immediately transferred the students from Pennsauken High School to LEAP, where two of them immediately joined the basketball team. There was no showing of any prior connection or relationship between the two "guardians" and the out-of-state students or their families. All three athletes had been declared ineligible to play basketball in their states of origin. The two that remained at LEAP were subsequently written-up in New Jersey newspapers as the players that were most responsible for LEAP's tournament wins.

The record also includes Morcos' admission, in his testimony before the Controversies Committee, that he did not check the transferring athletes' eligibility. (Nor is there any evidence that the chief operating officer of LEAP or anyone else at the school did so.) In fact, Morcos took the position, citing no authority, that he was not permitted to review the athletes' academic records. This is contrary to the NJSIAA Transfer Waiver Form that Morcos

was required to provide for each athlete. That form, which Morcos signed for the athletes in question, requires certification that the students meet all the eligibility criteria in Article V of the NJSIAA bylaws.

Petitioners clearly failed in their responsibility to assure that their athletes were eligible to compete. In the Commissioner's view, the significance of this fact for purposes of this controversy is not its suggestion that NJSIAA bylaws other than Article V(4)(D) were violated by petitioners. Rather, the Commissioner finds that, when Morcos' submission of misleading transfer waiver forms is considered along with other facts established above, it helps suggest a deliberate plan to improve the level of petitioners' basketball program by: 1) inviting talented out-of-state athletes who could not compete in their home states to live with adults committed to the LEAP team; 2) transferring the athletes to LEAP immediately after their registration in Pennsauken; and 3) hiding from the NJSIAA the athletes' ineligibility in their states of origin.

There were enough examples of this conduct in a short period of time to suggest that out-of-state athletes were not gathering in Pennsauken and immediately transferring to LEAP by coincidence. Added to this picture was the discrepancy between the out-of-district percentage of the total student body and the out-of-district percentage of the basketball team. Further, Morcos' undisputed assistance with D.C.'s enrollment at Pennsauken implies that he had a role in the advent of the three athletes into LEAP Academy and its basketball team.

These facts, viewed collectively, are supportive of the notion that the reason for L.J.'s. C.G.'s and D.C.'s registration in Pennsauken and immediate transfer to LEAP was athletics, in violation of NJSIAA's bylaw concerning recruitment. Petitioners were given ample notice of the charge, were represented by counsel, and had an opportunity to be heard and the

right to appeal. They received the process they were due, *see, e.g., Doe v. Poritz,* 142 *N.J.* 1, 106(1995), but did not present evidence adequate to rebut the legitimate inferences.

Argument V

Petitioners allege that the penalties that the NJSIAA imposed upon them were sanctions for admitting affidavit students from Pennsauken and receiving tuition payments from Pennsauken. In their brief, p.51, they protest that "LEAP has no control over this legislation [concerning charter school attendance by out-of-district students] or where the guardians of affidavit students reside." Petitioners highlight the fact that it was Intervenor Pennsauken who approved the out-of-state youths as affidavit students, pursuant to *N.J.S.A.* 18A:38-1, and argue that petitioners should not be penalized for what Pennsauken set in motion, simply because LEAP benefited by the students' athletic talents. These arguments are duplicative of those made in petitioners' Argument III.

Respondents rejoin that petitioners confuse the issue of admission to a school with the issue of participation in interscholastic sports. While it was Intervenor Pennsauken who had to approve the enrollment of the out-of-state students into its school district, it was LEAP who was responsible for certifying the eligibility of its athletes. Respondents cite to Article V, Sections 4A and 4B of the NJSIAA bylaws which require member schools to submit annual affidavits, signed by the principals, certifying that all competing students meet all of the NJSIAA eligibility requirements.[6] Clarifying comment # 1 to Bylaw V, Section 4 (NJSIAA Handbook, p.45) explains that this must be done before a student's first participation in an interschool

[6] The required affidavits for LEAP were apparently signed by Morcos instead of the head of the school. Although the individual who served as the head of petitioner LEAP was asked to attend the hearing before the Controversies Committee, she did not.

scrimmage or game, and the record must include an athlete's personal statistics, including credits passed in the previous school year or semester, and prior participation in athletic competition.

The Commissioner notes that at the time Pennsauken accepted the three out-of-state students as affidavit students, it had no way of knowing that the students were exceptional athletes who were ineligible to compete in their home states, and that they planned to join the LEAP basketball team – with the knowledge of the LEAP athletic director. Moreover, affidavits had been provided to Pennsauken by Davis, Hidalgo and the students' parents that alleged familial relationships and/or hardship as reasons for the arrival of the three students into Pennsauken homes. In other words, Pennsauken accepted the students on the basis of far less than full disclosure. The Commissioner must consequently reject petitioners' argument that Pennsauken's acceptance of the students can shield LEAP and Morcos from penalties for recruiting.

Based upon all of the foregoing, the Commissioner determines that petitioners have failed to demonstrate that NJSIAA's decision either was reached in violation of their due process rights or was unsupported by sufficient credible evidence in the record as whole. Nor have they established as arbitrary, capricious or unreasonable NJSIAA's conclusion that petitioners' conduct violated the intent of Article V, Section 4D, especially when viewed in the context of other NJSIAA rules.

Thus, for the reasons articulated, *supra*, the Commissioner upholds the decision of the NJSIAA Executive Committee which, in turn, upheld the NJSIAA Controversies Committee's decision. The Commissioner further finds that the penalties imposed upon petitioners were appropriate to the violations found by the Controversies Committee and

affirmed by the Executive Committee. Accordingly, the Commissioner denies petitioners' appeal.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 4/03/07

Date of Mailing: 4/03/07

[7] This decision, as the Commissioner's final determination, may be appealed to the Superior Court of New Jersey, Appellate Division, pursuant to *N.J.S.A.* 18A:11-3.

124-07

D.H., on behalf of minor child, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged her son's suspension for possession of a firearm on school property, arguing that the penalty was excessive since the gun was a toy. Respondent Board contends that the penalty is warranted since the gun fits the statutory definition of "Firearm".

The ALJ found, *inter alia,* that: the firearm in question is a soft air pistol that shoots pellets, and meets the definition of a firearm as set forth in *N.J.S.A.* 2C:39-1f; G.H. admitted that he had the gun on the school bus and in his locker on school property; there was no violation of procedural due process; and the Board's disciplinary action was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ affirmed the Board's action in suspending G.H., and ordered the petition dismissed.

Upon full and independent review, the Commissioner concurs with the ALJ's determinations articulated in the Initial Decision, and dismisses the petition for the reasons stated therein.

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

OAL DKT. NO. EDU 9015-06
AGENCY DKT. NO. 229-6/06

D.H., on behalf of minor child, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed timely exceptions pursuant to *N.J.A.C.* 1:1-18.4.[1] No reply exceptions were received from the Board.

Petitioner's exceptions recast and reiterate her arguments advanced below. Specifically, she again argues that G.H. was denied procedural due process at the Board's hearing in that 1) the track coach should have been allowed to testify and 2) petitioner was not provided an opportunity to cross examine witnesses. Petitioner, additionally, corrects certain statements made by the Administrative Law Judge (ALJ) in her decision which petitioner contends do not comport to exact testimony at the instant hearing.

[1] Petitioner, who at all times during these proceedings was represented by legal counsel, submitted *pro se* exceptions to the Initial Decision. In that the Commissioner and her staff are, by law, strictly proscribed from considering information or argument outside the record of contested case proceedings – including papers sent directly by a party who is represented by legal counsel – petitioner was advised that her submission could not be taken into account or commented on in any way and this material was, therefore, returned to her. Petitioner subsequently advised the Bureau of Controversies and Disputes (the Bureau) that her representation by legal counsel had ended at the conclusion of the OAL hearing and she, therefore, requested that she be allowed to resubmit her *pro se* exceptions. By letter dated March 20, 2006, the Director of the Bureau advised the parties that, notwithstanding that petitioner was obligated at the time of her original submission to advise that she had elected to proceed *pro se*, in that she now attests that such is the case, her resubmitted exceptions, originally filed on March 6, 2007, would be accepted and considered by the Commissioner in her determination in this matter. Board counsel was afforded 5-days within which to file reply exceptions on behalf of the Board.

Upon a full and independent review, the Commissioner agrees with the conclusion of the ALJ that petitioner has failed to sustain her burden of establishing that the Board's action suspending her son, G.H., – for possession of a firearm on school property – was arbitrary, capricious, or unreasonable. As to petitioner's charges that the Board's hearing in this matter violated G.H.'s procedural due process rights, the Commissioner is in full accord with the ALJ that:

> [t]here is no dispute by the Board of Education in this matter that the right to confront and cross-examine witnesses is preserved in our Constitution. However, the facts and circumstances of this case are such that the student admitted to the possession. Therefore, other students who were on the bus on April 25, 2006 could not add to the admission. And, regardless of whether or not the track coach intervened or should have intervened in this situation, the fact remains that G.H. had a gun on school property which has been legally described as a firearm. Testimony from the track coach could not change the admission made by G.H. Once G.H. confessed that he was in possession of the firearm on school property, there were no questions of fact remaining.
> (Initial Decision at 7)

Accordingly, the recommended decision of the OAL is adopted – for the reasons stated therein – and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/05/07

Date of Mailing: 4/05/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. EDU 09015-06
AGENCY DKT NO. 229-6/06

D. H. O/B/O MINOR CHILD, G. H.,

Appellant,

v.

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

Respondent.

Marvin L. Comick, Esq., for appellant
(Love and Randall Attorneys At Law)

Stephen J. Christiano, Esq., for respondent

Record Closed: November 28, 2006 Decided: February 22, 2007

BEFORE SANDRA ANN ROBINSON, ALJ:

STATEMENT OF THE CASE

Appellant, D.H. (Mrs. H.), the mother of a fifteen-year old high school student, appeals her son's suspension for possession of a firearm on school property. Mrs. H. argues that the penalty was excessive since the gun was a toy. Respondent, West Orange Board of Education (Board of Education) contends that the penalty is warranted

since the gun fits the statutory definition of "Firearm". N.J.S.A.18A:37-8 and N.J.S.A. 2C:39-1 requires a mandatory suspension for possession of firearms on school premises.

PROCEDURAL HISTORY

On August 7, 2006, the Commissioner of Education transmitted this matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. The OAL held hearings which were concluded on November 9, 2006. The exhibits listed in the Appendix were marked into evidence. Post-hearing briefs were due and submitted by November 28, 2006 on which date the record closed.

Good cause having been shown, pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, the time for filing the Initial Decision was extended until February 26, 2007.

ISSUES

Does the toy gun meet the statutory definition of "firearm"?

Was there a violation of procedural due process?

Was the suspension arbitrary, capricious or unreasonable?

BACKGROUND

G.H. was a student and track-team member at West Orange High School on April 25 and 26, 2006. An incident regarding a toy gun started on the school bus as G.H. rode home on April 25th. On April 26th Patrick Galante, a West Orange High School dean, questioned G.H. about the school bus incident from the previous evening. After Dean Galante told G.H. that the tape was on in the bus, G.H. disclosed that he knew about the incident. Galante telephoned Mrs. H. to inform her of the incident. Ms.

H. spoke to her son on the phone and asked him where the toy gun was. G.H. told her the gun was in his locker. Mrs. H instructed her son to go with Dean Galante to retrieve the gun.

When Dean Galante took the gun, he contacted the West Orange Police Department. G.H. was suspended on April 26th, pending the outcome of a disciplinary hearing scheduled for May 8, 2006. On May 1, 2006 West Orange High School mailed Mrs. H. notice for the disciplinary hearing which included a statement of the charges against her son, the period of suspension, a proposed alternative educational placement plan, and statements of persons who witnessed or knew about the incident. The disciplinary hearing was completed on May 8, 2006. The Board determined that its interpretation of the pertinent New Jersey statute required a one-year suspension for possession of a firearm on school grounds. G.H. initially received the one-year suspension, which the superintendent reduced on May 22, 2006, to six months.

SUMMARY OF TESTIMONY

Mrs. H. has been an elementary school principal for ten years. She was a teacher in the Baltimore, Maryland school system and the East Orange, New Jersey school system for another ten years.

On April 25, 2006, Patrick Galante, a school dean, called Mrs. H. at her job. He told her that her son had a gun, which had been observed by the school bus driver on the video tape inside the bus. Mrs. H. told Mr. Galante that she was coming to the school to see the videotape. Mr. Galante said the videotape and the gun were not at the school and had been turned over to the police. Mrs. H.'s husband called Dean Galante and the dean repeated the same story told to Mrs. H.

Mrs. H. contacted the West Orange Police Department regarding the video which she wanted to see. An officer in the West Orange Police Juvenile Department telephoned Mr. and Mrs. H. to inform them that there was never a videotape.

Mrs. H and her husband retained counsel after May 1, 2006, when they learned that the school had brought charges against their son. She confirmed her appearance and that of her husband and son at the May 8, 2006 disciplinary hearing and noted that her son testified freely and admitted to having a toy gun on school property. She said a police officer was at the hearing but made no comment and did not testify; he only showed the toy gun. Mrs. H. said she had been unaware of her son's possession of a toy gun.

Mrs. H. said that on the eleventh day of her son's one-year suspension he was provided with an educational program at an alternative school. Mrs. H. believes that the punishment for her son is harsh and unfair, even though the chief school administrator later reduced the length of the suspension to six months.

Mrs. H. identified a picture of the gun illustrated in a newspaper advertisement as a soft air rifle and pistol. She said a family member in law enforcement advised her that if the toy gun had an orange tip it was considered a toy gun. The newspaper illustration showed an orange tip on the gun.

Mrs. H. also made inquiries of the West Orange Police Department in an attempt to understand when a toy gun is considered a firearm. An officer of the West Orange Police Department gave her a contact name at the Firearms Unit, New Jersey State Division of Firearms. She received a statement from the head of the Firearms Unit. Mrs. H. referred to an article in the Bergen Record newspaper, dated October 19, 2006, wherein the Attorney General of New Jersey and several county prosecutors provided statements regarding their views on firearms and toys. Mrs. H. said that she has had incidents of this type in the school where she is the principal, but in no incident was a toy pistol considered a firearm.

G.H. is the student involved in this case. He is a member of the track team. On some days after classes he and eight other students play with toy guns. G.H. said the

track coach knows about the students playing with the toy guns and suggested that an arena or driving range would be a good place to practice shooting the guns. The coach told the students that it was okay if they had the toy guns, but just don't use them on her.

G.H. said that he was walking to the office with Dean Galante on April 25, 2006, when the dean engaged him in a conversation, asking: "What happened on the bus yesterday, we have you on camera?" G.H. said that, when he heard or knew he was on videotape, he decided to tell the truth. G.H. did not disclose anything to Dean Galante prior to the dean telling him that he had been pictured on the videotape. G.H. purchased the toy gun from one of the track team members. He had it for one week and was unaware of how the pellets are propelled. He did not believe it was real because it was plastic.

FINDINGS OF FACT

Based on the law, the testimony and evidence presented, I **FIND** as follows:

1. G.H's toy gun is a soft air pistol that shoots pellets.
2. G.H. admitted that he had a toy gun on the bus and in his locker on school property.
3. The police incident report was consistent with the testimony presented.
4. G.H. was not denied procedural due process. No evidence was offered to show that testimony from the track coach would have altered the charges against G.H., after he admitted to possession of the toy gun on school property.
5. The Board of Education did not act arbitrarily, capriciously or unreasonably when suspending G.H., because the law requires a suspension from the school's regular education

program for at least one year, when it is determined that the student possessed a firearm on school property.

LEGAL ANAYLSIS

The "Zero Tolerance for Guns Act," N.J.S.A. 18A:37-7 to -19, enacted by the New Jersey State Legislature in 1995, is critical to the resolution of this case. The Act, in pertinent part, states:

> Any pupil who is convicted or adjudicated delinquent for possession of a firearm or a crime while armed with a firearm or found knowingly in possession of a firearm on any school property . . . shall be immediately removed from the school's regular education program pending a hearing before the local board of education to remove the pupil from the regular education program for a period of not less than one calendar year subject to modification on a case-by-case basis by the chief school administrator.

G.H. admits that he had a toy gun in his locker and went to the locker with a school dean to retrieve the gun. G.H. has labeled the gun "a toy." However, the definition of a firearm includes the description of G.H.'s weapon.

The meaning of firearm is set forth in N.J.S.A. 2C:39-1 f, (in part):

> . . . any handgun, rifle, shotgun, machine gun, automatic or semiautomatic rifle, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.

G.H.'s gun is a soft air pistol that shoots pellets, which was identified as a Sig Sauer P230 soft air pistol offered by Mrs. H, and by the police officer receiving it.

School board hearings must allow students an opportunity to confront and cross-examine witnesses. Goss v. Lopez, 419 U.S. 565 (1975). There is no dispute by the Board of Education in this matter that the right to confront and cross-examine witnesses is preserved in our Constitution. However, the facts and circumstances of this case are such that the student admitted to the possession. Therefore, other students who were on the bus on April 25, 2006 could not add to the admission. And, regardless of whether or not the track coach intervened or should have intervened in this situation, the fact remains that G.H. had a gun on school property which has been legally described as a firearm. Testimony from the track coach could not change the admission made by G.H. Once G.H. confessed that he was in possession of the firearm on school property, there were no questions of fact remaining.

In order to overturn a school board's disciplinary action, petitioner must show that the board acted arbitrary, capriciously or unreasonably. Kopera v. West Orange Board of Education, 60 N.J. Super 288, 294 (App. Div. 1960); K.L. v. Matawan/Aberdeen Regional H.S. District, 91 S.L.D. 1823, 1829. In the instant case, the facts and circumstances of the case do not demonstrate that the West Orange Board of Education's decision to suspend G.H. was arbitrary, capricious or unreasonable.

CONCLUSION

Based on the review of testimony, documentary evidence, and the legal analysis, I **CONCLUDE** that there is no violation of procedural due process and that the "toy gun" fits the description of "firearm" in New Jersey state statutes.

ORDER

Based on the foregoing, I hereby **ORDER** that respondent West Orange Board of Education's action in suspending G.H. be **AFFIRMED**. I further **ORDER** that the petition of appeal be **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 22, 2007
Dated

SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/22/07
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 2 2 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIXI

Appellant's Witnesses:

Mrs. H., G.H.'s mother

G.H., student

Respondent's Witnesses:

None

APPELLANT'S EXHIBITS

A-1 Newspaper with picture of gun

A-2 Notice of School Hearing May 8, 2006 with attachments

A-3 Suspension and Expulsion Policy Board of Education West Orange

A-4 Letter from Parents to Superintendent Tarnoff May 2, 2006

A-5 Minutes of the Board of Education Disciplinary Hearing May 8, 2006

A-6 Letter from Parents to Superintendent Tarnoff May 30, 2006

A-7 Letter from Superintendent Tarnoff to Parent June 5, 2006 with "Bedside Enhancement Program" description attached

RESPONDENT'S EXHIBITS

R-1 Minutes of the Board of Education Disciplinary Hearing May 8, 2006

R-2 Notice of Disciplinary Hearing May 1, 2006

R-3 Photocopy of weapon seized from G.H. April 26, 2006

R-4 Incident Report by West Orange Police April 26, 2006

R-5 Memo from West Orange Police regarding description of weapon seized from G.H. with photo October 11, 2006

R-6 Article from The Record "Toy or Weapon?" October 19, 2006

125-07

OAL DKT. NO. EDU 3041-07
AGENCY DKT. NO. 58-2/07

TODDLERTOWN CHILD CARE CENTER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.[1]

Preliminarily, the Commissioner observes that this matter was initiated on the morning of February 28, 2007 as a dispute over the applicability of certain facilities standards, wherein petitioner sought an interim order enjoining the Irvington Board of Education from withholding rental payments based on alleged noncompliance with such standards – a matter appropriately brought to the Commissioner for adjudication pursuant to *N.J.A.C.* 6A:10A-2.3(c)6. However, later that same day – based on receipt of the Board's letter putting petitioner on notice that its contract would not be renewed – petitioner sought an immediate hearing, and on March 15, 2007 it filed a revised brief additionally incorporating arguments against such nonrenewal. At the ensuing emergent relief proceeding held at the OAL on March 22, 2007, this latter issue was the only one heard by the ALJ, and it is the sole subject of the recommended Order here under review.

[1] On April 4, 2007, the Board of Education filed objections to the Order of the ALJ. However, because applicable procedural rules make no provision for such submissions, they are not considered by the Commissioner herein. *N.J.A.C.* 1:1-12.6. The OAL Order (at 3) errs in citing *N.J.A.C.* 1:1-14.10.

Upon review of the record, however, it is apparent that the Board's nonrenewal of its contract with petitioner has not been presented to the Office of Early Childhood Education for affirmation or denial, as required by *N.J.A.C.* 6A:10A-2.3(b). That rule provides, in pertinent part:

> (b) The district board of education, child care provider, and Department shall use the following process for non-renewal of a child care center provider's Abbott Preschool Program Contract:
>
> 1. The school district shall notify, in writing, the child care center provider and the Department of the decision and reasons for non-renewal of the Abbott Preschool Program Contract.
> 2. The child care center provider may dispute the non-renewal of the Abbott Preschool Program Contract by written notification within 10 business days to the Office with a copy to the Department of Human Services, Office of Early Care and Education.
> 3. The Office may request additional information.
> 4. The Office shall affirm or deny the appropriateness of the non-renewal decision.
> 5. The non-renewal decision may be appealed to the Commissioner pursuant to *N.J.A.C.* 6A:10A-9.2.

It is, thus, clear that he Commissioner does not yet have jurisdiction over the sole issue under review in this interim proceeding.

Accordingly, the recommended Order of the OAL is rejected and this matter – to the extent that it pertains to nonrenewal of the parties' contract – is hereby referred to the Office of Early Childhood Education in the Department of Education for decision pursuant to *N.J.A.C.* 6A:10A-2.3(b). The remaining claims raised by petitioner, which are not addressed in this interim ruling, shall continue at the OAL as determined by the ALJ in consultation with the parties.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/05/07

Date of Mailing: 4/05/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 03041-07
AGENCY DKT. NO. 58-2/07

TODDLERTOWN CHILD CARE CENTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Respondent.

Kecia M. Clarke, Esq., representing petitioner, Toddlertown Child Care Center

Jennifer Carrillo-Perez, Esq., representing Board of Education of the Township of Irvington, Essex County (Trenk DiPasquale Webster Della Fera Sodono)

BEFORE:**IMRE KARASZEGI, J.R.,** ALJ

Petitioner brings this action seeking emergency relief under N.J.A.C. 6A:3-1 et seq. regarding the non-renewal of petitioner's child care center provider contract with the Irvington Board of Education, an Abbot District. On March 15,

2007, the Commissioner of Education received Petitioner's application for emergent relief. On March 16, 2007, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a contested case. On March 22, 2007, oral argument was presented in the Newark offices of the Office of Administrative Law.

The standards for the granting of emergency relief are set forth in N.J.A.C. 6A:3-1.6(b). It may be granted if the judge determines from the proofs that :

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In the instant case, after hearing the arguments of counsel and any other documentation submitted, I find that petitioner is entitled to emergent relief because the proofs submitted have established the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). The letter terminating the contractual agreement between petitioner and the Irvington Board of Education is therefore, of no force and effect until a full hearing is conducted. Petitioner's motion for emergent relief is therefore **GRANTED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is

authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 22, 2007
Date:

IMRE KARASZEGI, JR., ALJ

#131-07

OAL DKT. NO. EDU 9698-06
AGENCY DKT. NO. 215-6/06

M.M., on behalf of minor child, A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the President and Board Secretary of the Board of Education of the Borough of Mountain Lakes signed the Agreement and Release on behalf of the Board. In that neither the file nor the agreement contains a copy of the Board's resolution approving the settlement and designating these individuals to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

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

IT IS SO ORDERED.*

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/07
Date of Mailing: 4/12/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT AGREEMENT
OAL DKT. NO. EDU 09698-06
AGENCY DKT. NO. 215-6/06

M.M. o/b/o A.M.,
Petitioner,
v.
MOUNTAIN LAKES BOARD OF EDUCATION,
Respondent.

David R. Giles, Esq., for petitioner

Michael Rowan, Esq., for respondent

Record Closed: February 26, 2007 Decided: March 2, 2007

BEFORE **Joseph A. Paone**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 11, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on January 10, 2007. Prior to the hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.
Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

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

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

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

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

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

March 2, 2007
DATE

JOSEPH A. PAONE, ALJ

tbj

Receipt Acknowledged:

3-6-07
DATE

UPS
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 8 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Settlement Agreement"), dated January 15, 2007 is entered into by and among Petitioners, **MARYANNE MURRAY and ANTHONY MURRAY** (collectively "Petitioners"), and respondent, **MOUNTAIN LAKES BOROUGH BOARD OF EDUCATION** ("Respondent"). Petitioners and Respondent are collectively referred to as "the Parties."

WHEREAS, Petitioners brought suit against the Respondent in the matter captioned M.M. obo A.M. v. Mountain Lakes Borough Board of Education, before the Commissioner of Department of Education, Agency Reference No. 215-6/06, and in the Office of Administrative Law, Docket No: EDU 09698 (the "Action"), and

WHEREAS, the Petitioners intend to and do hereby settle fully and finally all claims they may have which were asserted, or which could have been asserted, in the Action; and

WHEREAS, the Parties have agreed that the Action shall be dismissed with prejudice;

It is **HEREBY AGREED** as follows:

1. **Obligations of Petitioners:** Petitioners shall execute a Stipulation of Dismissal dismissing the Action with prejudice. Counsel for Petitioners shall promptly file the Stipulation upon execution of this Settlement Agreement and Release and shall promptly forward a filed copy of the Stipulation to counsel for Respondent upon receipt.

2. **Obligations of Respondent:** Respondent shall pay $3,040.00 to Petitioners within thirty (30) days of the execution by all Parties of this Settlement Agreement and Release.

3. **General Release:** Petitioners, as well as their agents, servants, assigns, representatives, attorneys, heirs, and successors release and forever discharge Respondent and its insurers, agents, servants, assigns, representatives, employees, attorneys, affiliates, officers, directors, and successors for any and all claims of any nature whatsoever, whether known or unknown, that Petitioners had, now have or claims to have against Respondent with respect to any claims that were, should or could or may have been raised in the Action.

Petitioners expressly waive, and assume the risk of, any and all claims for damages that exist as of this date, but that are unknown to the Petitioners for any reason whatsoever, and that if known would materially affect their decision to enter into this Settlement Agreement and Release. Petitioners further agree that they accept the agreements specified in this Settlement Agreement and Release as a complete compromise of matters involving disputed issues of law and fact.

4. **Enforcement**. Nothing in this Settlement Agreement and Release shall be construed to release the right of any Party to enforce any obligations under this Settlement Agreement and Release, or any claim arising out of a breach of this Settlement Agreement and Release.

5. **Confidentiality.** The Parties understand and agree that the existence and terms of this Settlement Agreement and Release are strictly confidential and shall not be disclosed without the prior written consent of each other Party to any person or entity except to the extent necessary to

enforce the terms of this Settlement Agreement and Release, as required by the Open Public Meetings Laws, Open Public Records Acts or other statute governing public entity disclosure requirements, or as otherwise required by law. The Parties further agree to promptly notify one another in the event that any of them receives any discovery request, subpoena, or court order, or any other written request or demand of any type, calling for production or disclosure of this Settlement Agreement and Release or any part hereof, in order to allow the other party to seek a protective order.

6. **No Admission of Liability.** This Settlement Agreement and Release reflects a business decision by the Parties to settle their differences, disputes and claims. Nothing contained in this Settlement Agreement and Release is intended to be, nor shall it be construed to be, an admission of liability by Respondent or an admission of the existence of any facts upon which liability could be based.

7. **Warranties.** The Parties represent and warrant that they are duly and validly authorized to enter into and execute this Settlement Agreement and Release and have not transferred, assigned or conveyed, agreed to transfer, assign or convey, or taken any action that would cause there to be a transfer, assignment or conveyance, to any other entity of any claim or interest subject to this Settlement Agreement and Release.

8. **Entire Agreement.** This Settlement Agreement and Release contains the entire agreement among the Parties as to the settlement of their disputes alleged or that could have been alleged in the Action, and no amendment, modification or addendum to this Settlement Agreement and Release shall be effective unless in writing and dated and executed by the parties after the date of this Agreement. The Parties further acknowledge that this Settlement Agreement and Release is intended to replace any and all written or oral existing agreements and representations between the Parties with respect to the subject matter of this Settlement Agreement and Release.

9. **Binding Effect:** All of the provisions of this Settlement Agreement and Release shall bind the Parties hereto and their predecessors, successors and/or assigns.

10. **Severability.** If any provision of this Settlement Agreement and Release is held to be invalid, illegal or unenforceable for any reason, it shall not affect the validity, legality or enforceability of any other provision.

11. **Counterparts.** This Settlement Agreement and Release may be executed in one or more counterparts, each of which shall be deemed an original, but together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties to this Settlement Agreement and Release affix their signatures as of this 15 day of January, 2007.

Susan McCusker Dated: 1/30/07

Susan McCusker, President
Mountain Lakes Borough Board of Education

Dated: 1-30-07

Daniel Borgo, Board Secretary/Business Administrator

Maryanne Murray

Maryanne Murray

Dated: 1-18-07

Anthony Murray

Anthony Murray

Dated: 1/20/07

Education Law Center
David R. Giles, Of Counsel
76 South Orange Avenue, Suite 305
South Orange, New Jersey 07079
973-763-1500

Attorney for Petitioner

M.M. on behalf of A.M.,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
Petitioners,	
v.	OAL Dkt. No. EDU 09698-06 Agency Ref. No. 215-6/06
MOUNTAIN LAKES BOROUGH BOARD OF EDUCATION,	STIPULATION OF DISMISSAL
Respondent.	

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 FEB 26 P 5:12

WHEREAS, petitioners, M.M. on behalf of A.M., initiated this Action pending before the Office of Administrative Law under the above-referenced docket numbers; and

WHEREAS, petitioners and respondent, Mountain Lakes Borough Board of Education, entered into a Settlement Agreement, a copy of which is attached hereto, that settles all claims that were or could have been asserted by petitioners within this action;

Petitioner, MARY ANNE MURRAY, now hereby stipulates to the dismissal of this Action with prejudice.

IN WITNESS WHEREOF, she affixes her signature as of this 16th day of February, 2007.

Mary Anne Murray
Mary Anne Murray

#128-07

MARIA PARISE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

RESPONDENT,

AND

IRIS C. STOCK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners challenged the Board's action eliminating their positions as tenured social workers on the District's child study team due to a reduction in force (RIF) in 2003; petitioner Stock remains a titled petitioner, although her issues were resolved by a prior Commissioner's decision, dated June 10, 2005, which found the RIF to be invalid. However, the Commissioner remanded the matter regarding petitioner Parise for a determination of appropriate relief in light of pending tenure charges against her, and her retirement on a disability pension subsequent to the filing of the original petition. Ms. Parise subsequently noted her intention to return to work, and an independent medical examiner has found her fit to do so; respondent has not, however, returned her to work because of the pending tenure charges and her retirement. The instant matter seeks to determine the appropriate relief to be given Ms. Parise in light of the invalid RIF.

The ALJ found that: although petitioner was determined to be capable of returning to work, and is entitled to do so under statute and case law, she cannot do so since respondent Board filed tenure charges and suspended her without pay in 2003; the tenure charges remain unresolved and are scheduled for a hearing in April 2007; pursuant to *N.J.S.A.* 18A:6-14, if a final determination is not made within 120 days after certification of tenure charges, an employee is entitled to full salary until such determination is reached. The ALJ concluded that until a final determination is made in the tenure case, respondent can continue Ms. Parise's suspension, but she is entitled to back pay from September 26, 2003 until August 1, 2004 – the date on which she received her disability pension.

Upon independent and careful review of the record, the Commissioner adopted the Initial Decision with the clarification that the award of back pay is subject to recoupment should the Board prevail on its position that Parise's rejection of a .10 position was tantamount to her resignation, which matter is currently pending hearing at the OAL.

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

April 11, 2007

OAL DKT. NO. EDU 7451-05
(NOS. EDU 5953-03 AND EDU 7633-03 – CONSOLIDATED - ON REMAND)
AGENCY DKT. NOS. 181-6/03 AND 238-7/03

MARIA PARISE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IRIS C. STOCK,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were filed in accordance with *N.J.A.C* 1:1-18.4. No reply exceptions were filed by or on behalf of petitioner Parise.[1] [2]

[1] It is noted that because this remanded matter has, since May 4, 2004, proceeded as a consolidated petition, Iris C. Stock remains a titled petitioner, notwithstanding that the issues with respect to this individual were resolved by the Commissioner's prior decision dated June 10, 2005.

[2] By letter dated March 6, 2007 Nancy I. Oxfeld, Esq., of the firm Oxfeld Cohen, P.C., advised that the instant Initial Decision erroneously lists John Boppert, Esq. of that firm as Ms. Parise's representative in this remanded case. She reports "the record should note that while our law firm did represent Ms. Parise in the initial matter before Judge Jones (OAL Docket No. EDU 5953-03, Agency Docket No. 181-6/03), Ms. Parise represented herself *pro se* before the Commissioner and, upon the remand, before Judge Jones." However, by letter dated March 12, 2007,

The Board advances two exceptions to the Initial Decision. First, it avers, the Administrative Law Judge (ALJ) was mistaken with respect to one of the dates she utilized in the calculation of back pay awarded to petitioner. Specifically, the ALJ "ordered back pay for the period from the 121st day after the tenure charges were certified, which is correctly given as being September 26, 2003, until the date Ms. Parise started receiving her disability pension, which is given as August 1, 2005. The correct date on which the disability pension began is August 1, 2004."[3] (Board's Exceptions at 1)

Next, the Board contends that the award of any back pay to petitioner here is premature. Such is the case, it maintains, because the issue of whether Ms. Parise effectively resigned by declining the Board's offer of a .10 position created after her full time position was abolished in the RIF is still pending adjudication before ALJ Celentano at the OAL (OAL Docket No. EDU 9055-03). Should that matter be resolved in the Board's favor, any back pay which might have been due petitioner pursuant to the tenure statute would be nullified by her resignation. (*Id.* at 2)

Upon a thorough and independent review, the Commissioner, fully cognizant that this matter was explicitly remanded for a determination of relief due petitioner Parise as a consequence of the Board's invalid RIF of her child study team social worker position - in light of the pending tenure charges against her and her retirement on a disability pension - is in accord with the ALJ's conclusion that Ms. Parise is entitled to her full salary for the period September 26, 2003 (the 121st day after certification of the tenure charges against her, adjusted

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Ms. Oxfeld filed a Substitution of Attorney form advising that, from that date forward, the firm of Oxfeld Cohen, PC would again be representing Ms. Parise in this matter.

[3] In support of this correction the Board enclosed a copy of the Appellate Division decision in the matter entitled *Parise v. Board of Review and Butler Board of Education*, App. Div. Dkt. No. A-5260-04T1, which confirms that petitioner's disability pension benefits became effective as of August 1, *2004*.

for the fourteen-day extension she requested to file an answer to such charges)[4] to August 1, 2004[5], the effective date of her disability pension. Given the specificity of the remand directive in this matter, the Commissioner rejects as without merit the Board's exception argument that this back pay award is premature. However, such award is granted subject to recoupment should the Board ultimately prevail on its position that Ms. Parise's rejection of a .10 position - created after the abolition of her full-time position – was tantamount to her resignation, which matter is currently pending hearing at the OAL.

Accordingly, the recommended decision of the OAL is adopted as clarified above. As a consequence of its improper RIF of her position, the Board is hereby directed to remit back pay to Ms. Parise for the period September 26, 2003 to August 1, 2004.

IT IS SO ORDERED.[6]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/07

Date of Mailing: 4/12/07

[4] The Commissioner notes that the record reflects that the parties agreed that the Board's tenure charges against Ms. Parise, OAL Docket No. EDU 5793-2003, should be held in abeyance until the instant matter, involving Ms. Parise's claim that the Board improperly abolished her position, and OAL Docket No. EDU 9055-2003, involving Ms. Parise's challenge to the Board's contention that she resigned her position (currently pending at the OAL), had both been adjudicated – as the resolution of these matters might serve to render the tenure charges moot.

[5]The ALJ's use of the date August 1, *2005* in her Initial Decision order (Page 5) is an obvious typographical error (See Initial Decision, Page 4, footnote 1, paragraph 5, where it is clear that she recognized that Parise's ordinary disability became effective on August 1, 2004.)

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

MARIA PARISE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,
Respondent.

INITIAL DECISION
OAL DKT. NO. EDU 7451-05
AGENCY DKT. NO. 181-6/03

On Remand from
OAL DKT. NO. EDU 5953-03
AGENCY DKT. NO. 181-6/03

and

IRIS C. STOCK,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 7633-03
AGENCY DKT. NO. 238-7/03

John A. Boppert, Esq., for petitioner Maria Parise

James F. Schwerin, Esq., for respondent Borough of Butler (Parker, McCay & Criscuolo, attorneys)

Record Closed: January 11, 2007 Decided: February 26, 2007

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By way of background, petitioners Maria Parise and Iris Stock challenged the action of the respondent, the Board of Education of the Borough of Butler, Morris County, that eliminated their positions as tenured members of the Butler School District's child study team, due to a reduction in force (RIF). The matters were transmitted to the Office of Administrative Law for hearing as contested cases. An Order of Consolidation was entered on March 4, 2004. Thereafter, hearings were held on November 8 and 9, 2004.

On April 28, 2005, I issued an Initial Decision concluding that the RIF was invalid. It was ordered that petitioners Parise and Stock be reinstated to their positions as social workers and be given back pay, any salary adjustments and all emoluments for the period of time that their positions were reduced or eliminated.

By Decision dated June 9, 2005, the Commissioner of the Department of Education affirmed the Initial Decision but remanded the matter for determination of the appropriate relief for petitioner Parise because she had pending tenure charges against her. Further, she had retired from the District on a disability pension.

Subsequent to the Commissioner's decision, a conference was held with the parties wherein Parise noted her intention to return to work. An issue arose as to whether Parise, who suffers from multiple sclerosis and esophoria, was capable of returning to her position as a social worker.

Thereafter, Parise was examined by several doctors, including an independent medical examiner, Dr. Daniel Feuer, who found her fit to return to her former position. By letter dated January 5, 2007, the Board of Trustees of the Teachers' Pension and Annuity Fund determined that Parise's disability had diminished and that she is capable of resuming her former duties of social worker or any other comparable duty that the District is willing to assign to her. Significantly, the Board of Trustees wrote: "if you do not have a suitable position to which Ms. Parise may return, . . . be advised that . . . under N.J.S.A. 18A:66-40 a retiree will not suffer the loss of benefits while . . . await[ing] restoration to active service."

The respondent has not returned Parise to her position because of the tenure charges and her retirement. However, since the independent medical examiner found Parise physically fit to return to work, this matter is ripe for determining the appropriate relief to be given her in light of the invalid RIF.

DISCUSSION

Pursuant to N.J.S.A. 18A:66-39, New Jersey teachers are entitled to retire on a disability pension provided certain requirements are met. A teacher under sixty years of age who has ten or more years of credit for New Jersey service may be retired for ordinary disability by the Board. N.J.S.A. 18A:66-39(b). The teacher must first submit to a medical examination by a Board-designated physician. The physician must certify to the Board that the teacher is physically or mentally incapacitated for the performance of duty and should be retired.

Reemployment is possible after retiring on a disability pension. Indeed, the Teachers' Pension and Annuity Fund may require a disability beneficiary who is under the age of sixty to undergo annual medical examinations by a Board-designated physician for a period of five years following his retirement. N.J.S.A. 18A:66-40(a). This is to determine whether or not the disability that existed at the time of retirement has vanished or has materially diminished. If the physician's report shows that a beneficiary is able to perform his or her former duty or some other comparable duty that his or her former employer is willing to assign, then the beneficiary must report for duty.

The Commissioner has found that retirees have a statutory entitlement to reemployment under N.J.S.A. 18A:66-40. In Klumb v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County, EDU 2892-03, Comm'r Decision (June 16, 2005), aff'd, State Board of Education (January 4, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>, and Bublin v. Board of Education of Point Pleasant, Ocean County, 96 N.J.A.R.2d (EDU) 768, 774 (Bublin II), it was found that reinstatement was mandatory, citing In the Matter of John J. Allen, 262 N.J. Super. 438 (App. Div. 1993), and Board of Police Commissioners, City of East Orange v.

Board of Trustees, Police and Firemen's Retirement System, No. A-2629-87T8 (App. Div. May 18, 1989), in which the interpretation of N.J.S.A. 43:16A-8, a statute substantially identical to N.J.S.A. 18A:66-40, was found to compel reinstatement in order to carry out its legislative purpose.

The right to reinstatement, however, is not unfettered. For example, there is no requirement that an additional slot be created if there are no existing vacancies in the retiree's former position, nor will a current employee be "bumped" to make room. If there is a vacancy in the retiree's former position, then the retiree must be placed in that position. Alternatively, if there is no vacancy, then it is in the discretion of the employer whether to place the retiree into another position. Klumb, supra, Comm'r Decision (June 16, 2005) <http://lawlibrary.rutgers.edu/oal/search.html> (citing Bublin v. Bd. of Educ. of Point Pleasant, Comm'r Decision (January 26, 1994) (Bublin I)).

Here, Parise was found capable of returning to work by the independent medical examiner, and under our statutory scheme and case law she is entitled to return to her position as a school social worker. However, I **FIND** that Parise cannot return to her position since the respondent filed tenure charges against her on April 29, 2003, and immediately suspended her without pay. On May 14, 2003, the tenure charges were filed with the Commissioner. On May 19, 2003, Parise requested and was granted an extension of fourteen days to file an answer. The tenure charges have not been resolved and are scheduled for a hearing in April 2007.[1]

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[1] In January 2002 Parise filed a handicap discrimination complaint against the respondent in the New Jersey Superior Court, Morris County. On April 29, 2003, the District filed the tenure charges and suspended her. On April 28, 2003, the District notified Parise of the RIF. On May 27, 2003, Parise notified the Board that she was refusing a .10 position. On June 9, 2003, Parise filed a petition of appeal with the Commissioner regarding the RIF. On June 17, 2003, the District notified Parise that her refusal to accept a .10 position would be deemed a formal resignation. On June 27, 2003, a tenure charge was filed at the OAL under OAL Dkt. No. EDU 5793-03 and assigned to the undersigned. On July 11, 2003, Parise v. Butler, an RIF case, was filed at the OAL under OAL Dkt. No. EDU 5953-03 and assigned to the undersigned.

On September 10, 2003, Parise v. Butler BOE was filed at the OAL and assigned OAL Dkt. No. EDU 9055-03. Here Parise challenges the Board's action on her refusal of a .10 position. The case was assigned to ALJ Celentano.

On September 12, 2003, Parise argued in favor of a stay tenure proceeding until the Superior Court case was resolved.

On May 6, 2004, Parise filed an action alleging that the Board's refusing her a .40 position violated her tenure rights. The matter was filed under OAL Dkt. No. EDU 5171-04 and assigned to ALJ Sukovich.

All dockets were stayed until disposition of the civil case. On May 24, 2004, the civil case was resolved with a verdict against Parise and in favor of the District. On August 1, 2004, Parise's ordinary disability became effective. On April 28, 2005, an Initial Decision in the RIF matter was issued and on June 9, 2005, the Commissioner affirmed the Initial Decision but remanded the matter for a determination of appropriate relief.

Pursuant to N.J.S.A. 18A:6-14, if a final determination is not made within 120 days after the certification of tenure charges, then the employee is entitled to his or her full salary until such determination is reached:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

I **CONCLUDE** that until a final determination is made in the tenure case, the District can continue Parise's suspension, but she is entitled to back pay. Pursuant to N.J.S.A. 18A:6-14, Parise is entitled to her full salary beginning on September 26, 2003, the 121st day after certification of the charges, adjusted for the fourteen-day extension to file her answer, until she received her disability pension, effective August 1, 2005, and it is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/26/07
DATE

Irene Jones
IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2/26/07
DATE

Mailed to Parties:

FEB 27 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej/tbj

#127-07

127-07

OAL DKT. NO. EDU 1306-07
AGENCY DKT. NO. 442-11/06

IN THE MATTER OF THE TENURE	:	
HEARING OF ERIC POLHILL,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	

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

Upon such review, the Commissioner concurs with the ALJ that the settlement terms are consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is approved, and this matter is hereby dismissed subject to compliance with the terms of the settlement. Pursuant to *N.J.A.C.* 6A:9-17.6 (a) 1, a copy of this decision shall be transmitted to the State Board of Examiners for action against respondent's certificate as the Board may deem appropriate.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: April 11, 2007
Date of Mailing: April 11, 2007

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1306-07
AGENCY DKT. NO. 442-H/06

IN THE MATTER OF THE TENURE HEARING OF ERIC POLHILL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

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Adam S. Herman, Esq., for the Newark State-Operated School District
(Office of the General Counsel)

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

Record Closed: February 21, 2007 Decided: February 23, 2007

BEFORE **IRME KARASZEGI,** ALJ:

On January 10, 2007 this matter was transmitted to the Office of Administrative Law for determination as a contested case.

Prior to hearing, the parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

February 23, 2007

DATE

IMRE KARASZEGI, ALJ

Receipt Acknowledged:

3-1-07

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 7 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into on this _____ day of _____ ,2007, by and between the Newark Board of Education with offices located at 2 Cedar Street, Newark, New Jersey 07102 (hereinafter referred as the "Board"), and Eric Polhill (hereinafter referred as "Polhill"), whose address is 4Tornillo Road, West Orange, New Jersey

WHEREAS, Polhill was a tenured teacher with the Newark Board of Education during the 2005/2006 school year; and

WHEREAS, on or about January 27, 2006, Polhill requested a medical leave of absence from February 1, 2006 to March 30, 2006; and

WHEREAS, Polhill's medical condition did not improve but instead worsen during his leave of absence; and

WHEREAS, in March 2006 Polhill submitted his letter of resignation to the Board; and

WHEREAS, said letter of resignation was presumably not received by the Board; and

WHEREAS, on or about November 15, 2006, the Board filed a Petition with the Commissioner of Education, asserting Polhill had abandoned his employment; and

WHEREAS, the Polhill subsequently filed an Answer with Affirmative Defenses denying that he had abandoned his position but instead had resigned therefrom; and

WHEREAS, this matter was transferred to the Office of Administrative Law as a contested case and was Docketed as EDUTH 01306-2007N; and

WHEREAS, the parties have elected to settle all outstanding matters and allegations in dispute in lieu of a hearing so as to avoid expending further resources and to eliminate the uncertainty of litigation; and

WHEREAS, the Board and Polhill are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice; and

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. Polhill hereby resigns from his position of employment with the Newark Board of Education, together with all tenure and seniority rights effective March 30, 2006. See Letter of Resignation annexed hereto as Exhibit A made a part hereof. Said resignation is subject to the approval of the Commissioner of Education.

2. Polhill hereby waives any and all claims he has or could have against the Board, its agents and employees, including but not limited to claims for discrimination, tort or constitutional violation contemporaneously with the execution of this agreement.
3. This agreement shall also release and discharge the Board from any and all claims, liabilities and expenses, including claims for tenure and any contractual or statutory benefits that may have arisen from Polhill's employment with the Board.
4. Polhill, specifically acknowledges that he has been advised and has the explicit understanding that the Commissioner of Education can refer this matter to the State Board of Examiners for possible action which could result in the revocation of his teaching certificate, pursuant to Cardonick vs. Brooklawn Board of Education, 1983 S. L. D. (State Board of Education April 6, 1983). Consult further the decision In the Matter Of The Tenure Hearing Of Lenore M. Allen, School District Of The Township Of Old Bridge, Middlesex County decided by the State Board of Education, November 2000.
5. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date any year aforesaid.

2/9/07
Date

Eric Polhill
ERIC POLHILL

WITNESS

MELVIN C. RANDALL
Attorney At Law
State of New Jersey

2/15/07
Date

NEWARK BOARD OF EDUCATION
Marion A. Bolden
State District Superintendent

Angela L. Johnson 2/15/07
WITNESS

ANGELA L. JOHNSON
MY COMMISSION EXPIRES
NOVEMBER 23RD 2010
NOTARY PUBLIC

EXHIBIT A

February 5, 2007

The Newark Public Schools
Human Resources Services
2 Cedar Street
Newark, New Jersey 07102-3091
Attention: Human Resource Director

RE: SECOND LETTER OF RESIGNATION

Dear Sir or Madam:

Please be advised that I, Eric Polhill, hereby tender my **second** Letter of Resignation from the Newark Public Schools, as a Teacher assigned to the Rafael Hernandez School effective **March 30, 2006**.

This second Letter of Resignation is being submitted as it is my understanding that my original Letter of Resignation was inadvertently misplaced.

Sincerely,

Eric Polhill

ERIC POLHILL

Sworn to and Subscribed to before me
this 5 day of February 2007

Marquette Simon

NOTARY PUBLIC

MARGUETTE SIMON
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES FEBRUARY 19, 2009

126-07

#126-07

OAL DKT. NO. EDU 100-06
AGENCY DKT. NO. 346-12/05

IN THE MATTER OF THE TENURE	:	
HEARING OF FREDDIE WILLIAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

The record of this matter – wherein respondent was charged with excessive absenteeism, insubordination and unbecoming conduct – and the advisement of his failure to appear at hearing, transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, have been reviewed. On February 22, 2007, a notice providing respondent with an opportunity to submit an explanation of his nonappearance was sent to counsel by the OAL; on February 27, 2007, upon receipt of the record, the Department sent a second notice directly to respondent because his designated counsel – to whom the OAL notice was addressed – had been relieved of his obligation to provide representation by a February 16, 2007 Order of the Administrative Law Judge. Notwithstanding such notice, no explanation was filed by respondent.

In light of respondent's failure to appear at hearing, the charges against him – previously found sufficient, if true, to warrant dismissal or reduction in salary – are deemed admitted, and respondent is accordingly dismissed from his employment as a tenured custodian with the Trenton Board of Education as of the date of this decision.*

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: April 11, 2007
Date of Mailing: April 11, 2007

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4-1.1 *et seq.*

#129-07

OAL DKT. NO. EDU 3240-05
AGENCY DKT. NO. 452-12/04

D.G. AND B.B.G., on behalf of minor children, L.A.G. AND O.R.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes with respect to Term No. 15 that: 1) Pursuant to *N.J.A.C.* 1:1-14.1(a), records of all contested case hearings are open for public inspection unless, for good cause shown, the Administrative Law Judge orders sealing of the record, or any part thereof; and 2) the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.,* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/11/07
Date of Mailing: 4/12/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03240-05

AGENCY DKT. NO. 452-12/04

D.G. AND B.B.G., on behalf of minor children,
L.A.G. AND O.R.G.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,
Respondent.

D.G. pro se, for petitioners

Paul N. Barger, Esq., for respondent (Barger & Bolger, attorneys)

Record Closed: February 14, 2007 Decided: February 23, 2007

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

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on March 17, 2005 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. At the request of the parties, I adjourned hearings scheduled for August 2005, January 2006, March 2006, and September 2006 in order to afford them the opportunity to complete discovery and engage in settlement discussions.

On the hearing date of January 24, 2007, the parties were able to resolve the matter and submitted the attached Settlement and Release Agreement. This Agreement was also read into the record at which time D.G. executed the Agreement and represented that he had the authority of all petitioners to consent to its terms. **Additionally, counsel for respondent represented in the Agreement that it, and all the terms contained therein, is acceptable to the Board, and he affixed his signature to the Agreement to reflect that fact.** Having reviewed the record and the settlement terms, I

FIND

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is

authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

February 23, 2007
DATE

JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

3-1-07
DATE

DEPARTMENT OF EDUCATION

MAR 7 2007
DATE

Mailed to parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

RECEIVED
2007 FEB 23 A 8:12
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT & RELEASE AGREEMENT

THIS AGREEMENT IS MADE on this 24th day of January, 2007, by and between the Millburn Township Board of Education (the "Board") and D.G. and B.B.G. (the "Parents"), the parents of L.A.G. and O.R.G., students residing within the confines of the Millburn Township School District (the "District");

WHEREAS Petitioners filed a Petition with the New Jersey Commissioner of Education, pursuant to N.J.S.A. § 18A:6-9, alleging, among other things, discriminatory conduct by the Board; and

WHEREAS the Board has denied all of Petitioners' allegations; and

WHEREAS the parties hereto wish to amicably resolve this matter in order to avoid risk, costs and inconvenience of litigation.

NOW THEREFORE, in consideration of the mutual covenants and promises set forth below, the Board and the parents, individually and on behalf of L.A.G. and O.R.G., agree to the following terms and conditions:

1. The parents, L.A.G. and O.R.G. will be permitted to continue to work with the African American Club to develop exhibits to be displayed at the Middle School and the High School in connection with Black History Month. The parents, L.A.G. and O.R.G. are invited to meet with the District's public relations director to prepare a press release, which will be distributed to the community, regarding the exhibits.

2. The current ban prohibiting D.G. from entering the High School will be removed. As would be the case with any other District parent, the Board reserves the right to institute a subsequent ban if the situation so warrants.

3. If L.A.G. continues to act in an appropriate manner, as he has done throughout the 2006-07 school year, the Superintendent will write a college recommendation letter for L.A.G. The letter will include information regarding L.A.G.'s founding of the African American Club and recommendations that L.A.G. has made or will make regarding additions to the Millburn High School curriculum in connection with the contributions and history of African Americans.

4. The District agrees to follow the existing Board policy and Student Handbook with respect to discrimination, harassment and bullying. The Student Handbook will be provided to all students at the outset of the school year and will include information addressing peer harassment and/or discrimination on the basis of racial and/or sexual orientation.

5. The Superintendent will meet with the African American Club, if an invitation is extended by the Club, to discuss ways to improve racial sensitivity in the District. Further, the African American Club is invited to meet with members of the High School Administration to explore ways for the members to visit national historical sites regarding contributions of African Americans.

6. The Board and the Administration will continue to explore ways to attract qualified minority candidates for teaching staff positions. This includes, but is not limited to, the possibility that the Board will advertise open positions in the Amsterdam News.

7. The High School Administration will continue to ensure the safety of all students by requiring that any non-student or staff member entering the building sign in at the front office. Any violation of this rule could be considered trespassing and could result in arrest. It is the High School's policy to advise parents of any physical altercation involving their student.

8. While New Jersey law prevents the District from expunging L.A.G.'s disciplinary record for a period of five (5) years after graduation from High School, the Board agrees that L.A.G. will be treated as any other student with respect to the guidance department's treatment of college applications.

9. L.A.G. and O.R.G. are encouraged to meet with the Social Studies department and the High School Administration to present their ideas for incorporating the history and contributions of African Americans and descendants of the African Diaspora into the curriculum. The Board cannot agree to include any new items to the curriculum until after L.A.G. and O.R.G. present their ideas to the appropriate bodies. After that, a determination will be made as to whether additions to the curriculum will be considered by the Board. L.A.G. and O.R.G. will attempt to invite a representative, such as Dr. Carnell West, to attend the meeting.

10. L.A.G. is invited to meet with his guidance counselor and members of the High School Administration to explore possible scholarships or partial scholarships to assist Petitioners in funding L.A.G.'s attendance at college.

11. The parents, L.A.G. and O.R.G. agree that upon receipt of the above-referenced consideration from the Board, any and all claims, demands, liabilities, damages, costs, expenses, actions and causes of action which they now have or may hereafter have, including, but not limited to, claims for compensatory education, attorneys' fees, legal costs and expenses, against the Board, including but not limited to each and every claim which the parent

made or could have made in any forum, including the Office of Administrative Law, the Superior Court or the Federal Courts, are hereby compromised and settled, released, remised, acquitted and fully discharged forever, without any further liability of the Board or any of its past, present or future agents, employees, officers, directors, divisions, successors or assigns.

12. By entering into this Agreement, the Board makes no admissions with respect to Petitioners' claim of discriminatory practices by the Board and/or District personnel. Indeed, the Board denies the allegations contained in the Petition.

13. This Settlement and Release Agreement constitutes the full and complete Agreement of the parties and may not be changed or modified. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest. This Agreement shall be governed by and construed in accordance with New Jersey law. This Agreement shall be construed as if it were drafted contemporaneously by both parties.

14. This Agreement is made without any admissions of liability or responsibility by any party hereto and shall not be admissible in any legal proceeding except to enforce its terms.

15. The parties further mutually agree that the terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party. In the event the Agreement is required to be disclosed in any litigation, including an action to enforce the Agreement, the party or parties involved shall make every effort to have it disclosed to the court in camera and subject to an appropriate protective order maintaining the confidentiality of the Agreement to the fullest extent possible.

16. The Board, the parents, L.A.G. and O.R.G. each hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

17. As counsel to the Board, Paul N. Barger represents that this Agreement, and all the terms contained herein, is acceptable to the Board.

18. Reverend Daryl L. George is acting on behalf of Petitioner B.B.G. and on behalf of L.A.G. and O.R.G. in entering into this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Dated: January 29, 2007

By: _____
Dr. Richard L. Brodow, Superintendent
Millburn Township Public Schools

Sworn to and subscribed
before me this 29th
day of January 2007

_____

Dated: January 29, 2007

By: _____
Paul N. Barger, Esq.
Attorney for the Millburn Township
Public Schools

Sworn to and subscribed
before me this
day of January 2007

_____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Dated: January __, 2007

By: _____
D.G., parent

Sworn to and subscribed
Before me this
day of , 2007

_____

Dated: January __, 2007

By: _____
B.B.G., parent

Sworn to and subscribed
Before me this
day of , 2007

_____

Dated: January __, 2007

By: _____
L.A.G., student

Sworn to and subscribed
Before me this
day of , 2007

_____

Dated: January __, 2007

By: _____
O.R.G., student

Sworn to and subscribed
Before me this
day of , 2007

_____

SETTLEMENT & RELEASE AGREEMENT

THIS AGREEMENT IS MADE on this 24th day of January, 2007, by and between the Millburn Township Board of Education (the "Board") and D.G. and B.B.G. (the "parents"), as the parents of L.A.G. and O.R.G., students residing within the confines of the Millburn Township School District (the "District");

WHEREAS Petitioners filed a Petition with the New Jersey Commissioner of Education, pursuant to N.J.S.A. § 18A:6-9, alleging, among other things, discriminatory conduct by the Board; and

WHEREAS the Board has denied all of Petitioners' allegations; and

WHEREAS the parties hereto wish to amicably resolve this matter in order to avoid risk, costs and inconvenience of litigation.

NOW THEREFORE, in consideration of the mutual covenants and promises set forth below, the Board and the parents, individually and on behalf of L.A.G. and O.R.G., agree to the following terms and conditions:

1. The parents, L.A.G. and O.R.G. will be permitted to continue to work with the African American Club to develop exhibits to be displayed at the Middle School and the High School in connection with Black History Month.

2. The current ban prohibiting D.G. from entering the High School will be removed. As would be the case with any other District parent, the Board reserves the right to institute a subsequent ban if the situation so warrants.

3. If L.A.G. continues to act in an appropriate manner, as he has done throughout the 2006-07 school year, the Superintendent will write a college recommendation letter for L.A.G. The letter will include information regarding L.A.G.'s founding of the African American Club. and a recommendation that L.A.G. has made or will make regarding additions to the Millburn High School curriculum, in connection with the establishment of the African American Club.

4. District personnel will follow Board policy and the Student Handbook. The Board denies that District personnel have failed, in any way, to follow Board policy or the Student Handbook, but affirm, through this Agreement, that they will continue to do so.

5. The Superintendent will meet with the African American Club, if an invitation is extended by the Club, to discuss ways to improve racial sensitivity in the District. Further, the African American Club is invited to meet with members of the High School Administration to ~~discuss~~ explore ways for the members to visit national historical sites regarding contributions of African-Americans

6. The Board and the Administration will continue to explore ways to attract qualified minority candidates for teaching staff positions. This includes, but is not limited to, the possibility that the Board will advertise open positions in the Amsterdam News.

7. The High School Administration will continue to ensure the safety of all students by requiring that any non-student or staff member entering the building sign in at the front office. Any violation of this rule could be considered trespassing and could result in arrest. It is the High School's policy to advise proof of any physical altercation involving their ~~student~~ student.

8. While New Jersey law prevents the District from expunging L.A.G.'s disciplinary record for a period of five (5) years after graduation from High School, the Board agrees that L.A.G. will be treated as any other student with respect to the guidance department's treatment of college applications.

11 ~~9.~~ The parents, L.A.G. and O.R.G. agree that upon receipt of the above-referenced consideration from the Board, any and all claims, demands, liabilities, damages, costs, expenses, actions and causes of action which they now have or may hereafter have, including, but not limited to, claims for compensatory education, attorneys' fees, legal costs and expenses, against the Board, including but not limited to each and every claim which the parent made or could have made in any forum, including the Office of Administrative Law, the Superior Court or the Federal Courts, are hereby compromised and settled, released, remised, acquitted and fully discharged forever, without any further liability of the Board or any of its past, present or future agents, employees, officers, directors, divisions, successors or assigns.

12 ~~10.~~ By entering into this Agreement, the Board makes no admissions with respect to Petitioners' claim of discriminatory practices by the Board and/or District personnel. Indeed, the Board denies the allegations contained in the Petition.

13 ~~11.~~ This Settlement and Release Agreement constitutes the full and complete Agreement of the parties and may not be changed or modified. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest. This Agreement shall be governed by and construed in accordance with New Jersey law. This Agreement shall be construed as if it were drafted contemporaneously by both parties.

14 ~~12.~~ This Agreement is made without any admissions of liability or responsibility by any party hereto and shall not be admissible in any legal proceeding except to enforce its terms.

15 13. The parties further mutually agree that the terms and conditions of this Agreement shall be kept <u>strictly</u> <u>confidential</u> and will not be disclosed to any

individual that is not acting directly on behalf of any party. In the event the Agreement is required to be disclosed in any litigation, including an action to enforce the Agreement, the party or parties involved shall make every effort to have it disclosed to the court in camera and subject to an appropriate protective order maintaining the confidentiality of the Agreement to the fullest extent possible.

16 ~~14.~~ The Board, the parents, L.A.G. and O.R.G. each hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

17. ~~As~~ counsel to the Board, Paul Barger represents that this ~~matter~~ ~~is~~ Agreement is acceptable to the Board, and all the terms contained therein.

18. Richard George is acting on behalf of Petitioner B.B.G. and on behalf of L.A.G. and O.R.G. in entering into this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Dated: January __, 2007

By: _____
Dr. Richard L. Brodow, Superintendent
Millburn Township Public Schools

Sworn to and subscribed
before me this
day of January 2007

_____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Dated: January 24th, 2007

By: _____
D.G., parent

Sworn to and subscribed
Before me this
day of , 2007

_____

Dated: January __, 2007

By: _____
B.B.G., parent

Sworn to and subscribed
Before me this
day of , 2007

_____

Dated: January __, 2007

By: _____
L.A.G., student

Sworn to and subscribed
Before me this
day of , 2007

_____

Dated: January __, 2007

By: _____
O.R.G., student

Sworn to and subscribed
Before me this
day of , 2007

_____

1. The parents, L.A.G. and O.R.G. will be permitted to continue to work with the African American Club to develop exhibits to be displayed at the Middle School and High School in connection with Black History Month. The parents, L.A.G. and O.R.G. are invited to meet with the District's public relations director to prepare a press release which will be distributed to the community regarding the exhibits.

~~2. The current ban prohibiting O.G. from entering the High School will be removed~~

4. The District agrees to follow the existing Board policy and Student Handbook with respect to discrimination, harassment and bullying. The Student Handbook will be provided to all students at the outset of the school year and will include information addressing peer harassment and/or discrimination on the basis of racial and/or sexual orientation.

9. LAG and ORG are encouraged to meet with the Social Studies department and the High School Administration to present their ideas for ~~including~~ incorporating the history and contributions of African-Americans and descendants of the African Diaspora into the curriculum. ~~Curricula~~ The Board cannot agree to include any new items to the curriculum until after L.A.G. and O.R.G. present their ideas to the appropriate bodies. After that, a determination will be made as to which additions to the curriculum will be considered by the ~~Board~~ Board. L.A.G. and O.R.G. will attempt to invite a representative, such as Dr. Cornell West, to attend the meeting.

10. L.A.G. is invited to meet with his guidance counselor and members of the High School Administration to explore possible scholarships or partial scholarships to assist Petitioners in funding L.A.G.'s attendance at college.

132-07

#132-07

OAL DKT. NO. EDU 6901-05
AGENCY DKT. NO. 189-8/05

JOEL BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner generally approves the parties' settlement, but cautions that she has no jurisdiction over the purchase of pension credit and cannot obligate the Board of Trustees of the Teachers' Pension and Annuity fund with respect to the settlement term (No. 4) providing that petitioner shall be entitled to buy back pension time from February 2, 2005 to November 1, 2006. For purposes of her review herein, therefore, the Commissioner shall interpret this term to mean that the Board of Education will cooperate fully in petitioner's attempt to purchase the referenced credit, subject to applicable pension law.

Accordingly, with the understanding set forth above as to the settlement term regarding purchase of pension credit, the Commissioner adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/11/07
Date of Mailing: 4/12/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06901-05S
AGENCY DKT. NO. 189-8/05

JOEL BROWN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

Cristal Holmes-Bowie, Esq., for petitioner (Michael A. Armstrong, attorney)

Brooke A. Bonett, Esq., for respondent (Sumners George, P.C., attorneys)

Record Closed: March 5, 2007 Decided: March 7, 2007

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

This matter arises from a Verified Petition filed with the Commissioner of the Department of Education ("Commissioner") by Joel Brown, ("petitioner"), seeking reinstatement and restoration of salary lost as a result of unpaid suspension imposed by his employer, the Camden Board of Education ("respondent"). The Commissioner transmitted this matter to the Office of Administrative Law on September 22, 2005, for determination as a contested case, pursuant to pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy between these parties.

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

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

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

March 7, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: 3/9/07

Mailed to Parties:

MAR 13 2007

CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the City of Camden (BOARD) and its employee Joel Brown(Brown).

WHEREAS, Brown has been continuously employed by the BOARD as a Teacher since December 1, 1992; and

WHEREAS, as of March 2003 the BOARD voted to suspend M. Brown's employment due to the instigation of criminal charges brought by the Prosecutor's Office; and

WHEREAS, the charges against Mr. Brown were dismissed, the BOARD having no known reason to continue the suspension, reinstated Mr. Brown's employment as of January 1, 2006;

WHEREAS, the parties acknowledge and recognize the BOARD's commitment to the letter and spirit of the Reinstatement provisions of the Education Law, *N.J.S.A. 18A*:6-14. More specifically, the BOARD recognizes that under this provision, upon reinstatement it is required to reinstate full pay from the first day of such suspension. Likewise, Brown recognizes that the Board is entitled to deduct from full pay any sums received by way of substitute employment during the suspension period;

WHEREAS, the BOARD and Brown have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities pursuant to Title 18A; and

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

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

2. The BOARD will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, the Board shall pay the sum Twenty-One Thousand Dollars ($21,000.00) into Mr. Brown's pension account.

3. The BOARD will also pay Mr. Brown the sum of Seventeen Thousand Eight Hundred Eighteen Dollars and Twenty Cents ($17,818.20);

4. Mr. Brown shall be entitled to buy back pension time from February 2, 2005 to November 1, 2006;

5. Should the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for a plenary hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

6. Brown agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that she is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. Brown fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

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

8. The Agreement shall not take effect until the expiration of the Governor's statutory veto period, which is fifteen (15) days after a certified copy of the Board's minutes is received in the Governor's office.

9. The parties further agree in consideration of this Settlement Agreement that if it is approved by the Commissioner, that they will not assert in any judicial or administrative proceeding that any statements concerning the reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

DATED: 2-23-07

BY: _____
JOEL BROWN

SUMNERS GEORGE, P.C.
Attorneys for
Board of Education of the
City of Camden

BY: Brooke A. Bonett
BROOKE A. BONETT

Adopted: January 29, 2007

RESOLUTION
#115-SY '06
RESOLUTION OF THE
CAMDEN CITY BOARD OF EDUCATION TO CONFIRM SETTLEMENT OF LITIGATION WITH JOEL BROWN

WHEREAS, the Camden Board of Education ("the Board") and Joel Brown have been involved in litigation; and

WHEREAS, the Board's Labor Counsel and representatives for Joel Brown have been involved in negotiations to reach an amicable settlement in this matter; and

WHEREAS, the Board does not admit any liability in regard to the underlying action, entitled ***Joel Brown v. The Camden Board of Education***, OAL Docket No. EDUOA06901-2005S, included but not limited to Petitioner's claim for back pay for unpaid suspension or any other matters Mr. Brown presently has before the Office of Administrative Law, or any other administrative agency or court; and

WHEREAS, both parties desire to settle this matter and dismiss, with prejudice and without an award of costs or attorneys' fees, of the complaint filed in the matter; and

WHEREAS, the Board agrees to pay the sum Twenty-One Thousand Dollars ($21,000.00) into Mr. Brown's Pension account.

WHEREAS the Board agrees to allow Mr. Brown to buy back pension time from February 2, 2005 to November 1, 2006.

WHEREAS, the Board agrees to remit Joel Brown the sum of Seventeen Thousand Eight Hundred Eighteen Dollars and Twenty Cents ($17,818.20) in full satisfaction of all claims arising out of the underlying action and be responsible for all applicable taxes as a result of the receipt of these monies.

NOW, THEREFORE, BE IT RESOLVED, that the Board approves of this settlement with Mr. Brown, and authorizes counsel to execute all documents pertaining thereto.

Adopted: January 29, 2007

133-07

#133-07

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board of Education challenged the Department's denial of funding for certain items in its revised 2007-2008 Preschool Operational Plan. The Department determined that the food service expenditures for petitioner's preschool program should be placed in petitioner's general food service budget, within its "Fund 50" enterprise fund, which was established for program activities that can generate income to offset costs. Petitioner asserts that the Department acted in an arbitrary manner in denying the food service costs, as such costs were allowed in 2006-2007.

The ALJ found that: the Department's directive to place preschool food service expenses in the "Fund 50" was appropriate given the nature of the district's food service operation and the purpose of the enterprise fund; the Department did not act in an arbitrary manner in its method of funding the preschool food program; and the principles of estoppel and waiver do not generally apply to government agencies. The ALJ concluded that the District failed to meet its burden to prove that additional state aid is necessary for its in-district preschool food program, and dismissed the petition.

The Commissioner concurred with the ALJ's findings, noting that the issues in this matter were already addressed and well articulated in a previous Commissioner's decision dated April 15, 2005. The Initial Decision of the OAL was adopted as the final decision, and the petition was dismissed.

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

April 12, 2007

OAL DKT. NO. EDU 648-07
AGENCY DKT. NO. 41-2/07

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

This matter was precipitated by respondent Department of Education's (Department) denial of the petitioning school board's requests for early childhood funds for food service salaries, benefits and other operating costs, and petitioner's appeal of same. The Department determined that the food service expenditures for petitioner's preschool program should be placed in petitioner's general food services budget, within its "Fund 50," which was established for program activities that can generate income to offset costs. The Commissioner concurs with the Administrative Law Judge (ALJ) and the Department that such allocation is appropriate for reasons already articulated in the Commissioner's April 15, 2005 decision entitled *Board of Education of the City of Vineland v. New Jersey Department of Education,* OAL Dkt. No. EDU 660-05, Agency Dkt. No. 41-2/05.

In that decision, the Commissioner articulated two reasons why it was reasonable for the Department to determine that food service expenses for pre-school programs should not be segregated from food service expenditures for the entire Vineland school district:

> (1) School district budgets include a differentiated auxiliary fund (Fund 50) expressly for those programs such as food services which generate both revenue and expenditures, with the expectation that, where a program contributes revenues, associated costs will also be handled through the fund, the goal being to reach eventual self-sufficiency; and 2) the Board's food service operations are district-wide, so that there is no practical or budgetary reason to segregate preschool food service costs from those for K-12.
>
> *Board of Education of the City of Vineland, supra,* at 3.

Thus, the Commissioner determined that because of the district-wide nature of petitioner's food service operation and the existence of the enterprise fund, such food service needs as staffing should be funded and assessed within the context of the district's general budget.

Petitioner argues now, as it did in 2005, that it is unfair for the respondent to fund food service programs of private early childhood education providers, but to decline to allocate to petitioner extra food service funds specifically dedicated to petitioner's early childhood program. The Commissioner expressly rejected that argument in 2005, because private early childhood providers are not similarly situated to petitioner as regards the above articulated reasons for denying petitioner separate funding for food services. More specifically, many such private providers do not belong to larger organizations with food service operations from which they may receive support, and their frequently smaller size prevents them from having the benefit of economy of scale.

In addition, the Commissioner notes that the record in this case indicates that private providers must participate in the USDA's Child and Adult Care Food Program (CACFD) (Exhibit P-7).[1] Department witness Karin Garver testified (hearing transcript, page 124) that membership in the CACFD imposes the obligation upon private providers to show a stable funding source. This requirement, not imposed upon public school early childhood programs such as petitioner's, would be a difficult requirement to satisfy for many private providers who serve small, fluctuating numbers of

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[1] CACFP is authorized at section 17 of the National School Lunch Act (42 U.S.C. 1766). Program regulations are issued by the U.S. Department of Agriculture (USDA) under 7 CFR part 226.

pre-school children, were it not for their eligibility to receive funding from the public school districts that they serve.

Finally, petitioners contend that the Department's denial of funding for food services in the 2007-2008 school year is arbitrary and capricious because the Department granted petitioner a special request for $54,000 for food service workers for the 2006-2007 school year. Petitioner did not, however, meet its burden to show arbitrariness. The Commissioner notes that the Department's Early Childhood Education Office's budget instructions and guidance for Abbott preschool programs (Exhibit P-13) is expressly designed for one-year budgets. In addition, as the ALJ found, budgets are subject to cycles and fluctuating circumstances and forecasts. The fact that the Department may have granted a request for food service funds in one year but not in another does not create a precedent or requirement that such grants of public monies continue. [2]

Accordingly, the petition is dismissed.

IT IS SO ORDERED[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/07

Date of Mailing: 4/13/07

[2] And as the ALJ noted, "estoppel" and "waiver" generally do not apply to government agencies. *Buonviaggio v. Hillsborough Tp. Commission,* 122 *N.J.* 5, 17 (1991) (We recognize that the application of waiver or estoppel principles to government actions is to be most strictly limited).

[3] Pursuant to P.L. 2006, c. 45, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with *N.J.A.C.* 6A:10A-9.7(a)5, such appeals must be filed within six (6) days of the Commissioner's decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. EDU 648-07

AGENCY DKT. 41-2/07

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Robert A. DeSanto, Esq., for petitioner (Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys)

Carolyn Labin, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: March 12, 2007 Decided: March 19, 2007

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

STATEMENT OF THE CASE

The Vineland School District (petitioner or District) is an Abbott District as defined by N.J.S.A. 18A:7F-3 and N.J.A.C. 6A:24-1.2. On February 7, 2007, the

Department of Education (Department or DOE) approved a $15,033,047 budget for the District's three and four year old early childhood program. The Department denied the District's special requests for increased teacher's and teacher's aide's salaries in the amount of $64,323 and its special requests for food service costs in the amount of $49,383. The Department also retracted its approval of the District's special request for food service salaries and benefits in the amount of $44,768. The District appealed, seeking additional funding. The parties resolved the District's request for increased teacher's and teacher's aide's salaries in the amount of $64,323. Accordingly, the District withdrew its request based upon the resolution. This left the District's request for an additional $94,151, comprised of food service costs in the amount of $49,383 and salaries and benefits of $44,768 as the contested issues.

The Department asserts the additional funding sought by the District is unnecessary because food service costs and related expenses are part of an enterprise fund within the District. The enterprise funds are required to operate under similar financial constraints as private business. Therefore, any anticipated deficit should be resolved by reappropriating funds, increasing revenues or decreasing expenses, rather than through requests for additional state aid. For the reasons stated below, I am **DENYING** the District's request for additional funding.

PROCEDURAL HISTORY

On February 13, 2007, the District filed an appeal of the Commissioner's decision. The matter was received by the Office of Administrative Law (OAL) on February 13, 2007, as an expedited contested case. N.J.S.A. 18A:38-1. The matter was heard on March 5, 2007. Post-hearing submissions were submitted on March 12, 2007.

SUMMARY OF MATERIAL FACTS

The Vineland school district provides educational programs for approximately 11,000 students, of which 1,272 are enrolled in the early childhood program. The District's total budget is approximately $140,000,000. Eighty percent of the District's budget is state funded, ten percent from property tax levies and another ten percent from other sources, such as federal grants. The Department approved a $15,033,047 for the District's early childhood program. This correlates to approximately $11,818 per early childhood pupil.

The District's food operations are part of a program called the Enterprise Fund or Fund 50. Enterprise funds are costs centers within the District operations that are intended to function like a private enterprise. These cost centers are intended to generate their own revenues, control their expenses and either break even or generate a profit.

The District contends that its early childhood program food services will generate a deficit of approximately $94,151 for 2007-08. The deficit has two specific categories. Food costs will generate a deficit of $49,383. Food service workers' salaries and benefits will generate a deficit of $44,768.

Here, the District has carved out or isolated the food operations for the early childhood program separate and apart from the remaining food operations for the entire District. The early childhood food program was isolated from the remaining food service operations so additional funding could be obtained from Abbott aide.

The District's urges that it has utilized all of the revenue sources within the pre-K food cost center. This cost center cannot generate any further revenue and reduce expenses. For example, only eighty students out of the 1,272 pay full price for lunch. And, there is a cap on the amount the District can charge as a "full price." Currently the District charges $2.20 as its full price. Witnesses for the District contend that the maximum amount they can charge is $2.25 as set by the National Lunch Program

(NLP). The amount ($2.25) was only an estimate of the ceiling. The actual ceiling was not known by either party. It has been confirmed, however, by the Department in its post-hearing brief. (Exhibit B-post; hearing brief). If an added five cents were charged to eighty students, it would only contribute an additional $720 towards its anticipated deficit. However, if the District charged an additional $.05 for all students who paid full price (grades pre-K through12), it would generate an additional $29,000 toward the deficit (3,240 students X $.05 X 180 days).

The District also asserts that it cannot reduce the expense side of the equation. The District seeks an additional $44,768 for workers' salaries and benefits. The workers are unionized. Their salaries and benefits are controlled by a Collective Bargaining Agreement. Therefore, the District is unable to negotiate worker salaries outside of the collective bargaining process.

Finally, the District seeks an additional $49,383 for food costs. The food items are purchased through a food cooperative. This gives the District additional buying power. It offers the District the most cost-effective means to purchase food items. Again, in terms of the projected 2007-08 deficit, little more can be done to reduce the pre-k food costs.

The Department asserts that the District has the means to operate in a financially prudent and constrained manner by utilizing the Enterprise Fund concept. The District carved out the pre-K portions of its food operations to reflect the deficit. The Department contends that, if the food service operations are viewed as a whole, including pre-K and K through 12, there would be sufficient means to generate savings to the deficit related to the pre-K food program. The pre-K food program is but a small segment of other larger food operations within the district. For example, the District has operated with a deficit for approximately the past nine years. Each year the District was able to reallocate funds between cost centers to offset any deficit in the pre-K food program. In prior years, the District was able to allocate monies from other food cost centers or from the general fund. The Department also asserts that the District could privatize the food service operations in order to eliminate its internal deficit.

LEGAL ANALYSIS AND DISCUSSION

The early childhood program is required to provide each student with an enriched, balanced, nutritious food program. N.J.A.C. 2:36-1.2. The early childhood program provides student meals in three categories: fully paid, reduced and free. Lunch programs are also offered through two distinct outlets; 1) in-district lunch program; and 2) lunch programs at private learning centers. The present dispute involves the in-district lunch program. A fully paid lunch for the early childhood program is approximately $2.20. The reduced rate varies depending on the child's financial situation.

Here, the District's 2007-08 budget for its pre-K early childhood programs is $15,043,047. The cost per pupil is approximately $11,818. The District is petitioning for additional Abbott funding in the amount of $94,151. The additional funding, expressed as a percentage of the total Abbott funding, is ½ of one percent.

The district assets that its in-district lunch program is being treated differently than the private-provider programs. The in-district program must pay a percentage of the deficit whereas the providers do not. This is fact is not disputed. But, providers are not subject to the enterprise fund. Providers submit entirely different budget requests. (cf. P-13 and P-7). Therefore, inequities do exist but, it is by design in the budget process.

The District also asserts that the Department is acting arbitrary in its method of funding the pre-K food program. The Department denied funding in 2005-06, then in 2006-07 provided funding is the amount of $54,000 for food service workers. Now, it is again denying funding in 2007-08. The District argues such conduct constitutes a waiver or estoppel. Moreover, the Department is acting outside the Abbott regulations and cases. I **DISAGREE** as discussed below.

The Abbott funding is, in part, a budgetary process. This process involves cycles, changes, revisions and the like. Here, the Department provided $15 million in Abbott aide. This dispute centers on a very small segment. And, the segment at issue is an enterprise fund. The very core of an enterprise fund concept is to adjust revenues and expenses in order to break even. Applying this concept to the case at hand, the food operations can either be looked at in gross, which is all food operations for the District, or in groups, i.e. pre-K and K through 12. The District isolated the pre-K food operations. It asserts that the pre-K food operations will operate at a deficit. It therefore needs additional funding to offset the anticipated deficit.

The Department asserts that if all food operations are grouped together, funds can be reallocated, in accordance with the enterprise concept, and close the deficit. Therefore, the District's request for additional funding tailored solely for the pre-K program is inappropriate.

The enterprise concept requires all in-district food operations to be looked at in total. This way, shortfalls in some cost centers can be offset by the reallocation of resources from other solvent cost centers. This argument has particular merit during a time of financial restraint and difficulty currently being experienced by the state, of which I take judicial notice. Evid. R. 201. Presenting the pre-K in-district food program deficit in isolation from the other enterprise funds distorts financial picture.

The request by the District is not significant in the larger scheme. The request is for an additional ½ of one percent of Abbott funding for in-district food operations. The District maintains that if it is unable to receive additional funding, it cannot reallocate resources, and would have to cut programs. This argument was not well supported. And, past experience refutes that contention. As brought out by the Department, the District has experienced deficits in its food operations over the last nine years and has successfully reallocated resources. The District did not demonstrate its inability to reallocate resources to the significant detriment of any programs. There was no competent evidence that important programs are in jeopardy in the absence of more aide. The District has not exhausted all resources in its enterprise funds, including

raising the food reimbursement rate, reallocating monies from other enterprise funds on a school wide basis, or privatizing services. See, Board of Educ. of the City of Vineland v . N.J. Dep't of Educ. OAL DKT No. EDU 660-05 (March 24, 2005); adopted in part and reversed in part, Com'r of Education Agency DKT No. 136-05 (April 15, 2005).

Finally, I **CONCLUDE** that estoppel and waiver do not apply. These principles generally do not apply to government agencies. Buonviaggio v. Hillsborough Twp. Comm., 122 N.J. 5, 17 (1991). Here, there was no detrimental reliance raised by the District or any manifest injustice. The limited issue involved budgets. And, they are subject to cycles, changes, estimates, revisions and the like. Funding may vary year-to-year.

CONCLUSION AND ORDER

Based upon the foregoing, I **CONCLUDE** that the District failed to meet its burden of proof that additional Abbott aide is necessary for its pre-K in-district, food program.

I **ORDER** that the relief sought by the District is **DENIED** and the petition **DISMISSED**.

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

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

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in *Abbott* District budget appeal matters shall be filed within five (5) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19, 2007
DATE

W J Miller
W. TODD MILLER, ALJ

Date Received at Agency: 3-19-07

Mailed to Parties:

MAR 21 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

Daniel Smith, Early Childhood Fiscal Specialist
Kevin Franchetta, Assistant Superintendent and School Board Secretary

For Respondent:

Tonyia Davis, Educational Program Specialist
Karin Garver, Educational Program Development Specialist
Joe Kirchon, Budget Manager

EXHIBITS

For Petitioner:

P-1 2007-08 Budget Worksheet, August 25, 2006
P-2 Office of Early Childhood Education, 2007-08 Programmatic Budget
P-3 Letter to Charles Ottinger from DOE, January 12, 2007
P-4 Letter to Charles Ottinger from DOE, February 7, 2007
P-5 Not in evidence
P-6 District Special Request form, August 25, 2006
P-7 Private Provider One Year Budget, 2007-08, August 30, 2006
P-8 Not in evidence
P-9 Not in evidence
P-10 Not in evidence
P-11 Letter to Dr. Clarence C. Hoover, III from DOE, January 13, 2006
P-12 Letter to Dr. Clarence C. Hoover, III from DOE, January 23, 2006

P-13 District One-Year Budget Instructions and Guidance, 2007-08, August 25, 2006

For Respondent:

R-1 Letter to Charles Ottinger from DOE, February 28, 2007

Joint:

J-1 Commissioner of Education Decision, Board of Education of the City of Vineland, Cumberland County v. New Jersey State Department of Education, OAL Docket No. EDU 660-05, April 15, 2005

#134-07

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Pemberton Board of Education sought to recoup a tuition overpayment to the Burlington County Special Services District (BCSSD) for the 2000-01 school year, based on the Department of Education's January 27, 2004 recertification of such rates. Pemberton also sought return to sending local district boards of education of that amount of BCSSD's 2004-05 surplus exceeding the permissible level of 10%.

The ALJ dismissed Pemberton's petition as to recoupment of 2000-01 overpayment because he found it to be untimely, holding that Pemberton should have filed its appeal within 90 days of receiving notice of the recertified rates in February 2004. The ALJ granted the petition as to return of BCSSD's excess surplus, devising an *ad hoc* method for this purpose in the apparent belief that proposed rules had not yet been finalized by the State Board of Education.

The Commissioner adopted the Initial Decision in part, and rejected it in part. The Commissioner concurred with the ALJ that Count One of the petition was untimely filed, since Pemberton had sufficient information to protect its rights by appealing within 90 days of becoming aware of the recertified rates notwithstanding the ongoing efforts of staff to resolve the matter informally. The Commissioner did not, however, concur with the ALJ's method of returning BCSSD's excess surplus, finding that the State Board had, in fact, adopted the referenced rules in September 2006 and that the Department soon thereafter made adjustments to BCSSD's 2004-05 excess surplus consistent with them. Because Pemberton had already received the relief it sought in a manner consistent with rule and policy of the State Board, the Commissioner dismissed Count Two of the petition as moot.

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

April 12, 2007

OAL DKT. NO. EDU 8568-04
AGENCY DKT. NO. 278-8/04

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions to the Initial Decision were filed by both petitioner (Pemberton or the Board) and respondent (BCSSD); BCSSD's exceptions, however, were untimely filed and consequently not considered herein.[1] Neither party replied to the other's exceptions.

In its exceptions, Pemberton first objects to the November 5, 2005 Order of the Administrative Law Judge (ALJ)[2] dismissing Count One of the Petition, wherein the Board sought to recoup a tuition overpayment to BCSSD for the 2000-01 school year based on rates recertified by the Department of Education (Department) in January 2004. The Board contends that the ALJ erred in finding that its petition was required to be filed within 90 days of February 23, 2004 – the date it learned of the recertified rate – since Pemberton's business

[1] Pursuant to *N.J.A.C.* 1:1-18.4, exceptions were due thirteen days from the mailing date of the Initial Decision (February 21, 2007), or March 6, 2007. Respondent's exceptions dated March 6, 2007 were mailed on that date and filed on March 8, 2007.

[2] Noted in the Initial Decision at 2 and appealed at the end of the contested case pursuant to *N.J.A.C.* 1:1-14.10(j).

administrator did not become aware that the revised certification would not result in an adjustment to the Board's tuition liability for the 2004-05 school year until she received verbal notice to this effect from the Department in response to her May 19, 2004 memorandum. Moreover, Pemberton claims, even if the ALJ's deadline were to be accepted, relaxation of the 90-day rule is warranted pursuant to *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975). The Board explains:

> The rates sought to be invoked here were those set forth in the Department's letter of January 27, 2004. When and how would this letter put Pemberton on guard that BCSSD would not apply the new rates? It wouldn't. When, then, did Pemberton find out that BCSSD would not apply the new rates? When should have Pemberton known that its rights were in jeopardy? Certainly not for the first 90 days after BCSSD got the January 27, 2004 letter. BCSSD could have challenged the new rates during this time period. In any event, BCSSD never told Pemberton about the new rates. That information came from an informal fax from a Department employee on February 23, 2004. But that fax only indicated that the new rates existed, not that BCSSD would ignore them. The February 23, 2004 fax in any event was still within the time period when BCSSD could have challenged the new rates. During this time period there could be no expectation that BCSSD would not challenge the rates, or, if no appeal was taken, that the new rates wouldn't be applied. Therefore, until April 28, 2004 (90 days after January 27), no expectation could exist that required action by Pemberton. After April 28, 2004, [Pemberton Business Administrator] Austin repeatedly tried to find out what was going on. No definitive decision was ever forthcoming: not from BCSSD, not from the County Superintendent, and not from the Department. It was not until May 19, 2004, and then on a most informal basis, that Ms. Austin and therefore Pemberton, found out that BCSSD would not apply the new rates and that a challenge to this decision, the decision not to follow the January 27, 2004 directive, should be mounted. A Petition filed on August 10, 2004 is timely. Even if it is not, the informal nature and ex parte nature of how Pemberton gathered sufficient facts to put it on guard that its rights were being adversely effected (*sic*) warrant a relaxation of the rules to permit a late filing. Count One should be reinstated. Pemberton's cross motion requiring modification of the tuition rate and reimbursement for overpayments should be granted.
>
> (Pemberton's Exceptions at 3-5, quotation at 4-5)

Pemberton further excepts to the relief ordered by the ALJ as a result of his finding – on Count Two of the Board's petition – that BCSSD maintained a fund balance in

excess of 10%. On this point, the Board reiterates its arguments – summarized in the Initial Decision at 10 – with respect to rules "proposed" by the Department,[3] contending that neither the rule proposal nor the remedy crafted by the ALJ are sufficiently refined to ensure that sending districts are, in fact, fully and fairly compensated for prior tuition overcharges, and that a methodology must be devised to address "all of the concerns with the system" so as to rectify the "basic unfairness" of both its current and proposed forms. (Pemberton's Exceptions at 5-7, quotations at 7)

Upon careful review and consideration, the Commissioner adopts the Order of the ALJ finding Count One of Pemberton's appeal untimely filed, but rejects the relief ordered in the Initial Decision as to Count Two.

With respect to the question of timeliness, the Commissioner concurs with the ALJ that Pemberton should have acted to file its petition within 90 days of learning of the recertified rates on February 23, 2004. While this notice alone – as observed by the ALJ – might not necessarily alert a sending board to a cause of action against a receiving district, it cannot be overlooked that in this matter such notice was received under circumstances where: 1) the clear terms of rule and contract[4] provided for tuition adjustments to be made not later than the third year (2003-04) following the contract year in question (2000-01) and the adjustment sought by the Board in response to the recertification would need to be effectuated outside that regulatory and contractual time frame; and 2) it was evident by early-to-mid-April at the very latest – well within 90 days of February 23 – that BCSSD was taking no action of any kind toward making

[3] The rules at issue were, in fact, adopted by the State Board of Education on September 8, 2006. 38 *N.J.R.* 4178(b). Pemberton's references to the "current" form of the rule cite to its language prior to the September 2006 amendment. See Note 6 below.

[4] See *N.J.A.C.* 6A:23-3.1(f)6, 6A:23-3.4(g)-(h); see also BCSSD's Memorandum in Reply to the Opposition to Motion for Summary Judgment and in Further Support of Respondent's Application (R-6), Exhibit A (Special Education Tuition Contract Agreement for County Special Services Districts). The current rules and contract are substantially the same as those in effect during the period at issue.

the requested adjustment.[5] Under these facts, there is no question that Pemberton should have acted to protect its rights by filing an appeal within 90 days of its notice of the recertified rates – i.e., on or before May 23, 2004 – notwithstanding the persistent efforts of its Business Administrator to resolve the matter informally through BCSSD directly, and by seeking assistance from staff in the Department's Division of Finance and others. *Riely v. Hunterdon Central Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980), *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993)

With respect to Pemberton's claim for refund of surplus held by BCSSD during the 2004-05 school year above the level (10%) permitted by law, the Commissioner finds this matter to be moot as a dispute between the parties in light of the State Board of Education's adoption – on September 8, 2006[6] – of rules establishing a mechanism for refund of excess surplus to sending districts, and the Department's October 20, 2006 application of that rule to 2004-05 balances for all special services districts, including BCSSD (Exhibit R-12). Given that the State Board has now spoken – as a matter of policy and law – as to how the issue raised by Count Two of Pemberton's petition is to be handled for 2004-05 and prospectively, and given that Pemberton has already been accorded the relief it sought in Count Two of its petition in a manner consistent with the State Board's directive, there is no basis on which the Commissioner can sanction a different result as recommended by the ALJ. To the extent Pemberton believes that the mechanism established by the newly adopted rule is insufficient and not responsive to its

[5] See Certification of Pat Austin (Exhibit P-1), ¶17-24 and attached Exhibits 4-8; Pemberton's Memorandum in Opposition to Motion for Summary Judgment (Exhibit P-2) at 4-5 and 7-8; and Pemberton's Responses to Interrogatories (Exhibit P-3), attached exhibits A, D and F.

[6] See Note 3 above. It appears from the record and the Initial Decision that neither Pemberton nor the ALJ realized that the "proposed" rules referenced throughout proceedings at the OAL had actually been adopted by the State Board. Additionally, while BCSSD's filings from mid-to-late December 2006 (Exhibits R-12, R-13) indicate that the Department had devised a procedure addressing the issue of excess surplus and made the requisite adjustments to the benefit of sending districts, they do not explicitly state that the proposed rules were enacted into law.

concerns, the Board's remedy lies in the rulemaking processes of the Administrative Procedure Act,[7] not in the contested case process – where the result it seeks would, in effect, cause the Commissioner to engage in improper rulemaking through her decision in this matter. *Metromedia, Inc. v. Director, Division of Taxation*, 97 *N.J.* 313 (1984).

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is adopted in part and rejected in part, and the Petition of Appeal is dismissed as untimely filed (Count One) and moot (Count Two).

IT IS SO ORDERED.[8]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/12/07
Date of Mailing: 4/13/07

[7] *N.J.S.A.* 52:14B-1 *et seq.*, *N.J.A.C.* 1:30-1.1 *et seq.*, *N.J.A.C.* 6A:6-1.1 *et seq.* It is noted in this regard that Pemberton did not submit comments on the proposed rules upon their publication in the *New Jersey Register*. See 38 *N.J.R.* 4178(b). Additionally, although the record shows that Pemberton was engaged in related discussions with the Burlington County Association of School Business Officials during April and June of 2004 – while the rule proposal was under consideration by the State Board prior to its publication in the *Register* – the New Jersey Association of School Business Officials' comments on the proposed rules did not address the issues raised by Pemberton. See Pemberton's Answers to Interrogatories (Exhibit P-3), ¶8 and attached exhibit L; 38 *N.J.R.* 4178(b), 4181.

[8] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
AS TO RESPONDENT'S MOTION FOR SUMMARY DECISION TO DISMISS COUNT 2 OF PETITION
OAL DKT. NO. EDU 8568-04
AGENCY DKT. NO. 278-8/04

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES DISTRICT, BURLINGTON COUNTY,
Respondent.

Frederick W. Hardt, Esq., for petitioner
John T. Kelley, Esq., for respondent (Kelley, Wardell & Craig, attorneys)

Record Closed: January 3, 2007 Decided: February 13, 2007

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the Township of Pemberton, Burlington County, filed a petition with the Commissioner of Education on August 10, 2005, seeking a refund of tuition it claims it overpaid to respondent Burlington County Special Services District for the 2000-2001 school year, and a determination that respondent's surplus exceeds limits imposed by the regulations. Petitioner seeks an order that such surplus be reduced and refunded to all affected school districts. In its answer to the petition, respondent generally denied petitioner's claims, raised the issue of the timeliness of the petition pursuant to N.J.A.C. 6A:3-1.3 and counter-petitioned for monies which it alleges is owed to it by petitioner.

The matter was transmitted to the Office of Administrative Law (OAL) on October 14, 2004, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to me on November 18, 2004. On July 5, 2005, respondent filed a motion to dismiss Count 1 of the petition. After oral argument on the motion, I entered an Order on November 3, 2005, granting respondent's motion to dismiss Count 1 of the petition as untimely under the provisions of N.J.A.C. 6A:3-1.3(i). I then scheduled further proceedings to address the remaining issues. At the request of the parties, I scheduled a settlement conference for February 1, 2006. Following this, the parties contacted the New Jersey Department of Education (DOE) in an effort to have the matter resolved by the Department. In May 2006, I was advised by the parties that the DOE would not take a position in the matter and the parties agreed that the matter must be addressed in this proceeding. The parties agreed to provide stipulated facts. When a stipulation of facts was not forthcoming, I directed the parties to submit a motion to address the legal issues. On June 26, 2006, respondent filed a motion for summary decision seeking dismissal of Count 2 of the petition (R-7, R-8 and R-9). Respondent replied (P-4, P-5 and P-6), and after additional submissions (P-7 and R-10), I closed the record with respect to this motion on October 6, 2006.

During my writing of the Initial Decision in this matter, I had concerns whether the proposed remedy I was considering would take into account specific details of the free

balance in question or other information which was not of record. For this reason, I arranged a conference with counsel on November 6, 2006, to discuss these concerns. In an effort to address all outstanding issues in a proper manner, and in order to finalize this matter, I offered to counsel the opportunity to address the issue of the proper remedy and both counsel agreed to do so. Accordingly, I reopened the record on November 6, 2006, to allow counsel to submit their arguments on this issue. Upon receipt of these additional arguments, I closed the record on January 3, 2007.

FACTUAL DISCUSSION

Undisputed facts

A review of the pleadings filed by the parties in this matter, respondent's Statement of Uncontested Material Facts, and the briefs and submissions of both parties establishes the following as the undisputed facts herein.

The petitioner is a local board of education located in Pemberton Township, Burlington County. It is an Abbott[1] school district and receives special needs assistance as one of thirty-one poor urban districts within the State with special needs. Among its responsibilities, petitioner is required to identify children with special needs and to develop for each of them an individualized educational program (IEP) and placement under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1491. For students with certain disabilities, this may require sending them to an out-of-district educational facility specializing in the education of special needs children because the school district does not have the programs and services necessary to implement the IEP.

Respondent Burlington County Special Services District (BCSSD) is a body corporate and politic which operates schools for students with special needs. It accepts such students from local school districts and, in so doing, it is executing the school district's responsibility to educate students on behalf of their home school district.

[1] Abbott v. Burke, 149 N.J. 119 (1997).

The BCSSD educates many of the petitioner's special education students for which the petitioner pays tuition. Tuition rates are set and are subject to control by the DOE. The BCSSD is permitted to charge for tuition of those pupils, a sum not to exceed the actual cost per pupil as determined for each special education program or for the special services school district, according to the rules prescribed by the Commissioner and approved by the State Board. N.J.S.A. 18A:46-31(b), This is referred to as the "certified rate."

The DOE is to assure that the rates charged are in keeping with the limits set. The DOE periodically monitors and reviews the accounts of schools such as respondents. In an effort to get the rates correct it is not uncommon for the DOE to adjust or re-certify the tuition rates. It is also not uncommon for the certified rate to be re-certified after an initial rate has been found to be in error.

In the present case, for the school year 2000-2001, there were at least two rates struck. The first rate was certified in a November 21, 2002, letter from the DOE. It is not disputed that on November 21, 2002, the Commissioner of Education issued certified costs per pupil for tuition adjustment for the 2000-2001 school year. (R-5, Exhibit A.) On February 1, 2003, the petitioner's superintendent was advised of the adjustment for the 2000-2001 school year. (R-5, Exhibit B.) That led to a request contained in a letter dated February 1, 2003, that Pemberton reimburse BCSSD the amount of $441,319.02 for the year 2000-2001. On January 27, 2004, the Commissioner revised the tuition adjustments for the 2000-2001 school year. (R-5, Exhibit C.)

A second rate for the 2000-2001 school year, presumably based on re-consideration of the factors considered by the DOE in setting a rate, was set on or about January 27, 2004. Retro-tuition adjustments for 2000-2001 for BCSSD were made in 2003-2004 as a direct deduction from Pemberton Township's State Aid payments. These deductions would be then paid to BCSSD by the DOE. Total deductions were $441,319. and were based on the original 2000-2001 certified rate.

Pursuant to statute and regulations, a special services school district may carry a general fund balance no greater than ten percent of the annual budget. N.J.S.A. 18:46-31. It is not disputed that for the period 2004-2005, the free balance of the BCSSD district exceeded the ten percent permissible limit.

Petitioner submitted the following to supplement same. In response to petitioner's request, a representative of the DOE replied by e-mail and has confirmed the following:

a. On January 27, 2004, a re-certified rate was calculated for Burlington County Special Services for the 2000-2001 school year.

b. The original rates for 2000-2001 were overstated since the District submitted data through the School Register Summary that was incorrect. BCSSD reported students by classification and not by program.

c. The number of students sent to BCSSD by Pemberton Township in 2000-2001, was 169. Currently for the school year 2005-06, Pemberton is sending 98 students.

d. Pemberton Township's student population sent to BCSSD is declining. Therefore, the re-certified rates for 2000-2001 should be applied to the 170 students sent in 2000-2001 and not in a future adjustment since Pemberton Township would not be fairly compensated.

LEGAL DISCUSSION AND ANALYSIS

It is undisputed that during the school year 2004-2005, the general fund budget of respondent exceeded the ten percent limitation on undesignated general fund balance. Therefore, the issue before me involves a determination as to the appropriate remedy, if any, for respondent's maintaining of an undesignated general fund balance exceeding ten percent of the general fund budget.

N.J.S.A. 18A:46-31(b) allows the maintaining of an undesignated general fund balance not to exceed ten percent of the general fund budget exclusive of tuition adjustments of prior years. N.J.A.C. 6A:23-3.4(e)(2) provides the method of determining tuition rates for county special services districts and provides that if the ending general fund free balance is equal to or greater than ten percent of its general

fund budget for the year the tuition rate applies, no amount shall be added to the net cost of any tuition category. However, there is no statutory or regulatory provision establishing a mechanism in the tuition certification process to "give back" excess charges because of an incorrect certification.

Respondent concedes that the parties are generally in accord that the excess free balance must be returned in a way that meets the mandates of both the statute and the administrative regulations. Both petitioner and respondent have contacted the DOE seeking guidance as to how this should be accomplished. To date, a mechanism for the return of these funds has not been promulgated by the DOE.

Respondent takes the position that it must comply with the directions of the DOE, but only when regulations are issued dealing with this issue. Since there is an absence of regulations at present, respondent contends that an order should be entered directing that respondent comply with the directions of the Department of Education at such time as they are issued, and that the petitioner's petition should be dismissed because there is no dispute between the parties.

Respondent further contends in its response to petitioner's position that petitioner is attempting to reargue its time-barred and dismissed claim set forth in Count 1 of the petition.

In response, the petitioner concedes that there is no mechanism in the tuition certification process to "give back" excess charges because of an incorrect certification. However, it points out that even the respondent acknowledges the existence of excess funds in its general fund balance.

Petitioner points out that the Pemberton Township School District is an "Abbott" district and is one of the thirty-one poorest, urban districts in the State of New Jersey warranting special aid and assistance. To make matters worse, on May 9, 2006, the New Jersey Supreme Court issued an order which permitted the State to freeze this special aid at the level of prior years. Petitioner contends that since it is an "Abbott" school district, it is confronted with serious and immediate financial issues and cannot

afford to wait indefinitely for reimbursement from respondent.

Petitioner argues that jurisdiction exists in the present matter to direct the reimbursement requested and that petitioner is entitled to reimbursement in the amount of $441,319. In the alternative petitioner requests that respondent be directed to deposit the excess funds in an escrow account until the DOE determines an alternate mechanism for reimbursement.

Analysis

N.J.S.A. 18A:46-31.b. provides in relevant part as follows:

> The board of education of any county special services school district . . . shall be entitled to collect and receive from sending districts . . . for the tuition of those pupils, a sum not to exceed the actual cost per pupil as determined for each special education program or for the special services school district, according to rules prescribed by the commissioner and approved by the State Board.

A further provision in this same section states:

> An undesignated general fund balance of 10 percent of the general fund budget exclusive of tuition adjustments of prior years may be maintained.

N.J.A.C. 6A:23-3.4 provides the method of determining tuition rates for county special services districts. Subsection (e)2 of that section provides:

> If the county special services district board of education's ending general fund free balance is equal to or greater than 10 percent of its general fund budget for the year the tuition rate applies, no amount shall be added to the net cost of any tuition category.

When tuition rates are certified and the surplus exceeds ten percent, no amount is subtracted from the net tuition cost of any tuition category. There is no mechanism in the tuition certification process to "give back" excess charges because of an incorrect

certification.

The DOE is to assure that the rates charged are in keeping with the limits set; in an effort to get the rates correct it is not uncommon for the DOE to adjust or re-certify the tuition rates; it is also not uncommon for the certified rate to be re-certified after an initial rate has been found to be in error.

There is no doubt that respondent has excess funds in its general fund balance for the 2004-2005 school year, and I so **FIND**. I agree with the parties that there is no mechanism, procedure or formula set forth in either the statutes or the regulations dealing with the tuition certification process to "give back" excess charges the cause of an incorrect certification. I have been unable to find any case law or other guidance that is directly on point as to how to decide this matter.

However, I **FIND** it legally indefensible to allow the respondent to retain funds in violation of a specific provision of the law which prohibits such retention. Under these circumstances, I **FIND** that it is necessary for the DOE to fashion a remedy which requires that the excess free balance be returned in a way that meets the mandates of both the statute and the administrative regulations.

The only case I have been able to find which gives some guidance as to how to approach this question is In Re Fees of State Board of Dentistry, 84 N.J. 582 (1980). While that case clearly differs from the present matter, I **FIND** that the legal principles contained therein provide assistance in formulating a remedy in the present matter.

In the State Board of Dentistry case, the appellant dental association challenged the State Board's increase in registration fees for dentists. The statute in question, N.J.S.A. 45:1-3.2, provided that fees shall not be fixed at a level that will raise amounts in excess of the amount estimated to be required. The purpose of the statute was to ensure that fees set by State agencies pursuant to the statute would not generate revenues in excess of the needs of the agencies. Over four years after the filing of this challenge, the lower court held that the State Board's amended regulation, which increased the registration fees, was in conflict with the applicable statute and was

invalid. When the agency refused to refund the monies collected under the invalidated regulation, the appellant filed motions in aid of litigant's rights and a petition for a rehearing. The lower court denied both motions and the petition.

The Supreme Court held that the case should be remanded to the State Board of Dentistry for the calculation and distribution of a refund based on the difference between the fees collected during the years in question and the Board's actual expenses during those years, supra at 586. To determine the proper amount to be refunded for collections made in past years, actual expenses, not estimated ones, were determined to be the proper measure. That refund was being distributed to all dentists who paid registration fees under the invalidated fee schedule.

The Court stated that basic principles of honesty and equity mandated this result. Furthermore, there is no basis in law for the Board to retain the disputed funds since they were collected in violation of the statute. To hold otherwise would allow the Board to enrich itself unjustly at the expense of the members of the Association and would violate one of the cardinal principles of the common law, requiring restitution to prevent unjust enrichment. "[T]he law raises an assumption to refund the money which can no longer be honestly retained." The taxing entity has "not a particle of right to the money in question," which is due to the taxpayer "according to the principles of common honesty." Id. at 586-588

Applying the foregoing principles, I **FIND** that there is no basis in law for the respondent to retain the excess funds in its general fund balance for the 2004-2005 school year, since their continued retention is in violation of the statute. To hold otherwise would allow the respondent to enrich itself unjustly at the expense of the sending districts and would violate one of the cardinal principles of the common law, requiring restitution to prevent unjust enrichment. The law raises an assumption to refund the money which can no longer be honestly retained.

Based upon my determination that respondent is required to refund tuition collected which results in its free balance exceeding the ten percent limitation, I became concerned that in establishing a remedy I might fail to take into account specific details

of the free balance in question in order to establish an appropriate remedy. As I stated in the Statement of the Case and Procedural History, I reopened the record on November 18, 2006, to allow counsel to submit their arguments on this issue.

In his letter of December 11, 2006 (R-11), attorney for respondent attached as Exhibit A thereto a process used by respondent in calculating the proportional refund to be paid to sending districts of any excess unreserved general fund balance. He asserts that this process uses the same paradigm used by the DOE in determining the annual budget in order to calculate the funds to be returned to the sending districts. He requested that I adopt this as an exhibit so that this procedure could be approved by the DOE. In his letter of December 15, 2006 (R-12), attorney for respondent asserts that in the DOE's Certification of Rates for the 2004-2005 school year (attached to R-12), it has already adjusted the general fund balance to resolve the issue of the excess general fund balance. Finally, in his letter of December 21, 2006 (R-13), attorney for respondent contends that it is up to the DOE to resolve this issue and that it has established a procedure to do so as set forth in his letter of December 15, 2006 (R-12).

In response to the foregoing, in his letter of December 18, 2006 (P-8), attorney for petitioner points out that a procedure has been proposed by the DOE to be adopted by regulation which attempts to deal with this tuition refund issue, and that it would not be appropriate to fail to recognize these efforts in rule-making. In addition, attorney for petitioner points out that fund balances are impacted by over-estimated or under-estimated revenues, by capital reserves that are not considered in the net cost adjustment, and by revenues that are not considered part of costs associated to special services districts. In addition, unauthorized transfers in expenditures to avoid generating additional surplus impact the excess surplus calculation and should also be considered. For these reasons attorney for petitioner urged that I affirm my draft decision and leave the ultimate methodology for such refunds to be established by the Commissioner of Education. In a second letter of December 18, 2006 (P-9), attorney for petitioner again urged that I issue my draft decision as the Initial Decision in this matter. By letter dated December 27, 2006 (P-10), attorney for petitioner reiterated this request.

I have considered the foregoing submissions in determining an appropriate

remedy in this matter. I did not find these submissions to be helpful in deciding the appropriate specific method of calculating the refund amount. Therefore, I have determined that I would set forth in general terms what I believe to be the correct method.

I **FIND** that in order to determine the correct amount to be refunded the respondent should first be required to calculate a total refund amount based on the difference between the tuition collected during the year or years in which its free balance exceeds the ten percent limitation and the amount determined by adding the respondent's actual expenses plus a ten percent free balance during those years. I **FIND** that the resulting amount should then be divided among all sending districts in proportion to the total amount of any payments made by each sending district for the year in question. I **FIND** that these calculations should then be submitted to the DOE for its approval and, if so approved, the refunds should be made by respondent to the petitioner and to all other sending districts.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that the respondent shall be required to refund the amount of any excess tuition collected during the year or years in which its free balance exceeds the ten percent limitation. I **ORDER** that the respondent shall calculate the amount of the refund based on the difference between the tuition collected during the year or years in which its free balance exceeds the ten percent limitation and the amount determined by adding the respondent's actual expenses plus a ten percent free balance during those years. I further **ORDER** that the resulting amount shall then be divided among all sending districts in proportion to the total amount of any tuition payments made by each sending district for the year in question. I **ORDER** that these calculations shall then be submitted to the DOE for its approval and, if so approved, I **ORDER** that the refunds as so calculated shall be made by respondent to the petitioner and to all other sending districts.

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

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

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

February 13, 2007
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2-14-07
DATE

Mailed to Parties:

FEB 21 2007
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph/mh

APPENDIX

LIST OF EXHIBITS:

For petitioner:

P-1 Certification of Pat Austin with the following attachments:

1. Letter from Lucas to Cowell, dated January 7, 2004, claiming $866,489.06
2. E-mail, dated February 19, 2004, Austin to Leary re: discussion adjustments
3. Letter from Lucas to Cowell, dated February 10, claiming $459,786.91 4. E-mail to Leary firm from Austin, dated February 12 and 18, 2004, requesting information on rates
4. Fax from Leary providing detail on rates, dated February 23, 2004
5. E-mail to County Superintendent on meeting concerning rates, dated March 5, 2004
6. E-mail to Leary on adjustment, dated April 6, 2004
7. Letter, dated May 19, 2004, requesting the adjustment for the 2000-2001 School year tuition

P-2 Memorandum in Opposition to Motion for Summary Judgment

P-3 Set of answered interrogatories, with exhibits

P-4 Counter Statement of Uncontested Material Facts, dated June 23, 2006

P-5 Certification of Pat Austin, dated July 21, 2006

P-6 Memorandum in Opposition to Respondent's Motion for Summary Decision

P-7 Reply letter memorandum, dated July 28, 2006

P-8 Attorney for petitioner letter, dated December 18, 2006, with the following attached:

A. Sample Excess Surplus Calculation

B. Respondent General Fund Balance Adjustments

C. Proposed Regulations

P-9 Attorney for petitioner, letter dated December 18, 2006

P-10 Attorney for petitioner, letter dated December 27, 2006

For respondent:

R-1 Notice of Motion to Dismiss (as to Count 1 of petition)

R-2 Memorandum of Law in Support of Motion

R-3 Statement of Uncontested Material Facts

R-4 Certification of John T. Kelly, Esq., with attachments:

A. Petitioner's Answer to Interrogatories

R-5 Certification of Donald P. Lucas, Ed.D., respondent's Superintendent, with attachments:

A. Department of Education letter, dated November 21, 2002

B. Respondent's letter, dated February 1, 2003

C. Department of Education letter, dated January 27, 2004

R-6 Reply Memorandum of respondent with attachment:

A. Special Education Tuition Contract

R-7 Notice of Motion for Summary Judgment, dated June 23, 2006

R-8 Certification of Donald P. Lucas, Ed.D., dated June 21, 2006

R-9 Memorandum of Law in Support of Motion, dated June 23, 2006

R-10 Reply letter brief, dated July 21, 2006.

R-11 Attorney for respondent letter dated December 11, 2006, with the following attachments:

A. Calculation of Excess Unreserved General Fund Balance

R-12 Attorney for respondent, letter dated December 15, 2006, with attachment consisting of DOE Certified Per Pupil Tuition Rates

R-13 Attorney for respondent, letter dated December 21, 2006

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING MOTION TO DISMISS COUNT 1 OF PETITION
OAL DKT. NO. EDU 8568-04
AGENCY DKT. NO. 278-8/04

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES DISTRICT, BURLINGTON COUNTY,
Respondent.

Frederick W. Hardt, Esq., for petitioner
John T. Kelley, Esq., for respondent (Kelley, Wardell & Craig, attorneys)

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the Township of Pemberton, Burlington County, filed a petition with the Commissioner of Education on August 10, 2005, seeking a refund of tuition it claims it overpaid to respondent Burlington County Special Services District for the 2000-2001 school year. It also seeks a determination that respondent's surplus exceeds limits

imposed by the Commissioner and seeks an order that such surplus be reduced and refunded to all effected school districts. In its answer to the petition, respondent generally denies petitioner's claims, raises the issue of the timeliness of the petition pursuant to *N.J.A.C.* 6A:3-1.3 and counter-petitions for $962,491.35 in monies which it alleges is owed to it by petitioner.

The matter was transmitted to the Office of Administrative Law on October 14, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to me on November 18, 2004, and I scheduled a telephone prehearing conference for January 5, 2005. As result of that telephone prehearing conference, I scheduled the matter for hearing on September 21 and 22, 2005, and also scheduled another telephone conference for March 3, 2005. On March 3, 2005, I discussed the status of the matters with the parties and there was agreement that after the discovery was completed respondent would be moving to dismiss the petition on the basis of timeliness. Additional telephone conferences were scheduled and held. On July 5, 2005, respondent filed a motion to dismiss. After petitioner responded, I scheduled oral argument on the motion which was held on September 16, 2005. I closed the record with respect to the motion on September 16, 2005, and I am issuing this Order within 45 days of that date.

FACTUAL DISCUSSION

Undisputed facts

A review of the pleadings filed by the parties in this matter establishes the following as undisputed facts herein. The petitioner is a local board of education located in Pemberton Township, Burlington County. It is an *Abbott* school district (*Abbott v. Burke,* 149 *N.J.* 119 (1997)), and receives special needs assistance as one of 30 poor urban districts within the State with special needs. Among its responsibilities, petitioner is required to attend to identify children with special needs and to develop an individualized educational program (IEP) and placement under the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.* Sec. 1400-1491. For students with certain disabilities, this may mean sending them to an out-of-district educational facility specializing in the education of special needs children because the school district does not have the program necessary to implement the IEP.

Respondent is a body corporate and politic which operates schools for individuals with special needs, and in so doing it is executing the school district's responsibility to educate students on behalf of their home school district. Respondent charges the local school district for the service but is not free to select the rates charged. These rates are subject to control by the New Jersey Department of Education (DOE). The DOE is required to assure that the rates charged by a school such as respondent are in keeping with the limits set, and it periodically monitors and reviews the accounts of schools such as respondent's.

There are certain additional facts that do not appear to be disputed. It does not appear to be disputed that on November 21, 2002, the Commissioner of Education issued certified costs per pupil for tuition adjustment for the 2000-2001 school year. (Lucas Certification, Exhibit A.) It also does not appear to be disputed that on February 1, 2003, the superintendent of the petitioner school district was advised of the adjustment for the 2000-2001 school year. (Lucas Certification, Exhibit B.) On January 27, 2004, the Commissioner revised the tuition adjustments for the 2000-2001 school year. (Lucas Certification, Exhibit C.) The petition in this matter was filed on August 10, 2004.

Disputed facts

Respondent contends that petitioner was aware of the January 27, 2004, revision on that date (Lucas Certification, Exhibit A), and that the failure to commence the within proceeding within 90 days of that date is fatal to its claim.

Petitioner submitted the July 25, 2005, Certification of Pat Austin, the Business Administrator of the Pemberton Township School District. In that Certification Pat Austin states that a certified rate for tuition is determined for each special services school district pursuant to *N.J.S.A.* 18A:46-31(b). The DOE is to assure that the rates charged are in keeping with the limits set and that it is not uncommon for the DOE to adjust or recertify the tuition rates after an initial rate has been found to be in error. In the present case there were at least two rates struck for the 2000-2001 school year. A rate appears to have been first certified by the DOE as of November 21, 2002. This led to a request that petitioner reimburse respondent the amount of $441,319.02.

Pat Austin goes on to state in the Certification that a second rate, presumably based on

reconsideration of the factors considered in setting a rate by the DOE, was struck on or about January 27, 2004. However, petitioner was never formally notified that a new rate had been recertified nor was petitioner advised of the effect that a change in the rate would have on the petitioner school district's tuition obligation for the year 2000-2001. Respondent never challenged the new rate within 90 days of the January 27, 2004 letter.

Pat Austin further states in the Certification that on February 12, 2004, the DOE was contacted by e-mail to obtain information on the recertified rates for the 2000-2001 school year. On February 23, 2004, Heather Leary, an employee of the DOE, faxed a copy of the new rates to Pat Austin. Petitioner acknowledges that while this faxed copy of the new 2000-2001 rates was not exactly official it was "knowledge" that new rates had been recertified. Petitioner goes on to state that on May 19, 2004, it formally requested the DOE to make the adjustment called for in the January 27, 2004, recertifying rates, and that Pat Austin was verbally advised a few days later that the request was denied. Petitioner contends that it filed the petition in this matter within 90 days of being advised that the requested adjustment was being denied.

LEGAL DISCUSSION AND ANALYSIS

Based on my review of respondent's motion to dismiss and the arguments made by the parties, I am satisfied that the motion is directed solely to Count 1 of the petition. The motion relies on *N.J.A.C.* 6A:3-1.3(i), which provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

In *Kaprow v. Bd. of Educ of Berkeley Tp.*, 131 *N.J.* 572 (1992), the Court discussed the requirement for notice and what notice is deemed "adequate notice." *Id.* at 587-589. It stated that adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate and that it must be sufficient to further the purpose of the ninety-day limitations period. The Court explained that

adequate notice should effectuate concerns for individual justice by not triggering the limitations period until the involved individual has been alerted to the existence of facts that may equate in law with a cause of action. *See Burd v. New Jersey Tel. Co.*, 76 *N.J.* 284, 291 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone,* 21 *N.J.* 28, 48 (1956). In *Kaprow,* the notice the petitioner had received when others were appointed to the position to which he was seeking reinstatement was adequate to enable him to pursue his claim. He received adequate notice when he learned from the local board the existence of that state of facts that would enable him to file a timely claim.

Based on the foregoing, the issue to be resolved in the present matter is when petitioner Pemberton Township Board of Education learned of the existence of a state of facts that would enable it to file a timely claim?

Apparently, the procedure that was followed when the DOE completed its first review of respondent's costs per pupil for the 2000-2001 school year pursuant to *N.J.A.C.* 6A:23-3.4, was that it notified respondent of the certified cost per pupil for tuition adjustment purposes by a writing dated November 21, 2002. Respondent then issued a letter directed to petitioner dated February 1, 2003, setting forth its calculation of petitioner's additional liability for the 2001-2002 school year resulting from the DOE's determination of the certified cost per pupil for tuition adjustment purposes.

It may be argued that it is significant that when DOE notified respondent by a writing dated January 27, 2004, of its revision of the 2000-2001 per pupil cost-tuition, neither that writing nor any subsequent written notice was provided to petitioner by respondent or by the DOE. The question then arises whether notice of the existence of the January 27, 2004 DOE revision of the 2000-2001 per pupil cost-tuition amounted to notice of the existence of a state of facts that would enable it to file a timely claim. Based upon the procedure followed in connection with the first review of respondent's costs per pupil for the 2000-2001 school year, an argument may be made that simply being notified of the January 27, 2004 DOE revision of the 2000-2001 per pupil cost-tuition was insufficient to give rise to notice of a claim. There was no letter issued by respondent directed to petitioner setting forth respondent's calculation of

petitioner's undercharge or overcharge for the 2001-2002 school year resulting from the DOE's revised determination of the certified cost per pupil for tuition adjustment purposes. If there had been such a letter, petitioner clearly would have been placed on notice.

However, petitioner had been previously billed for tuition for the 2000-2001 school year in an amount that apparently exceeded the amount that should have been paid pursuant to the recertified tuition rate of January 27, 2004. I **FIND** that the facts that petitioner had been so billed and that the tuition rate had been revised downward existed as of January 27, 2005. I **FIND** that the Pemberton Township Board of Education learned of the existence of this state of facts on February 23, 2004, and that the existence of this state of facts would enable it to file a timely claim. I **FIND** that as of that date, the petitioner had been billed tuition based on the prior rate and it was on notice of a revised rate that had the effect of reducing its tuition obligation for the 2000-2001 school year.

In view of the foregoing findings, I **FIND** that petitioner was aware of the January 27, 2004, tuition rate revision no later than February 23, 2004, and that the failure to commence the within proceeding within 90 days of that date is fatal to its claim. Therefore, I **CONCLUDE** that respondent's motion to dismiss Count 1 of the petition as untimely under the provisions of *N.J.A.C.* 6A:3-1.3(i) should be **GRANTED**, and Count 1 of petitioner's petition should be **DISMISSED**.

Since respondent's motion to dismiss addresses only Count 1 of the petitioner's petition, I intend to schedule a conference with the parties to discuss the necessity for further proceedings to address Count 2 of the petition as well as respondent's counter-petition.

ORDER

For the reasons stated above, I **ORDER** that respondent's motion to dismiss Count 1 of the petition as untimely under the provisions of *N.J.A.C.* 6A:3-1.3(i) is hereby **GRANTED**, and Count 1 of petitioner's petition is hereby **DISMISSED**.

This order may be reviewed by the **COMMISSIONER OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

November 3, 2005
DATE

JOSEPH F. MARTONE, ALJ

mph

APPENDIX

LIST OF EXHIBITS:

For petitioner:

P-1 Certification of Pat Austin with the following attachments:

1. Letter from Lucas to Cowell, dated January 7, 2004, claiming $866,489.06
2. E-mail, dated February 19, 2004, Austin to Leary re discussion adjustments
3. Letter from Lucas to Cowell, dated February 10, claiming $459,786.91
4. E-mail to Leary firm from Austin, dated February 12 and 18, 2004, requesting information on rates
5. Fax from Leary providing detail on rates, dated February 23, 2004
6. E-mail to County Superintendent on meeting concerning rates, dated March 5, 2004
7. E-mail to Leary on adjustment, dated April 6, 2004
8. Letter, dated May 19, 2004, requesting the adjustment for the 2000-2001 School year tuition

P-2 Memorandum in Opposition to Motion for Summary Judgment

P-3 Set of answered interrogatories, with exhibits

For respondent:

R-1 Notice of Motion to Dismiss

R-2 Memorandum of Law in Support of Motion

R-3 Statement of Uncontested Material Facts

R-4 Certification of John T. Kelly, Esq., with attachments:

A. Petitioner's Answer to Interrogatories

R-5 Certification of Donald P. Lucas, Ed.D., respondent's Superintendent, with attachments:

A. Department of Education letter, dated November 21, 2002

B. Respondent's letter, dated February 1, 2003

C. Department of Education letter, dated January 27, 2004

R-6 Reply Memorandum of respondent with attachment:

A. Special Education Tuition Contract

135-07

#135-07

OAL DKT. NO. EDU 4169-04
AGENCY DKT. NO. 170-5/04

IN THE MATTER OF THE GRANT OF THE	:	
RENEWAL APPLICATION OF THE	:	COMMISSIONER OF EDUCATION
RED BANK CHARTER SCHOOL,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement – pursuant to *N.J.A.C.* 1:1-19.1(c) and (d) – is deemed to be the final decision in this matter.

IT IS SO ORDERED.

Lucille T Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/07

Date of Mailing: 4/13/07

McOMBER & McOMBER, P.C.
54 Shrewsbury Avenue
Red Bank, NJ 07701
(732) 842-6500
Attorneys for the Board of Education of the
Borough of Red Bank, in the County of Monmouth

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

I/M/O GRANT OF RENEWAL APPLICATION OF THE RED BANK CHARTER SCHOOL, MONMOUTH COUNTY.

OAL Docket No.: EDUOT 04169-2004S

Agency Ref. No.: 170-5/04

CONSENT ORDER

THIS MATTER, being opened to Honorable John Tassini, A.L.J. pursuant to the consent of the Board of Education of the Borough of Red Bank, in the County of Monmouth ("Red Bank Board"), by its counsel, McOmber & McOmber, P.C., R. Armen McOmber, Esquire, appearing; the Red Bank Charter School ("Charter School") by its counsel, McCarter & English, Esquires, David C. Apy, Esquire, appearing; and the Commissioner of Education of the State of New Jersey by her counsel, Carolyn Grace Labin, Deputy Attorney General, appearing, and it appearing that the parties have agreed to the form and content of the within Consent Order, and for other good and sufficient cause, it is on this 20th day of March, 2007;

ORDERED as follows:

1. In accordance with the provisions of *N.J.A.C.* 6A:11-7.2, in order for a student residing in the Borough of Red Bank to apply for enrollment or continued enrollment in the Charter School, the student must first register with the Red Bank Board,

and upon submission of a registration form, the Red Bank Board shall process the registration of the student for the subsequent school year. All registrations shall be processed in a timely manner by the Red Bank Board including an assessment of residency. Further, in the event that the Charter School becomes aware that the residency of any student attending the Charter School and registered by the Red Bank Board shall change at any time, the Red Bank Superintendent shall immediately be notified, in writing, by the Charter School. Further, the Charter School shall in concert with the Red Bank Board continue to use reasonable efforts to assess the residency of all of its students. All present Charter School students and students expected to begin attendance in September of 2007 will be registered with the Red Bank Board by September 1, 2007.

2. No later than October 30th of each school year, the Red Bank Superintendent shall submit in writing to the Charter School and the Charter School shall submit to the Red Bank Superintendent, the number of students by grade level, their gender, race/ethnicity, economic status *i.e.* the percentage of students entitled to free and reduced lunch and the number of students who are limited English proficient, attending the Red Bank District School and the Charter School, respectively.

3. No later than January 15th of each school year, the Charter School shall submit to the Red Bank Superintendent, in writing, the number of students by grade level, their gender, race/ethnicity, economic status and the number of students who are limited English proficient from each district selected for enrollment from the initial recruiting period of the Charter School for the following school year, *N.J.A.C.* at 6A:11-4.4(b).

4. In accordance with the provisions of *N.J.A.C.* 6A:11-4.5, the Charter School shall continue to maintain a waiting list and shall provide a written copy of the waiting list to the Red Bank Superintendent, including the district of residence, no later than October 15th, January 15th and May 15th of each school year.

5. In accordance with the provisions of *N.J.A.C.* 6A:11-4.7, the Charter School shall provide an enrolled limited English proficient student with all required courses and support services to meet the New Jersey Core Curriculum Content Standards for High School Graduation in accordance with *N.J.S.A.* 18A:7A-4 and 5 and *N.J.A.C.* 6A:15.

6. Within ten (10) days of the date of the approval of the Minutes of each Open Public Meeting of the Charter School, copies of the Minutes shall be provided to the Red Bank Superintendent, without any additional request, and the Red Bank Board shall pay all statutory costs therefor. Additionally, copies of the formal agendas for all of the Open Public Meetings of the Charter School shall be forwarded to the Red Bank Superintendent at least twenty-four (24) hours prior to the Open Public Meeting without any additional request therefor and the Red Bank Board shall pay all statutory costs therefor. The Red Bank Board will receive written notice of all Open Public Meetings of the Charter School and at least forty-eight (48) hours' notice of any changes in the times, dates or places of such Open Public Meetings.

7. In accordance with the provisions of *N.J.A.C.* 6A:11-5.1, all classroom teachers, principals and professional support staff employed by the Charter School shall hold appropriate New Jersey Certification in accordance with *N.J.A.C.* 6A:11-3.1 and be

"highly qualified" in accordance with Section 9101(23) of the *Elementary and Secondary Education Act*, also known as the No Child Left Behind federal legislation ("NCLB"). In accordance with the provisions of the *Elementary and Secondary Education Act,* in the event that any of the classroom teachers, principals and professional staff employed by the Charter School are not "highly qualified" in accordance with Section 9101(23), letters shall be sent to parents advising them of same in accordance with NCLB and copies shall be sent to the Red Bank Board.

8. In the event that the Charter School Child Study Team determines that an out-of-district residential or non-residential placement of one of its students is warranted based on the student's individualized educational program, written notice shall be given to the Red Bank Superintendent prior to the placement in order that same may be evaluated by the Red Bank Schools' Child Study Team; provided however, that the Charter School Child Study Team shall, subject to law, make the final decision on the student's individualized educational program.

9. The Charter School shall use its best efforts to assure that the gender, race/ethnicity, economic status and limited English proficient percentages of the students attending the Charter School equate as closely as practicable with the gender, race/ethnicity, economic status and limited English proficient percentages of the students residing in the Borough of Red Bank.

10. The Charter School will use its best efforts to comply with its File Code 5131 entitled "Conduct/Discipline" and will exhaust all reasonable methods to enforce that policy before suggesting that a student return to the Red Bank District Schools. In

no event will a student be transferred from the Charter School to the Red Bank District Schools within a period of 24 weeks prior to a statewide standardized test. Further, the Charter School shall use its best efforts to comply with Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

11. In accordance with Section 6.1.3 of the Policies and Procedures of the Charter School entitled "Recruitment Activities", recruitment efforts shall include newspaper advertisements and press releases in Spanish to be placed in Spanish newspapers including, but not limited to, *El Diario, Nosotros and Nuestra Communidad.* Further, community flyers and community announcements shall be in both English and Spanish and to the greatest extent possible, the Charter School shall seek to recruit students by grade level, gender, race/ethnicity and economic status to be in general conformity with the students residing in the Borough of Red Bank. Additionally, the Charter School shall send announcements of its annual lottery in both English and Spanish to the Red Bank Board and to all Red Bank clubs, groups, churches and other public and quasi-public organizations. Commencing with the lottery for the 2007-2008 school year, the Charter School shall use its best efforts to assure that the applicants entered into the lottery are in the same proportions of Caucasian, African-American and Hispanic Limited English Proficient students as reside in the Borough of Red Bank.

12. Written notice of the time, date and location of the annual student lottery of the Charter School shall be provided, in writing, to the Red Bank Superintendent at least

ten (10) days prior to the lottery in order that representatives of the Red Bank Board may attend the lottery.

13. Commencing on October 15, 2007 and on each October 15th thereafter, the Charter School shall provide to the Red Bank Board written information concerning the impact of its sibling policy on the enrollment demographics of the Charter School. Said information shall include how many of the students selected under the sibling policy are Caucasian, African-American, Hispanic and/or limited English proficient. The Red Bank Board reserves the right to challenge the sibling policy of the Charter School should it be demonstrated that said policy is having an adverse impact on the gender, race, ethnic and/or limited English proficient balance of the student population of the Charter School.

14. The entry of this Consent Order shall only be dispositive of the issues directly relating to this matter and shall neither restrict nor prejudice in any way, the rights of the parties to pursue against each other any legal action with respect to any claim or violation of law, rule or regulation.

JOHN TASSINI, A.L.J.

I hereby consent to the form and entry of the within Consent Order.

McCARTER & ENGLISH, ESQUIRES
Attorneys for the Red Bank Charter
Charter School

By: _____
David C. Apy

McOMBER & McOMBER, P.C.
Attorneys for the Board of Education
of the Borough of Red Bank, in the
County of Monmouth

By: _____
R. Armen McOmber

CAROLYN GRACE LABIN, DAG
Attorney for the Commissioner of Education
of the State of New Jersey

137-07

OAL DKT. NO. EDU 700-07
AGENCY DKT. NO. 36-2/07

J.M.J., on behalf of minor child, R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

On April 5, 2007 – in light of petitioner's withdrawal of the Petition of Appeal – this matter was returned to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2(b).

Upon review of the record, however, the Commissioner notes that – notwithstanding petitioner's letter to the OAL indicating that she had decided against pursuing her appeal – the Board's answer in this residency matter contains an unresolved counterclaim for tuition for the period of R.O.'s alleged ineligible attendance. Accordingly, the Commissioner remands this matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/17/07
Date of Mailing: 4/17/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#136-07

OAL DKT. NO. EDU 1997-06
AGENCY DKT. NO. 44-1/06

K.R., on behalf of minor child, T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed as a contested case, the question of T.C.'s continued enrollment in the schools of the district having been mooted by petitioner's decision to enroll him elsewhere and the Board having withdrawn its counterclaim for tuition.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the matter is dismissed.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/12/07
Date of Mailing: 4/13/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 1997-06
AGENCY DKT. NO. 44-1/06

K. R. o/b/o MINOR CHILD, T. C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

K. R., pro se

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: February 20, 2007 Decided: March 2, 2007

BEFORE: **IRENE JONES**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 24, 2006, petitioner, K.R., filed a Pro Se Residency Appeal with the Commissioner of Education. Petitioner challenged the respondent's, Bloomfield Board of Education, decision to disenroll his son (T.C.) from the District's school on the basis that T.C. was not domiciled in the Township of Bloomfield.

On February 22, 2006, the matter was accepted for filing as a contested case at the Office of Administrative Law. The matter was scheduled for hearing on February 22 and 23, 2007.

Prior to the hearings, respondent advised that T.C. was no longer enrolled in the District school, having transferred to the City of Orange School District. As consequence of the transfer, the only issue remaining for hearing would be the District's counterclaim which it has elected to withdraw.

FINDINGS

Having reviewed the record in this matter, I **FIND** that petitioner is no longer enrolled in the District's school, thus the issue of disenrollment is moot. I further **FIND** that the District withdraws its counterclaim for tuition during the period of alleged ineligible attendance, thus this matter is no longer a contested case and should be and is hereby **DISMISSED**.

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

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

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

3/2/07
DATE

IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 3/2/07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 6 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

138-07

OAL DKT. NO. EDU 4577-06
AGENCY DKT. NO. 120-3/06

ANDRE STURGIS,	:	
PETITIONER.	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/07

Date of Mailing: 4/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4577-06

AGENCY DKT. NO. 120-3/06

ANDRE STURGIS,

Petitioner,

v.

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

Respondent.

Cristal Holmes-Bowie, Esq., for petitioner (Michael A. Armstrong, attorneys)

Harold W. George, Esq. for respondent (Sumners George, attorneys)

Record Closed: March 5, 2007 Decided: March 7, 2007

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

This matter was transmitted to the Office of Administrative Law on June 29, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 7, 2007
DATE

DONALD J. STEIN ALJ

Date Received at Agency:

MAR 13 2007

DATE

3/9/07

Mailed to Parties:

ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

bdt

CERTIFICATION

I, **JAMES J. DEVEREAUX**, SCHOOL BUSINESS ADMINISTRATOR/ BOARD SECRETARY OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN, IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY, **HEREBY CERTIFY** THAT THE FOREGOING ANNEXED EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF SAID CITY DULY CALLED AND HELD ON **MONDAY, JANUARY 29, 2007**, HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AS OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE BOOK OF SAID BOARD OF EDUCATION AND IS A TRUE, COMPLETE AND CORRECT COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATES TO THE SUBJECT MATTERS REFERRED TO IN SAID EXTRACT.

IN WITNESS WHEREOF, *I HAVE SET MY HAND AND AFFIXED THE CORPORATE SEAL OF SAID BOARD OF EDUCATION THIS 12TH DAY OF FEBRUARY, 2007*

2007 MAR -5 A 11: 29

JAMES J. DEVEREAUX
School Business Administrator/
Board Secretary

RESOLUTION
#101-SY '06
RESOLUTION OF THE CAMDEN CITY BOARD OF EDUCATION TO CONFIRM SETTLEMENT OF LITIGATION WITH ANDRE STURGIS WITHOUT AN AWARD OF COST

WHEREAS, the Camden Board of Education ("the Board") and Andre Sturgis have been involved in litigation; and

WHEREAS, the Board's Labor Counsel and representatives for Andre Sturgis have been involved in negotiations to reach an amicable settlement in this matter; and

WHEREAS, the Board does not admit any liability in regard to the underlying action entitled Andre Sturgis v. The Camden Board of Education, OAL Docket No.: EDUOA 04577-2006S, included but not limited to Petitioner's claims of violation of the United States and State of New Jersey Constitutions or any other matters Mr. Sturgis presently has before the Office of Administrative Law, or any other administrative agency or court; and

WHEREAS, both parties desire to settle this matter and enter into a "Last Chance Agreement" as set forth in Exhibit-A attached hereto and dismiss, with prejudice and without an award of costs or attorneys' fees, of the complaint filed in the matter; and

WHEREAS, all particulars of the settlement are attached as Exhibit-A and have been reviewed by both parties;

NOW, THEREFORE, BE IT RESOLVED, that the Board approves of this settlement with Mr. Sturgis.

Adopted: January 29, 2007

2007 MAR -5 A 11: 29
STATE
OFFICE

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2007 MAR -5 A 11
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the City of Camden (BOARD) and its employee Andre Sturgis (Sturgis).

WHEREAS, Sturgis has been continuously employed by the BOARD as a truck driver in the Food Services Division for approximately fifteen (15) years; and

WHEREAS, on January 30, 2006 the BOARD voted to terminate Mr. Sturgis for "Conduct Unbecoming and Insubordination"; and

WHEREAS, genuine questions of law and fact exist as to whether the BOARD provided Sturgis with adequate Due Process in accordance with the Constitution;

WHEREAS, the parties acknowledge and recognize the BOARD's commitment to the letter and spirit of the handicap accommodation provisions of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.,* as previously adopted by the Commissioner in *In re Yaniello*, CD 203-95 (Jun. 12, 1995), *affd.* S.B. 78-95 (Jan. 8, 1997), *affd* App. Div. Dkt. No. A-3482-96T1 (Apr. 2, 1998)(unreported). More specifically, the BOARD recognizes that under the New Jersey Law Against Discrimination, an employer is required to consider the possibility of reasonable accommodation before firing an employee with disabilities. Likewise, Sturgis recognizes that notwithstanding BOARD's obligation to provide reasonable accommodation to an employee with disabilities, the employee must still be capable of performing his duties, including but not limited to maintaining sobriety consistent with *Yaniello, supra,* the BOARD may lawfully hold Sturgis to the terms of a return to work agreement;

WHEREAS, the BOARD and Sturgis have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities pursuant to Title 18A and the New Jersey Law Against Discrimination; and

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

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

2. The BOARD will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, the Board shall return Sturgis to his former position and step with all benefits, medical, dental, vision, accrued sick time, vacation, pension, and entitlements in place prior to Sturgis' separation on January 31, 2006;

3. Should the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for a plenary hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

4. Sturgis shall not be entitled to any "back-pay" a result of this Settlement Agreement, and the period of separation shall be indicated as a leave of absence in his personnel file;

5. Within 30 days of the Commissioner issuing a final decision approving this settlement, Sturgis will attend an out-patient program for substance abuse and rehabilitation at a reputable facility for a minimum period as set by said facility. Sturgis may choose the facility subject to the approval of the Superintendent of Schools; such approval will not be unreasonably withheld;

6. Sturgis shall have the aforementioned facility provide the Board with proof of completion of treatment. Failure to do so will result in a breach of this Agreement and subject Sturgis to termination consist with the terms contained herein;

7. For a period of one year from the Commissioner's final approval of this agreement by and between Sturgis and the BOARD, Sturgis consents in advance to submit to a Breathalyzer analysis or blood testing upon request by the BOARD or its administrators for the presence of alcohol and/or controlled dangerous substance (ACDS) in his body. Blood testing is to take place at a licensed, BOARD-designated hospital, laboratory or clinic utilizing a split sample method, with the sample to be split into three parts. In the event that the first part of the sample tests positive utilizing the then-current standards accepted by the United States Department of Transportation, the BOARD may immediately suspend Sturgis in accordance with *N.J.S.A.* 18A:6-10, *et seq.,* and the second part of the sample will be forwarded promptly and directly by the licensed, BOARD-designated hospital, laboratory or clinic to a facility operated by Quest Diagnostics or its successor by merger or acquisition (which Sturgis agrees, in advance, is an independent laboratory of his choice). Sturgis will pay for the analysis of the second part of the sample. In the event that the second part of the sample tests positive, it will be considered as a violation of this agreement by Sturgis . In the event that the second part of the sample tests negative, the third part will be tested by Laboratory Corporation of America or its successor by merger or acquisition at the expense of the BOARD. The third test shall be conclusive. In the event that the third part of the sample tests positive, it will be considered as a violation of this agreement by Sturgis. In the event of a violation of this agreement by Sturgis , following the principles articulated in *Yaniello*, Sturgis acknowledges that he will be subject to the termination of his employment and he will not be entitled to a third strike.

8. Sturgis agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. Sturgis fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

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

10. The Agreement shall not take effect until the expiration of the Governor's statutory veto period, which is fifteen (15) days after a certified copy of the Board's minutes is received in the Governor's office.

11. The parties further agree in consideration of this Settlement Agreement that if it is approved by the Commissioner, that they will not assert in any judicial or administrative proceeding that any statements concerning the reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

DATED: 2-22-07

BY: _____

ANDRE STURGIS

SUMNERS GEORGE, P.C.
Attorneys for
Board of Education of the
City of Camden

BY: _____

HAROLD GEORGE

139-07

OAL DKT. NO. EDU 1447-06
AGENCY DKT. NO. 372-12/05

Y.W.C., on behalf of minor child, W.X.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/18/07

Date of Mailing: 4/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01447-06
AGENCY DKT. NO. 372-12/05

Y.W.C. o/b/o minor child, W.X.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

Leon K. Luk, Esq., for petitioners (Luk & Luk, attorneys)

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

Record Closed: March 1, 2007 Decided: March 9, 2007

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

This matter was transmitted to the Office of Administrative Law on January 23, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement, which was received by the undersigned on March 1, 2007.

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

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

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

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

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

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

March 9, 2007
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 12 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Attorneys for Respondent
Wayne Township Board of Education
Our File No. 283

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 MAR -1 A 8:50

Y.W.C. o/b/o Minor Child W.X., Petitioners, v. WAYNE TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO.: 372-12/05 OAL DOCKET NO.: EDUOS 1447-2006N **STIPULATION OF SETTLEMENT**
K.M.L. o/b/o Minor Child W.X., Petitioners, v. WAYNE TOWNSHIP BOARD OF EDUCATION, Respondent.	AGENCY REF. NO.: 373-12/05 OAL DOCKET NO.: EDUOS 1423-2006N

THIS AGREEMENT, made on the 22 day of February, 2007, by and between Yu Wen Chen, who currently resides at 1 Bella Court, in the Township of Wayne, the County of Passaic, and State of New Jersey (hereinafter referred to as "Chen"), Kwong Ming Lee (hereinafter referred to as "Lee") and the Wayne Township Board of Education, which has offices located at 50 Nellis Drive in the Township of Wayne, the County of Passaic,

and State of New Jersey (hereinafter referred to as the "Board").

WITNESSETH:

WHEREAS, Chen sought to enroll his minor child, W.X., in the Wayne Township Public School District (hereinafter referred to as the "District"), which is operated by the Board, on or about November, 2005, indicating by way of letter drafted by his cousin, Lee, that Chen lived with Lee in Wayne six (6) days per week, spending the other day with the rest of Chen's family in Brooklyn, New York; and

WHEREAS, Chen's application was denied based upon the District's determination that Chen was domiciled in Brooklyn, not Wayne, notwithstanding his part-time residence in Wayne; and

WHEREAS, on or about December 5, 2005, Chen filed a verified petition of appeal on behalf of his minor child W.X., contesting the District's residency determination and, as a result of the filing, W.X. was enrolled in the District in accordance with state law; and

WHEREAS, the Board filed an Answer and Counterclaim for tuition; and

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

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

1. Chen agrees to pay the Board one thousand five hundred dollars ($1,500.00) as a compromised tuition amount and that he shall repay said sums to the Board in eight (8) equal monthly installments of one hundred eighty-seven dollars and fifty cents ($187.50).

2. Chen agrees to make payments to the Board by way of check or money order made payable to the Wayne Township Board of Education and shall forward such sums to:

Mr. Gary Ottmann
Business Administrator/Board Secretary
Wayne Township Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

3. Chen agrees that the first payment shall be made within thirty (30) days after this Stipulation of Settlement is entered into a final order by an Administrative Law Judge. Each subsequent payment shall be due within thirty (30) days thereafter until the full amount set forth in Paragraph 1 has been paid.

4. In the event that Chen makes a late payment, which shall be defined as a payment received more than five (5) days after the due date, the Board shall have the option of giving Chen written notice that it is demanding that the remaining sum

due be paid in full in five (5) days from the receipt of said notice. Should Chen fail to pay the remaining amount, Chen shall be deemed to be in Default, and agrees that the Board may proceed by summary action to obtain a judgment and execute on the judgment. Chen agrees that in the event of Default, he shall be responsible for any and all attorneys' fees and costs incurred by the Board in the collection of the outstanding amount due.

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

6. This Agreement and all provisions hereof shall be governed by and construed under the law of the State of New Jersey, without regard to its choice of law principles.

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

8. The parties recognize that each has been represented by legal counsel or a representative of his or her own choosing and that they sign this Agreement as their own voluntary act and

deed, and that they fully understand the duties and obligations enumerated herein.

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

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

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

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

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

WITNESS:

Gary Ottmann
Board Secretary/
School Business Administrator

Dated: 1/26/07

WAYNE TOWNSHIP BOARD OF EDUCATION

By: Karinne Herrschaft
Karinne Herrschaft
Board President

Dated: 2/26/07

WITNESS:

Dated: 2/8/07

By: Yu Wen Chen
Yu Wen Chen

Dated: 2/8/07

WITNESS:

Dated: 2/8/07

By: Kwong Ming Lee
Kwong Ming Lee

Dated: 2/8/07

PUBLIC SCHOOLS
Wayne
50 Nellis Drive Wayne, New Jersey 07470

Administrative Offices
www.wayneschools.com
Phone: 973.633.3000

February 26, 2007

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey, convened in a Special Meeting/Executive Session on February 22, 2007, in the Conference Room of the Administrative Building at 50 Nellis Drive, Wayne, New Jersey. This meeting was scheduled to begin at 7:00 p.m. pursuant to the terms of the Sunshine Law.

The following members of the Wayne Board of Education were present: K. Herrschaft, J. Hutchison, R. Ceberio, D. Pavlak, D. Makowski, C. Simon, M. Polinik, T. J. D'Apolito

PS-34-07 – Approval of Stipulation of Settlement between the Board and Y.W.C and K.M.L – **RECOMMENDED ACTION:** "that the Board approve the Stipulation of Settlement between the Board and Y.W.C. and K.M.L. as found under Tab Approval of Stipulation of Settlement between the Board and Y.W.C. and K.M.L.

TAB APPROVAL OF STIPULATION OF SETTLEMENT BETWEEN THE BOARD AND Y.W.C. AND K.M.L.

MOTION: D. Makowski
SECOND: K. Herrschaft
VOTE: 9-0

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:
I, Gary Ottmann, Business Administrator, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on February 22, 2007, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in

said extract. In witness I have hereunto set my hand and affixed the corporate seal of the Wayne Board of Education this 26th day of February 2007.

SEAL

Gary Ottmann
Board Secretary/Business Administrator

140-07

OAL DKT. NO. EDU 1423-06
AGENCY DKT. NO. 373-12/05

K.M.L., on behalf of minor child, W.X.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Priscilla E Day

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/07

Date of Mailing: 4/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01423-06
AGENCY DKT. NO. 373-12/05

K.M.L. o/b/o minor child, W.X.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

Leon K. Luk, Esq., for petitioners (Luk & Luk, attorneys)

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

Record Closed: March 1, 2007 Decided: March 9, 2007

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

This matter was transmitted to the Office of Administrative Law on January 19, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement, which was received by the undersigned on March 1, 2007.

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

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

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

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

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

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

March 9, 2007
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency:

Mailed to Parties:

MAR 12 2007
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Attorneys for Respondent
Wayne Township Board of Education
Our File No. 283

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 MAR -1 A 8:50

Y.W.C. o/b/o Minor Child W.X., Petitioners, v. WAYNE TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO.: 372-12/05 OAL DOCKET NO.: EDUOS 1447-2006N **STIPULATION OF SETTLEMENT**
K.M.L. o/b/o Minor Child W.X., Petitioners, v. WAYNE TOWNSHIP BOARD OF EDUCATION, Respondent.	AGENCY REF. NO.: 373-12/05 OAL DOCKET NO.: EDUOS 1423-2006N

THIS AGREEMENT, made on the 22 day of February, 2007, by and between Yu Wen Chen, who currently resides at 1 Bella Court, in the Township of Wayne, the County of Passaic, and State of New Jersey (hereinafter referred to as "Chen"), Kwong Ming Lee (hereinafter referred to as "Lee") and the Wayne Township Board of Education, which has offices located at 50 Nellis Drive in the Township of Wayne, the County of Passaic,

and State of New Jersey (hereinafter referred to as the "Board").

WITNESSETH:

WHEREAS, Chen sought to enroll his minor child, W.X., in the Wayne Township Public School District (hereinafter referred to as the "District"), which is operated by the Board, on or about November, 2005, indicating by way of letter drafted by his cousin, Lee, that Chen lived with Lee in Wayne six (6) days per week, spending the other day with the rest of Chen's family in Brooklyn, New York; and

WHEREAS, Chen's application was denied based upon the District's determination that Chen was domiciled in Brooklyn, not Wayne, notwithstanding his part-time residence in Wayne; and

WHEREAS, on or about December 5, 2005, Chen filed a verified petition of appeal on behalf of his minor child W.X., contesting the District's residency determination and, as a result of the filing, W.X. was enrolled in the District in accordance with state law; and

WHEREAS, the Board filed an Answer and Counterclaim for tuition; and

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

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

1. Chen agrees to pay the Board one thousand five hundred dollars ($1,500.00) as a compromised tuition amount and that he shall repay said sums to the Board in eight (8) equal monthly installments of one hundred eighty-seven dollars and fifty cents ($187.50).

2. Chen agrees to make payments to the Board by way of check or money order made payable to the Wayne Township Board of Education and shall forward such sums to:

Mr. Gary Ottmann
Business Administrator/Board Secretary
Wayne Township Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

3. Chen agrees that the first payment shall be made within thirty (30) days after this Stipulation of Settlement is entered into a final order by an Administrative Law Judge. Each subsequent payment shall be due within thirty (30) days thereafter until the full amount set forth in Paragraph 1 has been paid.

4. In the event that Chen makes a late payment, which shall be defined as a payment received more than five (5) days after the due date, the Board shall have the option of giving Chen written notice that it is demanding that the remaining sum

due be paid in full in five (5) days from the receipt of said notice. Should Chen fail to pay the remaining amount, Chen shall be deemed to be in Default, and agrees that the Board may proceed by summary action to obtain a judgment and execute on the judgment. Chen agrees that in the event of Default, he shall be responsible for any and all attorneys' fees and costs incurred by the Board in the collection of the outstanding amount due.

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

6. This Agreement and all provisions hereof shall be governed by and construed under the law of the State of New Jersey, without regard to its choice of law principles.

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

8. The parties recognize that each has been represented by legal counsel or a representative of his or her own choosing and that they sign this Agreement as their own voluntary act and

deed, and that they fully understand the duties and obligations enumerated herein.

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

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

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

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

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

WITNESS:

Gary Ottmann
Board Secretary/
School Business Administrator

Dated: 2/26/07

WAYNE TOWNSHIP BOARD OF EDUCATION

By: Karinne Herrschaft
Karinne Herrschaft
Board President

Dated: 2/26/07

WITNESS:

Dated: 2/8/07

By: Yu Wen Chen
Yu Wen Chen

Dated: 2/8/07

WITNESS:

Dated: 2/8/07

By: Kwong Ming Lee
Kwong Ming Lee

Dated: 2/8/07

PUBLIC SCHOOLS
Wayne
50 Nellis Drive Wayne, New Jersey 07470

Administrative Offices
www.wayneschools.com
Phone: 973.633.3000

February 26, 2007

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey, convened in a Special Meeting/Executive Session on February 22, 2007, in the Conference Room of the Administrative Building at 50 Nellis Drive, Wayne, New Jersey. This meeting was scheduled to begin at 7:00 p.m. pursuant to the terms of the Sunshine Law.

The following members of the Wayne Board of Education were present: K. Herrschaft, J. Hutchison, R. Ceberio, D. Pavlak, D. Makowski, C. Simon, M. Polinik, T. J. D'Apolito

PS-34-07 – Approval of Stipulation of Settlement between the Board and Y.W.C and K.M.L – **RECOMMENDED ACTION:** "that the Board approve the Stipulation of Settlement between the Board and Y.W.C. and K.M.L. as found under Tab Approval of Stipulation of Settlement between the Board and Y.W.C. and K.M.L.

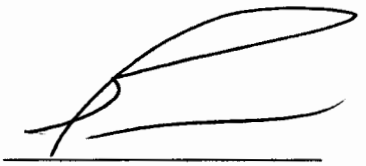
TAB APPROVAL OF STIPULATION OF SETTLEMENT BETWEEN THE BOARD AND Y.W.C. AND K.M.L.

MOTION: **D. Makowski**
SECOND: **K. Herrschaft**
VOTE: **9-0**

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:
I, Gary Ottmann, Business Administrator, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on February 22, 2007, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in

said extract. In witness I have hereunto set my hand and affixed the corporate seal of the Wayne Board of Education this 26th day of February 2007.

SEAL



Gary Ottmann
Board Secretary/Business Administrator

141-07

OAL DKT. NO. EDU 8024-06
AGENCY DKT. NO. 338-9/06

T.F., on behalf of minor child, A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the Board of Education's residency officer signed the Settlement Agreement on behalf of the Board. In that neither the record nor the agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf – nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation – the Commissioner cannot approve the within settlement agreement.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/07
Date of Mailing: 4/18/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8024-06

AGENCY DKT. NO. 338-9/06

T.F., on behalf of minor child, A.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

T.F., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: March 23, 2007 Decided: March 23, 2007

BEFORE **JAMES W. FAISON, III**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 2, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

I have reviewed the record and the terms thereof and I **FIND**:

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

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

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

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

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

March 23, 2007
DATE

JAMES W. FAISON, III, ALJ

Date Received at Agency: 3/27/07

Mailed to Parties:

MAR 28 2007
DATE

DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

T.F. o/b/o A.S.

v.

Ewing Board of Ed.

OAL Docket No.: EDU 08024-2006

Agency Ref. No.: 338-9/06

Settlement Agreement

This matter having been [redacted] presented to the Court by T.F., [redacted], pro se, and the Respondent, Ewing Bd. of Education, having been represented by Jeffrey F. Belz, Esquire, and the parties, having reached a settlement of the issues, agree as follows:

1.) Petitioner, T.F., shall withdraw A.S. from the Ewing school district by March 30, 2007.

2.) Ewing B.O.E. agrees to not pursue T.F. for truition.

Tatayda C. Fortson

Tatayda C. Fortson, Petitioner

142-07

142-07

OAL DKT. NO. EDU 1439-07
AGENCY DKT. NO. 426-11/06

N.V., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by the OAL on March 30, 2007, advising that they could submit explanations for such nonappearance – have been reviewed. There being no explanations filed by either party, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/19/07
Date of Mailing: 4/19/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4-1.1 *et seq.*

143-07L

143-07

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

April 19, 2007

Duane O. Davison, Esq.
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Dear Counsel:

I have considered the papers filed in conjunction with petitioner's request for interlocutory review of Administrative Law Judge (ALJ) Jeff S. Masin's March 29, 2007 Order regarding my jurisdiction over certain claims raised in the matter of *Maurice S. Kaprow v. Board of Education of the Township of Berkeley, Ocean County*, Agency Dkt. No. 397-11/06, OAL Dkt. No. EDU 12277-06. Upon such consideration, I have determined to grant the requested review so that this matter may move forward with its threshold jurisdictional question fully resolved, and, further, to proceed directly to a ruling on the Order rather than request an additional submission from the Board of Education, since the Board's responsive papers of April 12, 2007 substantially encompass the further argument contemplated by *N.J.A.C.* 1:1-14.10(d).

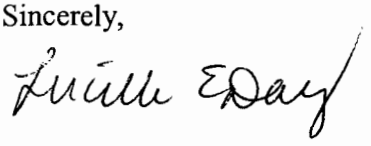
On interlocutory review, petitioner contends that his appeal is cognizable before the Commissioner of Education in its entirety, contending that the ALJ – who found that most of petitioner's claims were contractual in nature and consequently outside the Commissioner's jurisdiction – erred in failing to recognize that petitioner's claims for payment of accrued vacation/personal days and health insurance waiver arose from the relief awarded him in a prior Commissioner's decision, which the Commissioner has the necessary incidental powers to bring to completion. The Board, on the other hand, urges that the Order of the ALJ not be disturbed, since it correctly recognizes that the relief sought by petitioner is

granted to him, if at all, solely by the terms of a collective bargaining agreement – disputes regarding which are contractual in nature and do not arise under the school laws.

Having reviewed the Order of the ALJ and the arguments of the parties, I concur that resolution of petitioner's dispute will involve determination of rights under – and hence interpretation of – contractual terms and conditions of employment which do not fall within my jurisdiction.

Accordingly, I hereby ADOPT the Order of the ALJ for the reasons well expressed therein, and direct that this matter proceed solely on petitioner's claim for post-judgment interest as recommended by the ALJ.

Sincerely,



Lucille E. Davy
Commissioner

c: Honorable Jeff S. Masin, ALJ
Clerk, OAL
Clair Applegate
Jones Addo
County Superintendent

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER
REGARDING JURISDICTION
OAL DKT. NO. EDU 12277-06S
AGENCY DKT.NO. 397-11/06

MAURICE S. KAPROW,
Petitioner,
v.
BOARD OF EDUCATION OF BERKELEY TOWNSHIP, OCEAN COUNTY,
Respondent.

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

In a prior contested case, the Commissioner of Education adopted as the final decision an initial decision issued by Honorable James W. Faison III, ALJ, directing the respondent Board of Education to "immediately appoint petitioner to the position of District Director of Elementary Education and compensate him with back pay, less mitigation, and emoluments due him consistent with this decision." In the present matter, petitioner filed a Petition to Enforce Commissioner's Decision, claiming therein that although he and the Board had reached agreement on the amount of back pay due to him for the period from July 1, 2002, to August 31, 2006, that amount had not yet been paid, despite the passage of over sixty days since the effective date of the Commissioner's decision. In addition, petitioner claimed that a dispute existed regarding his claim for re-enrollment in the State pension plan, pension buy back differential, payment for accrued vacation and personal days in the amount of $42, 425.16 and payment of a health insurance waiver for "husband/wife" coverage. The petitioner notes that the Board disputes his entitlement to the waiver. Petitioner sought an order from the Commissioner to the Board that he be paid the "back pay and emoluments" as set forth in his Petition, pay prejudgment and post judgment interest,

commencing October 5, 2006, which was sixty days after the effective date of the Commissioner's decision and grant such other relief as was just and equitable.

In response, the respondent, claiming that the back pay and re-enrollment issues had been addressed, contended that the issues regarding compensation for vacation and personal days, as well as the health insurance waiver, were matters that arose pursuant to the applicable Berkeley Township Administrators Association collective bargaining agreement and were therefore issues that did not "arise under the school laws" and were not within the jurisdiction of the Commissioner since they were to be determined by interpretation of contract rights. In response to this argument, petitioner, relying on Board of Education of the City of Newark v. Levitt, 197 N.J.Super. 239 (App. Div. 1984) ("Levitt"), argued that a decision by the Commissioner on the issues of the vacation and personal days and health insurance waiver issues was required in order to provide "meaningful finality" to the Commissioner's earlier final decision.

The case was transferred to the OAL with specific direction to determine the issue of jurisdiction. The parties discussed the matter with the assigned ALJ in a telephone conference held on March 6, 2007. The record concerning the jurisdictional dispute closed as of that date.

During oral argument, counsel for Kaprow indicated that the dispute over vacation days involved Kaprow's contention that he should be paid for days he did not utilize as vacation days during the period when the Board had failed to properly appoint him, but the Board contends that he received the pay for these days as part of the back pay award.

Discussion

In the previous contested case, the petitioner, a tenured employee of the respondent school district, had been terminated in a Reduction In Force ("RIF"). He sought to establish that the district had defaulted in its responsibility to notify him of positions in which he could be reemployed and that he was entitled to be reemployed as the District's Director of Elementary Education. Judge Faison granted a motion for

summary decision, ordering that the petitioner be immediately appointed as District Director of Elementary Education and awarding "back pay, seniority rights, tenure rights and all other rights and benefits to which he is entitled consistent with this initial decision." As noted, the Commissioner's Final Decision adopted Judge Faison's decision.

At oral argument, counsel for Kaprow acknowledged that the vacation days and health insurance waiver in dispute were granted to the petitioner, if at all, by the terms and conditions of the contract between the Administrators' Association and the Board. All that the Final Decision held was that Mr. Kaprow was entitled to be the Director of Elementary Education and that as such, he was entitled to be made whole for that which he would have received by way of salary, tenure rights and seniority rights had he been treated properly by the Board and notified and appointed as he should have been. In addition, to the extent that he was deprived of other rights and entitlements because of the Board's failure to notify him and appoint him, the decision also establishes his entitlement to receive such benefits. But since his right to any specifically agreed upon vacation, personal time and insurance provisions constitute terms and conditions of employment provided for by the contract and not specifically by statute, the proper understanding of what his rights under the contract are involve interpretations of the contract. The case law makes clear that in such instances, the Commissioner is not empowered to perform this task. In South Orange-Maplewood Ed. Assn. V. Bd. of Ed. of South Orange, 146 N.J. Super. 457 (App. Div. 1977), the petitioners filed an action in the Chancery Division seeking specific enforcement of a provision of the agreement with the Board of Education relating to sabbatical leave. The trial court dismissed the action, transferring it instead to the Commissioner of Education. The court, stating that the action involved a dispute over terms and conditions of employment akin to wage and vacation benefits, reversed the trial court and remanded the case for a hearing in Chancery.

> The board exercised its authority under the school laws to fix the compensation and other terms of employment through negotiations with employees' representatives. The result was memorialized by the agreement. Now the only remaining dispute concerns the interpretation of that agreement. . . .

. . . .

> The Commissioner has jurisdiction over certain disputes in the absence of an agreement or if the subject matter is not susceptible to binding agreement because it concerns major educational policy or because the issues are controlled by the school laws. . .
>
> We see nothing in the dispute over the meaning of the agreement as it pertains to sabbatical leave which involves an interpretation of any specific statute in Title 18A.
>
> [Id. at 462-463].

Again, in Archway Programs v. Pemberton Board of Education, 352 N.J. Super. 420, 425 (App. Div. 2002), the court, citing Picogna v. Bd. of Ed. of Cherry Hill, 249 N.J. Super 332, 335 (App. Div. 1991), held, "Contract claims against boards do not arise under the school laws but rather from statutory or common law."

The petitioner believes that the Levitt case, supra., supports the Commissioner's jurisdiction. But in Levitt, the claim was for post-judgment interest on a back pay award granted by the Commissioner, who had determined that the Newark Board had improperly denied to the petitioners' tenure status which they had earned. The purpose of such interest was to make sure that where the payment of the back pay was delayed past the allowable sixty days, that the effective amount of the award was not diminished below the amount awarded. The court backed the Commissioner's authority to assure the effectiveness of the remedy, even in the face of a lack of statutory authority for the Commissioner to award interest.

> We are therefore persuaded that the Commissioner not only has the incidental power to award interest but, furthermore, that the interest of the judicial and administrative process as well of the litigants, would be advanced by his exercise thereof rather than deferring the question to a court for separate adjudication. In considering whether or not to allow interest, and, if so, how much, the Commissioner should, of course, be guided by the same principles respecting the award of pre-judgment interest and post-judgment interest which controls the judicial exercise of this power.
>
> [Levitt, at 248].

The petitioner rests much of his argument on the last portion of this quotation, that is, the court's concern to avoid piecemeal litigation. But it must be remembered that the issue of post judgment interest did not implicate any need to interpret a contractual agreement between the teachers and/or their bargaining representative and the Board, as the current dispute does. Thus, Levitt must be read to involve only a limited circumstance in which the courts endorse the Commissioner's role to protect the integrity of the Commissioner's order and the case cannot be read to overturn the basic principle espoused in South Orange-Maplewood, Picogna and Archway. This case falls within the ambit of the South Orange-Maplewood line of cases and not that of Levitt.

I **CONCLUDE** that the issues of petitioner's rights under the terms and conditions of the contract agreement are not matters that arise under the school laws and do not come within the jurisdiction of the Commissioner of Education. Therefore, the accrued vacation and personal days and the health insurance waiver issues are **DISMISSED**. The claim for post-judgment interest will be considered in further proceedings.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 29, 2007
DATE

JEFF S. MASIN, ALJ

mjm

144-07

#144-07

NANCY T. SNOW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former teacher in respondent's school district – alleged that the Board required her to submit a letter of resignation in order to continue her employment for the 2005-2006 school year, and that this requirement and the Board's subsequent refusal to allow her to withdraw her resignation before it took effect in May 2006 was arbitrary, capricious, and unreasonable. Respondent Board filed a motion for summary decision, based on petitioner's failure to timely file her petition.

The ALJ found, *inter alia*, that: petitioner's appeal, filed in July 2006, is time barred by *N.J.A.C.* 6A:3-1.3(i); the 90-day limitations period for filing began with the Board's acceptance of petitioner's letter of resignation in August 2005; there is no genuine issue of material fact in this matter, and summary decision is appropriate. The ALJ concluded that the petition is time-barred; granted summary decision in favor of respondent; and dismissed the petition.

Upon a full and independent review, the Commissioner concurs with the ALJ's grant of summary decision to the respondent, finding that the petition was filed well out of time. Accordingly, the Commissioner adopted the Initial Decision of the OAL dismissing the Petition of Appeal as the final decision in this matter.

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

April 20, 2007

OAL DKT. NO. EDU 6404-06
AGENCY DKT. NO. 255-7/06

NANCY T. SNOW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions – appending her Brief in Opposition to Motion for Summary Decision advanced below – essentially recast and reiterate her arguments made before the Administrative Law Judge (ALJ). Specifically, she first contends that the ALJ erred in concluding that her resignation was effective when it was accepted by the Board. Rather, she contends, because "she was induced by the Board for the unlawful purpose of circumventing the operation of the Tenure Law[,] [t]he agreement, thus entered into, between the Petitioner and the Board was therefore *void ab initio* and therefore it could not have been 'binding' as a matter of contract law at the time it was accepted by the Board." (Petitioner's Exceptions at pages 1-2). Further elaboration on this argument must be derived from petitioner's appended brief which indicates that the essence of petitioner's claim in this regard is that the agreement to resign –

irrespective of the benefits she may have derived from it – led to a situation where she was employed for the requisite period of time to obtain tenure status but, she argues, she did not receive that statutorily mandated status. Petitioner maintains the resignation letter the Board required her to sign as a condition of employment for the 2005-2006 school year – which was accepted by the Board in August of 2005 (but not effective until May of 2006) – contravened terms and conditions of employment dictated by the tenure statute which cannot legally be waived or bargained away and, therefore, she was entitled to rescind her resignation. (Petitioner's Brief in Opposition to Motion for Summary Decision at 5) Petitioner argues that the Board did not have the legal authority "to make such an end run around the tenure law" and to permit it to do so "would allow local boards to endlessly delay the granting of tenure by the subterfuge of each year obtaining a resignation, effective in the future, before granting a new contract." (*Id.* at 7)

Petitioner next excepts to the ALJ's conclusion that her petition was time-barred, asserting that at the time her resignation was accepted by the Board, "it was not binding, because it was entered into for an unlawful purpose." (Petitioner's Exceptions at 2) Additionally, as argued in her brief below, she maintains that – due to the fact that there remained a possibility that the parties, by mutual consent, would agree to the withdrawal of petitioner's resignation,[1] and because the resignation, by its own terms, did not become effective until May 22, 2006 – the 90-day time period for filing her Petition of Appeal began running on the effective date of her resignation rather than when the resignation was submitted and accepted. (Petitioner's Brief in Opposition to Motion for Summary Decision at 14-15)

[1] Petitioner's exceptions charge that it had been represented to her that "if she performed in an acceptable fashion, she might be permitted to rescind the resignation and enjoy continued employment with the district." (Petitioner's Exceptions at 2)

The Board's reply exceptions – which also appended its Brief in Support of Summary Decision, in addition to its Reply Brief to Petitioner's response and the ALJ's Initial Decision[2] – urge that the ALJ's holding that petitioner's resignation was effective and legally binding on her upon its acceptance by the Board at its regularly scheduled meeting on August 16, 2005[3] is correct. It advances that there is no legal authority – either cited by petitioner, or otherwise – which would require the Board to permit petitioner to rescind her resignation some nine months after this time. (Board's Reply Exceptions at 1)

In response to petitioner's charge that agreements of the nature of the one involved in this matter are illegal, the Board points out:

> [t]he material facts of this matter are undisputed – the Board agreed that in exchange for Petitioner's resignation, they would re-hire her so she could obtain her 25 years of service. Petitioner did so, and then attempted to circumvent the deal she proposed and agreed to by attempting to rescind her resignation. The agreement at issue did not violate the tenure laws, in fact, Petitioner later obtained tenure, worked for a few months past her tenure date, when her retirement became effective. The fact that she agreed to submit a letter of resignation prior to her obtaining tenure is of no consequence. (*Id.* at 2)

Finally, the Board charges that there is no authority for petitioner's "supposition" that the 90-day timeline for the filing of a petition in this matter did not begin to run until her last day of employment with the Board. Rather, it proposes – citing *Charles E. Willson III v. Board of Education of the Toms River Regional School District*, 96 *N.J.A.R.* 2d (EDU) 872 and *Blossom S. Nissman v. Board of Education of the Township of Long Beach Island*, 272 *N.J. Super.* 373, 380-81 (App. Div. 1994) – that this timeframe was triggered by the Board's acceptance of her letter of resignation. (Board's Reply Exceptions at 2) Moreover, it urges:

---

[2] The parties are advised that inclusion of their briefs filed below or the Initial Decision with their Exceptions is unnecessary as these materials are always contained in the record before the Commissioner.

[3] Respondent's exceptions mistakenly indicate the date as August 16, 2007.

> [p]etitioner does not dispute that she understood the effect of her letter of resignation, nor does she dispute that she was aware the Board had accepted her resignation at the August 16, 2005 Board meeting. Yet she waited over 11 months to dispute the Board's ability to accept her voluntary letter of resignation. If Petitioner wished to challenge [the] Board's authority to do so, she had to file her Petition within 90 days of August 16, 2005. She failed to do so, and thus, her Petition was properly dismissed for being out of time. (*Ibid.*)

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's grant of summary decision to the Board, as she agrees that there are no material facts in dispute and the Board is entitled to prevail as a matter of law (*N.J.A.C.* 1:1-12.5(b)), because this matter was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i) and is, therefore, appropriately dismissed. In so determining, the Commissioner notes that the instant record reveals:

> In late April or early May, 2005 petitioner was advised that her employment contract would not be renewed for the 2005-2006 school year.
>
> The Board subsequently agreed to rehire petitioner for the 2005-2006 school year in order to allow her to attain 25 years of service, thereby qualifying her for certain additional pension and health benefits, with the express understanding that she immediately submit a letter of resignation effective after the vesting of these benefits.
>
> By letter dated August 15, 2005, petitioner submitted her voluntary resignation – effective May 26, 2006[4] – which was accepted by the Board at its regularly scheduled meeting of August 16, 2005.
>
> By letter dated May 8, 2006 – subsequent to the vesting of her additional retirement benefits and less than three weeks before her scheduled resignation date – petitioner requested that the Board allow her to rescind her resignation.

[4] Petitioner claims that her union representatives urged her to submit this letter and that they led her to believe that if she performed well during the 2005-2006 school year, the Board might change its mind and keep her. She does not, however, charge that her letter of resignation was coerced or resulted from any misrepresentation on the part of the Board.

> The Board did not have a meeting in May 2006 and, therefore, petitioner's request was placed on the agenda for its June 20, 2006 meeting. At this time, the Board determined that since petitioner had resigned effective May 26, 2006, consideration of a request to rescind her resignation was a moot issue.
>
> The instant Petition of Appeal was filed on July 20, 2006.

The Commissioner finds and concludes that, pursuant to the Supreme Court's decision in *Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993), petitioner's receipt of notice of the Board's "final action" on the subject of her resignation at its August 16, 2005 meeting triggered the running of *N.J.A.C.* 6A:3-1.3(i) and, consequently, any challenge to this action by petitioner was required to be filed before the Commissioner within 90-days of this time. (*See also Willson* and *Nissman*,[5] *supra*) Neither the fact that petitioner continued in the Board's employ subsequent to its acceptance of her resignation nor petitioner's attempt to rescind her resignation by letter dated May 8, 2006 serve to preclude application of the 90-day rule. Therefore, the instant Petition of Appeal – filed in July 2006, some eleven months after the Board's final action – is clearly out of time.

Notwithstanding that the limitations rule of *N.J.A.C* 6A:3-1.3(i) is to be strictly applied, the Commissioner recognizes that she may – pursuant to her authority under *N.J.A.C.* 6A:3-1.16 – relax this rule under exceptional circumstances or if there is a compelling reason to do so. (*See Kaprow, supra*; *DeMaio v. New Providence Board of Education*, 96 *N.J.A.R.* 2d [EDU] 449, 453) Such authority, however, is rarely invoked unless strict adherence to the rule would be inappropriate, unnecessary or where injustice would occur (*DeMaio* at 453), or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties

[5] The focus of the 90-day rule is on "the date of the employer's wrongful act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee***." *Nissman* at 381

themselves. *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064. The instant matter presents no such compelling or exceptional circumstances – nor other sufficient reason – to warrant relaxation or waiver of the 90-day rule here.

Irrespective of the fact that untimeliness has barred consideration of the instant petition, the Commissioner is compelled to correct the ALJ's statement on Page 12 of his Initial Decision that "[p]etitioner was specifically denied tenure***." The petitioner in this matter was not prevented from acquiring tenure, as such status is statutory in nature and attaches automatically upon the fulfillment of the requisite conditions. However, the fact that petitioner may have acquired tenure at some point during the 2005-2006 school year has no bearing whatsoever in this matter. Petitioner resigned from the District – consequently, she voluntarily relinquished any rights which otherwise might have accrued to her by virtue of such status.

Accordingly, the Commissioner adopts the recommended decision of the OAL dismissing the instant Petition of Appeal as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i).

IT IS SO ORDERED.[6]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/20/07

Date of Mailing: 4/20/07

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY

DECISION

OAL DKT. NO. EDU 6404-06

AGENCY DKT. NO. 255-7/06

NANCY T. SNOW,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,
Respondent.

F. Michael Daily, Jr., Esq., appearing for petitioner (F. Michael Daily, Jr., LLC, attorneys)

Arthur F. Risden, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: February 28, 2007 Decided: March 19, 2007

BEFORE **DENNIS P. BLAKE**, ALJ:

STATEMENT OF CASE

Petitioner appeals the decision of the respondent, Moorestown Board of Education which refused to rescind her resignation and effectively denied her tenure. Petitioner had been employed by respondent from February 2003, until

June 2005. Prior to the start of the 2005-2006 academic year petitioner was notified that her contract would not be renewed. Petitioner was continued for that academic year only after agreeing to submit her resignation effective May 2006. This contract gave petitioner more than three consecutive years of employment with respondent. Respondent points out that the rationale for the contract extension was to permit petitioner to accumulate twenty-five years of service and entitle her to the resulting increased benefits. It argues that the resignation was effective on the date when respondent accepted it, August 16, 2005. It also argues that the petition was not filed within the ninety-day period required by N.J.A.C. 6A:3-1.3(i). Petitioner counters that the limitations period did not start to run until the last day of employment, May 26, 2006, and thus she complied with the ninety-day rule.

PROCEDURAL HISTORY

On July 20, 2006, petitioner filed its petition with the Commissioner of Education in accordance with N.J.S.A. 18A:6-9. Respondent filed its answer to the petition on August 9, 2006. On August 29, 2006, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 through 15 and N.J.S.A. 52: 14F-1 through 13. Respondent filed its Motion for Summary Decision on February 2, 2007. On February 19, 2007 petitioner filed its response, and on February 28, 2007, respondent filed its reply.

FACTUAL DISCUSSION

Petitioner was employed by the Moorestown Board of Education (Board) from February 10, 2003 through the end of the 2005 academic year. See Petitioner's Brief in Opposition to Summary Decision, February 19, 2007. In April of 2005, she was advised that her contract would not be renewed. The parties disagree as to what happened next, however it is clear the petitioner was offered a new contract conditioned upon her agreement to retire effective May 26, 2006. Ibid. She contends that she was not aware of this condition until August 11,

2005, and that she was advised by her union representative that she had no choice but to sign. She argues that she was coerced into submitting her resignation and that the Board misrepresented the circumstances of her resignation. Petitioner submitted her letter of resignation and was given a contract for the 2005–2006 school year. She alleges that she, "felt at the time the resignation was submitted that she had no alternative and that there still existed the possibility that if she performed well that she would be offered continued employment." In 2005–2006, she received good performance evaluations and approached the administration about continuing her employment. The administration refused to discuss future employment. On May 8, 2006, she wrote to the Board and requested to rescind her resignation. The May Board meeting was cancelled and her request was placed on the agenda for June 20, 2006. At the June Board meeting, the Board found that the resignation had been previously accepted and there was no need to reconsider petitioner's request to rescind.

The Board indicates that petitioner was non-renewed for the 2005–2006 school year and was only offered employment as part of a voluntary agreement conditioned on her resignation at the end of the 2006 school year. Respondent's Brief in Support of Summary Decision, February 2, 2007. This agreement arose because petitioner was approaching her twenty-fifth year of service and wanted to obtain the additional retirement benefits that are granted to teachers with twenty-five years of service. Her letter of resignation was accepted on August 16, 2005.[1] The text of the resignation letter is brief, but enlightening as to petitioner's understanding of the agreement she reached with the Board. The letter reads, "I am resigning on May 26, 2006 of this upcoming school year 2005–2006. Please consider this letter notice of my intention. Thank you for the opportunity to complete my twenty-five years as an educator." Ibid.

[1] Respondent's brief indicates the date as August 16, 2006, but that is incorrect.

CONCLUSIONS OF LAW

A. Petitioner's Resignation

Respondent argues that petitioner's resignation was binding when it was accepted by the Board. See Respondent's Brief in Support of Summary Decision, February 2, 2007. Respondent contends that petitioner reaped the benefit of her bargain by attaining twenty-five years, and cannot now turn around and rescind her resignation. In the alternative, respondent argues that if rescission is ordered, the parties should be put back in their original positions and petitioner should be non-renewed without the benefits of twenty-five years of service. Respondent makes the point that, "Snow was non-renewed. She was not entitled to tenure before her resignation agreement; therefore, the parties' agreement did not violate the tenure law..." See Respondent's Letter Brief, February 28, 2007. Petitioner argues that she actually attained tenure based on her period of employment, and that, "the arrangement or 'contract' presented to her by respondent contravened specific terms and conditions of employment set by a statute which legally could not be waived or bargained away and as result thereof she was entitled to withdraw her resignation." See Petitioner's Brief in Opposition to Summary Decision, February 19, 2007. According to petitioner, the resignation was void ab initio because it was accepted for the purpose of circumventing the tenure statute. Ibid. Petitioner contends that this case is controlled by the outcome in Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982).

In Spiewak, the plaintiffs were public school teachers who provided remedial and supplemental services to children with special needs. Id. at 66. Spiewak was denied tenure and was paid as an hourly employee. Id. at 68. The Supreme Court of New Jersey stated, "State statutes grant teachers in New Jersey the right to tenure. The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically

defines the conditions under which teachers are entitled to the security of tenure. The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms." Id. at 72-73 (internal citations omitted). The Court also noted, "[w]e have specifically stated that the tenure provisions of N.J.S.A. 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away." Id. at 76. While there is an exception for temporary employment, that exception only applies if the employee is hired to take the place of an absent employee. Id. at 77. The Court concluded, "Tenure is not dependent on agreement between the parties. Teachers are entitled to tenure because the Legislature has granted them that right." Id. at 80.[2] Based on Spiewak, it appears that petitioner did satisfy the terms of the tenure statute.

However, regardless of whether or not petitioner attained tenure, it is well settled that a resignation is legally binding upon its acceptance by the Board of Education. Gross v. Board of Education of the Township of Mount Holly, EDU 8567-04, Initial Decision (July 26, 2006) adopted, Comm. (September 1, 2006). In Gross, the petitioner participated in an enhanced sick leave buy-back program. As part of this program, the petitioner submitted his resignation. He argued that the school board promised him the right of first refusal to any long term substitute positions at an enhanced pay scale. The school district admitted to discussions about the possibility of long term substitute positions, but denied making promises of that nature. The petitioner argued that he was entitled to rescind his resignation based on a number of equitable circumstances. The Administrative Law Judge (ALJ) found that the petitioner received the benefit of his bargain with the school district when he received the enhanced sick leave buy-back. The ALJ

[2] But see Merlino v. Borough of Midland Park, 172 N.J. 1, (2002). Merlino dealt with tenure in the context of a construction code official. Id. at 4. The plaintiff was appointed to a four-year term as construction official. Ibid. The term was to end on June 3, 1994 and the governing body was undecided as to whether the plaintiff should be reappointed and thus, granted tenure. Ibid. The governing body proposed a compromise where the plaintiff would be given a brief hiatus, and then reappointed without tenure. Ibid. Based on this compromise, the plaintiff resigned on June 3, 1994 and ten days later was appointed to a new term. Id. at 4, 5. The tenure statute at issue required either appointment to a second consecutive term, or the commencement of a fifth consecutive year for an individual to achieve tenure. Id. at 8. The Court relied on Spiewak, and found that the plaintiff had not attained tenure because of the break between his appointments and the requirement of consecutive terms. Id. at 10.

concluded that the school board was within its rights to refuse rescission of the resignation.

Thus, in the present case, while it is clear that petitioner's resignation was effective upon its acceptance, it is not clear how petitioner's employment subsequent to her resignation affects her ability to gain tenure. However, this issue need not be resolved, because the petitioner's claim is time barred.

B. The Ninety-day rule

Controversies arising under school law are governed by N.J.A.C. 6A:3-1.1 to -1.17. A petition must be filed, "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i).

The ninety-day time period for filing a petition is not tolled by an individual's attempt to resolve the issue through negotiation. Maurice Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 588 (1993). In Kaprow, the tenured petitioner (Kaprow) was subject to a reduction in force (RIF) on June 30, 1981. Id. at 575. The local board failed to notify Kaprow of positions that became available after the RIF. Kaprow had no notice of such positions until February 23, 1988. Id. at 577. On that date, Kaprow asked the board secretary about any vacancies for positions that he would have tenure rights to. On the same date, the secretary sent Kaprow a letter indicating that two positions for which petitioner had tenure rights were filled by the board. On February 28, 1988, Kaprow sent a letter to the Board asserting his right to both positions. Initially, the board did not reply. The Board's attorney responded to the letter on June 14, 1988 and informed Kaprow that the positions were substantially different from the position Kaprow held, and that his RIF rights were not

implicated. Id. at 578. Kaprow filed a verified petition with the Commissioner on August 1, 1988.

The case was transmitted to the Office of Administrative Law and the ALJ granted partial summary judgment and dismissed Kaprow's claim of bad faith for insufficient evidence. Id. at 579. The Commissioner dismissed Kaprow's petition with prejudice, and found that the bad faith claim was untimely. The State Board of Education affirmed the Commissioner, agreeing that the petition was untimely. The Appellate Division affirmed and found that Kaprow would be entitled to his former position if the district reactivated it. Id. at 580.

> The Supreme Court of New Jersey held that Kaprow's petition was barred by the ninety-day rule. Id. at 591. The Court noted that, the limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety-days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements. [Id. at 582.]

The Court found that the Board's letter of February 23, 1988 gave Kaprow sufficient notice to begin the ninety-day limitation period. Id. at 586. Specifically, the Court determined that the final order, ruling or other action by the local board occurred when the Board appointed non-tenured individuals to positions that Kaprow claims tenure rights to. Id. at 588. However, since the Board did not notify Kaprow of these positions, he did not have adequate notice until he received the letter on February 23, 1988. The Court held that Kaprow did not file

his petition until August 1, 1988, which was more than two months after the ninety-day limitations period had expired. Id. at 589. Therefore, Kaprow's claim was time-barred.

The procedural question of the ninety-day rule should be decided prior to any decision on the merits. Blossom S. Nissman v. Board of Education of the Township of Long Beach Island, 272 N.J. Super. 373, 380-81 (App. Div. 1994). In Nissman, the petitioner (Nissman) appealed from a final decision of the State Board of Education dismissing her claim as time barred. Id. at 374. Nissman was hired as an elementary school principal on August 10, 1987, for a three-year term. During March and April of the third year, the local board held meetings to determine whether Nissman would be offered a new contract. Id. at 375. On April 23, 1990, the local board adopted a resolution that Nissman's employment contact would not be renewed and that she would not be granted tenure. Nissman received notice of the resolution on April 27, 1990, and continued to work through the last day of her contract, August 31, 1990.

On her last day, Nissman's attorney faxed the local board and indicated that Nissman was claiming tenure based on her service of three calendar years. Ibid. Counsel for the local board responded that Nissman has been terminated and was not granted tenure. Ibid. On September 21, 1990, Nissman filed a petition with the Commissioner of Education contending that she acquired tenure on August 31, 1990. Id. at 376. Before the ALJ, the local board argued that the petition was time barred based on the ninety-day rule. Nissman argued that the local board's correspondence on August 31, 1990, constituted action, and therefore the petition was properly filed within the ninety-day limitations period. The ALJ concluded that Nissman acquired tenure and ordered that she be reinstated. The Commissioner affirmed and determined that the claim was not time barred because of the correspondence on August 31, 1990. Id. at 376-77. The State Board concluded that the only action taken by the local board was the adoption of the resolution on April 23, 1990. Id. at 377. The State Board noted

that the August correspondence merely restated the prior action and did not constitute separate board action.

The Appellate Division affirmed the State Board's decision and held that Nissman's claim was time barred. Id. at 382. Additionally, the Appellate Division noted that the last date upon which Nissman could have brought her claim was July 23, 1990. Id. at 381. The court stated, "[p]etitioner may have elected not to file a petition prior to August 31, 1990 for tactical reasons. However, the Local Board was entitled to know within 90 days of its action whether its [decision]... was going to be challenged." Id. at 382.

An ALJ granted summary decision on behalf of a respondent school board when the petitioner failed to file his petition within the ninety-day time period. Charles E. Willson III v. Board of Education of the Toms River Regional School District, 96 N.J.A.R. 2d (EDU) 872. In Willson, the petitioner was employed by the Board of Education as a certified food services instructor. Id. at 873. On June 30, 1990, the petitioner's position was eliminated and the Board reassigned him to the high school as a permanent substitute. On February 10, 1992, the petitioner was transferred to the Alternate Learning School Center as an employment orientation/food program teacher. When this program was considered for elimination, the Board realized that this would eliminate the petitioner's position when he was just one year short of twenty-five years of service. On January 15, 1994, a meeting was held to discuss the situation. The petitioner attended the meeting and was accompanied by the union president. The Board decided to continue the food service program for one additional year to allow the petitioner to reach twenty-five years of service. At the meeting, it was suggested that the petitioner retire at the end of the 1994-1995 school year. Approximately one month after the meeting the petitioner submitted a letter of resignation, effective July 1, 1995. The Board notified the petitioner that his resignation would be discussed at the August 30, 1994, Board meeting. On August 31, 1994, the petitioner was notified that the board accepted his

resignation. The petitioner continued teaching through the end of the school year, but became concerned with his prospects of reemployment. On June 28, 1995, the petitioner sent the Board a letter attempting to rescind his resignation. The Board did not receive this letter and did not learn of the petitioner's request until July 17, 1995, when the petitioner's attorney contacted the Board. The Board told the petitioner's attorney that it considered him retired as of July 1, 1995.

The petitioner filed an appeal with the Commissioner on October 26, 1995. The Board sought dismissal of the appeal as time barred under N.J.A.C. 6:24-1.2(c).[3] The ALJ concluded that the "petitioner's receipt of the Board's action by letter dated August 31, 1994, triggered petitioner's, 'receipt of the notice of a final order, ruling, or other action' by the Board...the Board's action on August 30, 1994, was final...any challenge to the Board's action by petitioner was required to be filed before the Commissioner on or before November 29, 1994." Id. at 883. The ALJ further determined that the petitioner's attempt to rescind his resignation did not bar the application of the ninety-day rule. The Commissioner adopted the ALJ's decision and dismissed the petition. Id. at 884.

Petitioner in this matter argues that the ninety-day limitations period begins on the last date of employment. In support of this contention, petitioner relies upon Holmin v. TRW, Inc., 330 N.J. Super. 30 (App. Div. 2000) affirmed 167 N.J. 205 (2001). Petitioner asserts that Holmin stands for the proposition that New Jersey courts, "have held that the limitation period begins to run on the last day of employment." See Petitioner's Brief in Opposition to Summary Decision, February 19, 2007. As respondent points out, Holmin is distinguishable because it dealt with the cause of action of fraud, which requires damages as an essential element. Holmin, supra, 330 N.J. Super. at 35. However, Holmin is further distinguishable because the court directly addressed the issue of tenure in its discussion of the Nissman case. The court noted:

[3] The language of this provision is identical to the current regulation, N.J.A.C. 6A:3-1.3(i).

> [Nissman] involved an unusual chronology in a tenure dispute. A State Board of Education regulation, N.J.A.C. 6:24-1.2(c) barred any challenge to a local board order if the challenge was not filed within ninety-days of receipt of the order. Applying that regulation, this court found that petitioner's complaint was time barred, since it was filed more than ninety-days after she was told her contract would not be renewed and thus she would not receive her tenure....
> We repeat there is nothing "inherently arbitrary or capricious" about the regulation applied in Nissman. [Ibid.]

Thus, petitioner's reliance on Holmin is not persuasive because the case is factually different and the Holmin court noted that tenure disputes and the ninety-day rule are distinct from other types of employment termination.

Petitioner also cites Keelan v. Bell Communications Research, 289 N.J. Super. 531 (App. Div. 1996) for the proposition that the limitations period begins to run on the last date of employment. See Petitioner's Brief in Opposition to Summary Decision, February 19, 2007. Again, petitioner's reliance on this case is misplaced. In Keelan, the court stated, "We are cognizant that in an academic setting, the denial of tenure, and not the subsequent date when the employment ceased, invokes the running of the statute of limitations...." Keelan, supra. 289 N.J. Super. at 539.

Finally, petitioner argues that, "the resignation, by its very terms, did not become effective upon its acceptance instead it did not become effective until May 22, 2006." See Petitioner's Brief in Opposition to Summary Decision, February 19, 2007. Petitioner does not explain this argument. Here, the Board accepted the petitioner's letter of resignation on August 16, 2005. As of that date, the Board's action was final, and the petitioner had ninety-days to file an

appeal challenging the action. The petition was not filed until July 2006. Therefore, the petition is time-barred.

C. Summary Decision

Under the Uniform Administrative Procedure Rules (UAPR), summary decision is appropriate if, "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Essentially, the standard for summary decision mirrors the standard for summary judgment. Contini v. Board of Education of Newark, 286 N.J. Super. 106, 121-122 (App. Div. 1995), certif. den., 145 N.J. 372 (1996). "[W]hen deciding a motion for summary judgment under Rule 4:46-2,[4] the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance, Co., 142 N.J. 520, 523 (1995).

Here, the facts indicate that the petitioner submitted a letter of resignation to the school board. That resignation was accepted by the Board on August 16, 2005. Petitioner was specifically denied tenure and was only offered employment during the 2005–2006 school year to permit her to achieve twenty-five years of service. The final action taken by the Board was the acceptance of petitioner's resignation. Therefore, the ninety-day limitations period was triggered on August 16, 2005. Because petitioner did not file the petition until July, 2006, I **CONCLUDE** that the petition is time barred and summary decision shall be granted in favor of the respondent Board.

[4] Rule 4:46-2 governs motions for summary judgment in civil actions.

ORDER

I hereby **ORDER** that respondent's motion for summary decision is granted and petitioner's petition is **DISMISSED.**

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

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

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

3-19-07

DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency: 3/21/07

Mailed to Parties:

MAR 21 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

DPB/mamf

#149-07

OAL DKT. NO. EDU 8331-06
AGENCY DKT. NO. 304-9/06

COLLEEN CHATMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

Upon advisement of Deputy Attorney General Melissa T. Dutton that the New Jersey State Board of Examiners had voted to lift the block on Ms. Chatman's application for certification – thereby rendering this matter moot – the Office of Administrative Law returned the instant file to the Agency for disposition.

Upon review, the Commissioner dismisses this matter as moot and hereby forwards the instant file to the Board of Examiners, as requested, so that they may proceed in the application review process.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/07

Date of Mailing: 4/26/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

STUART RABNER
Attorney General

ROBERT J. GILSON
Director

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OFFICE OF ADMIN LAW

April 5, 2007

Laura Sanders,
Director and Chief Administrative Law Judge
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza, P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Colleen Chatman v. New Jersey Department of Education
OAL Docket no. EDUOR 08331-2006S

Dear Judge Sanders:

Please be advised that the New Jersey State Board of Examiners voted to lift the block on Ms. Chatman's application for certification. Therefore, the matter before Your Honor is moot. Upon closing the file at the OAL, kindly return the file to the Board of Examiners so that they may proceed in the application review process.

Thank you for your assistance in this matter.

Respectfully submitted,,

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY

By: Melissa Dutton/SB
Melissa T. Dutton
Deputy Attorney General

c: Roger A. Barbour, Esq.

150-07

#150-07 E

OAL DKT. NO. EDU 3394-07
AGENCY DKT. NO. 48-2/07

L.O'H. and J.O'H. on behalf of minor child, J.O'H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The pleadings, audio tapes of the March 21, 2007 hearing and the hearing exhibits pertaining to the above captioned matter – including an audio tape marked P-16 – have been reviewed.[1] The Commissioner agrees with the Administrative Law Judge (ALJ) that petitioners have failed to show that emergent relief is warranted in this case.

Petitioners lived in respondents' district until the summer of 2006, after their minor child's junior year at Northern Valley Regional High School (NVRHS). Prior to the commencement of the 2006-2007 school year, petitioners moved out of the school district, but nonetheless continued to send their child to NVRHS. Respondent determined that petitioners' child was no longer entitled to a free education in its district, and sent petitioners a tuition bill. Petitioners asked respondent to excuse them from paying tuition, based on their particular circumstances, and respondent offered a settlement that would require petitioners to pay about a third of the district's usual annual tuition for twelfth grade. Petitioners rejected the settlement offer, appealed to the Commissioner and moved for emergent relief.

[1] No exceptions were received by the parties.

A hearing on the emergent relief application took place in the Office of Administrative Law (OAL) on March 21, 2007. As to the standards set forth in *N.J.A.C.* 6A:3-1.6(b) – which petitioners must satisfy to receive a grant of emergent relief – the petitioners argued as follows:

- Irreparable Harm. Petitioners maintained that they cannot afford to pay the reduced tuition amount of $4,260, and that their child would quit school if respondent disenrolled her. Moreover, even if their child did not quit school, a transfer during her senior year would cause serious academic and social disruption.
- Settled Law. Petitioners made no argument concerning the status of the law applicable to this matter.
- Likelihood of Success. Petitioners contended that their ownership of a house in respondent's district and the payment of taxes thereon entitled their child to a free education at NVRHS, notwithstanding that the family was not domiciled in respondent's district. They testified that they thought that respondent had a policy to allow non-resident high school seniors to attend school tuition free if they had attended the district's school as a resident for the first three high school years.

Petitioners also urged that two of respondent's published policies on exceptions to *N.J.S.A.* 18A:38-1(a), which requires that a child be domiciled in the district to receive a free public education, apply to their child. Those exceptions are:

> A child otherwise eligible for attendance whose parent/guardian has signed a contract to buy, build or rent a residence in this district shall be enrolled based on the signed contract of residency without tuition charges.

> Regularly enrolled children whose parents/guardians have moved out of the school district during the final marking period shall be permitted to finish the school year without payment of tuition.
>
> (P-6)

Finally, petitioners asserted that respondent applied its policies in an arbitrary and capricious manner.

- Balance of the Equities. Petitioners contend that respondent is estopped from disenrolling their child because the administration did not respond to a letter that they sent in July 2006 (P-1) advising that they were moving out of the district. Petitioners also maintain that the harm their child will suffer if they do not prevail outweighs the harm the district will suffer if the Commissioner rules in favor of petitioners.

After hearing testimony from petitioner, L.O'H., and respondent's witness, Raymond Jacobus, the administrative law judge (ALJ) made the following findings of fact.

1. It is undisputed that the petitioners do not live in respondent's district. They purchased a half-interest in an $838,000 house in Rivervale, to which they moved in the summer of 2006. There is no mortgage on the house, and the taxes are paid by L.O'H.'s parents, who own the other half-interest in the house. Petitioners pay $12,000 per year for utilities and other expenses.
2. Petitioners still own their house in Northvale – in respondent's district. They attempted to sell it but were not able to command a price that would satisfy the mortgage and leave them with $165,000 to settle a loan from L.O'H.'s parents. Petitioners are renting out the Northvale house for $30,000 per year. The mortgage is $26,100 per year and taxes are $8000 per year.

3. J.O'H. earns $65,000 per year. L.O'H. receives $8,400 per year in disability payments.
4. Petitioners stated that their child has been accepted to college and that they plan to take out loans to finance her college education.
5. In May 2006 respondent sent a letter (R-1) to the parents of all its high school juniors articulating its policy for students who move out of the district during their senior year and wish to finish high school in the district. The letter stated that for such students respondent would charge 75 per cent of the regular tuition, prorated from the time the student was no longer domiciled in its district.

Based upon the foregoing factual findings, the ALJ arrived at the following legal conclusions regarding the four emergent relief standards in *N.J.A.C.* 6A:3-1.6(b):

Irreparable Harm

While petitioners' child would arguably suffer irreparable harm if forced to transfer out of respondent's high school during her senior year, the ALJ found that a viable alternative to that course of action existed. Namely, respondent offered to allow the child to attend its high school for a greatly reduced tuition fee of $4260. Based upon the information elicited at the OAL hearing about petitioners' financial situation, the ALJ found petitioner's claims that they could not afford respondent's tuition to be unsupported by the evidence. Accordingly, he could not conclude that irreparable harm was the inevitable consequence of denying petitioners' application for emergent relief. The Commissioner agrees.

Settled Law

The ALJ found that the law applicable to this controversy is settled, and the Commissioner concurs. Under *N.J.S.A.* 18A:38-1, domicile is a necessary precondition to a free

public education in a school district. Respondent may and did formulate policies that allow exceptions to the law concerning domicile. Those policies are set forth, *supra*, and the parties agree that they govern the instant dispute.

Likelihood of Success

Petitioners admitted that they are not domiciled in respondent's district, and the ALJ found that the two provisions of respondent's policy about non-resident students upon which petitioners relied for their appeal did not apply to them. First, J.O'H. could not receive a free education in respondent's school district as an enrolled child "whose parents/guardians have moved out of the school district during the final marking period," since petitioners had moved out of the district before the school year even began.

Second, J.O'H. could not receive a tuition-free education in respondent's district as "a child otherwise eligible for attendance whose parent/guardian has signed a contract to buy, build or rent a residence in this district," because her parents had signed no such contract. Further, petitioners conceded at the hearing that they had planned on selling their house in respondent's district, and that they had no plans to move back into the district.

Finally, the ALJ found that although petitioners had made generalized allegations that similarly situated students had been allowed to attend school in respondent's district tuition free, pursuant to district policy, they had presented no policy provisions – other than the above articulated provisions that do not apply to J.O'H. – or evidence to support those allegations. There was no basis to conclude that respondent had not followed its own policy or that respondent had acted arbitrarily.

In summary, the ALJ concluded, and the Commissioner agrees, that petitioners did not show that they were likely to succeed on the merits of their appeal.

Balance of the Equities

In discussing the equities, the ALJ found that petitioners would experience a greater impact from a ruling against them than would respondent. The Commissioner could concur with that finding if the analysis were limited to the relative financial impacts. However, there are other impacts to be considered, such as the consequences respondent would experience as a result of its abandonment of its own policy.

Moreover, there are other equities to balance. Petitioners alleged that they would have transferred their child at the beginning of the 2006-2007 school year if respondent had answered Mrs. O'H's letter, dated July 2, 2006, disclosing that J.O'H. was moving out of respondent's district.[2] However, as found above, prior to July 2006, respondent had sent a letter to the parents of all high school juniors advising that all students who moved out of the district during their senior year would be required to pay tuition, at the rate of 75% of the regular tuition, prorated from the date that the student moved. Thus, petitioners had been apprised of what would be expected of them. The ALJ also noted – and the Commissioner cannot disagree – that it was unreasonable of petitioners not to follow up on their July 2006 letter when no response had been received by September 2006.

Finally, in considering the equities, the Commissioner notes that respondent was prepared to subtract – from the total tuition due – the period of three months (September through November 2006) during which it was not aware that J.O'H. was a non-resident, and another two or three month period at the end of the school year corresponding to the last marking period. The net result was that petitioners were offered the opportunity to pay less than a third of normal tuition costs for twelfth graders in respondent's district.

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[2] The letter was sent to the Northern Valley Administrative Offices and its salutation was "To Whom It May Concern."

The ALJ denied petitioners' application for emergent relief by way of an oral opinion placed on the record at the end of the March 21, 2007 hearing. He found that they had not met their burden to satisfy *N.J.A.C.* 6A:3-1.6(b)(3), *i.e.,* they had not shown that they were likely to succeed on the merits of their appeal of respondent's determination concerning tuition. The Commissioner agrees and – for the reasons articulated above – is also not persuaded that petitioners satisfied any of the four standards of *N.J.A.C.* 6A:3-1.6(b). However, because the rule requires that all four of its standards be met before emergent relief is granted, the Commissioner need not reach any further than the determination that *N.J.A.C.* 6A:3-1.6(b)(3) was not satisfied.

The Order of the OAL – as amplified above – is adopted as the final decision on the motion for emergent relief, and petitioners' application for emergent relief is denied.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/07

Date of Mailing: 4/26/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF
OAL DKT. NO. EDU 03394-07
AGENCY DKT. NO. 48-2/07

L.O'H. & J.O'H., ON BEHALF OF MINOR CHILD,
J.O'H.,

Petitioners,

v.

NORTHERN VALLEY REGIONAL SCHOOL DISTRICT,
BERGEN COUNTY,

Respondent.

L.O'H. & J.O'H., petitioners, pro se

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: March 21, 2007 Decided: March 21, 2007

BEFORE **JOSEPH A. PAONE**, ALJ:

On March 21, 2007, petitioners came before me on an Application for Emergent Relief, seeking to remain in respondent's school without payment of tuition, despite petitioners' concession that J.O'H. is no longer domiciled in the district. After consideration of the Crowe v. DeGoia, 90 N.J. 126 (1982) standards, and for the reasons set forth in my oral opinion issued from the bench on March 21, 2007, I hereby **ORDER** that Petitioners' Application for Emergent Relief is denied, and I **FURTHER**

ORDER that the issue contained in the petition and presented at the proceeding of March 21, 2007, be heard at a plenary hearing scheduled for August 14, 2007, at 9:00 a.m.

This order on application for emergency relief may be adopted, modified or rejected by the Department of Education, which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Department of Education does not adopt, modify, or reject this order within forty-five (45) days, this recommended order shall become final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 21, 2007

DATE

JOSEPH A. PAONE, ALJ

lr

151-07

OAL DKT. NO. EDU 5976-06
AGENCY DKT. NO. 130-4/06

K.T. on behalf of minor child J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/26/07

Date of Mailing: 4/26/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5976-06

AGENCY DOCKET NO. 130-4/06

K.T. ON BEHALF OF J.T.,

Petitioner,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

Joseph A. Fortunato, Esq. for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: March 15, 2007 Decided: March 16, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 5, 2006, for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

Hearings were scheduled for September 25, 2006, January 4 & 25, 2007. The September 25, 2006 hearing was adjourned because petitioner was out of the country at the time of the hearing. During the pendency of the case at the Office of Administrative Law, the parties reached a settlement of the matter. The Stipulation of Settlement was received by the undersigned on March 15, 2007.

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

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

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

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

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

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

March 16, 2007
DATE

JOANN LaSALA CANDIDO, ALJ

Receipt Acknowledged:

3-21-07
DATE

UPS
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

BOARD OF EDUCATION
WEST ORANGE, NEW JERSEY 07052
TELEPHONE: 973-736-1636
FAX : 973-243-0505

STEPHEN J. CHRISTIANO
BOARD ATTORNEY

49 MOUNT PLEASANT AVENUE

March 14, 2007

Hon. Joann LaSala Candido, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

2007 MAR 15 P 3:38
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Re: K.T. o/b/o J.T. v. West Orange Board of Education
OAL Docket No. EDU 5976-06

Dear Judge Candido:

Relative to the above, I enclose fully executed Stipulation of Settlement and certified extract from the minutes of the Board's meeting of March 12, 2007, wherein the Board approved the settlement.

Very truly yours,

Stephen J. Christiano

Cc: Joseph A. Fortunato, Esq.

Encs.

SJC:kp

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on March 12, 2007 at 8:00 P.M., at the Administration Building, 179 Eagle Rock Avenue, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

The following motion was offered by Mrs. Casalino, and seconded by Mrs. Garnes, and adopted by the Board of Education by the following roll call vote:

Approval of Stipulation of Settlement Agreement: K.T. o/b/o J.T.

ROLL CALL: Ayes: Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

Abstain: None

CERTIFICATE

I, Jerry P. Tarnoff, Superintendent of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on March 12, 2007, has been compared by me with the original minutes as officially recorded in the office of the Business Administrator in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 14th day of March 2007.

Jerry P. Tarnoff
Superintendent

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 5976-06
AGENCY REF. NO. 130-4/06

2007 MAR 15 P 3:40
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

K.T., ON BEHALF OF MINOR CHILD, J.T.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws the petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) Petitioner's brother will be permitted to attend school in respondent's district so long as the requirements of school eligibility under law are met.

(4) Petitioner shall pay respondent the sum of $2,500 in full settlement of all past tuition charges. The first payment of $500 shall be due within 15 days of the approval of this settlement

by the Commissioner of Education. The remaining four payments of $500 shall be due at 30-day intervals after the first payment is due.

(5) If petitioner does not make any of the above payments by their due dates, respondent shall be entitled to the entire amount of tuition for J.T. from February 6, 2006 to the end of the 2006-2007 school year, less any payments previously made.

(6) This settlement is subject to approval by the Commissioner of Education.

(7) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated: 3/6/07

Kurleigh Thomas, Petitioner

Dated: 3/6/07

Joseph A. Fortunato, Esq.,
Petitioner's Attorney

Attest:

Secretary

Board of Education of
The Township of West Orange

By: _____
President

BOARD OF EDUCATION
WEST ORANGE, NEW JERSEY 07052
TELEPHONE: 973-736-1636
FAX : 973-243-0505

STEPHEN J. CHRISTIANO
BOARD ATTORNEY

49 MOUNT PLEASANT AVENUE

March 14, 2007

Hon. Joann LaSala Candido, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RECEIVED
2007 MAR 15 P 3:38
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Re: K.T. o/b/o J.T. v. West Orange Board of Education
OAL Docket No. EDU 5976-06

Dear Judge Candido:

Relative to the above, I enclose fully executed Stipulation of Settlement and certified extract from the minutes of the Board's meeting of March 12, 2007, wherein the Board approved the settlement.

Very truly yours,

Stephen J. Christiano

Stephen J. Christiano

Cc: Joseph A. Fortunato, Esq.

Encs.

SJC:kp

EXTRACT FROM THE MINUTES OF A MEETING
OF THE WEST ORANGE PUBLIC SCHOOLS
BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on March 12, 2007 at 8:00 P.M., at the Administration Building, 179 Eagle Rock Avenue, West Orange, NJ.

The following members of the Board of Education were present:
Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

The following motion was offered by Mrs. Casalino, and seconded by Mrs. Garnes, and adopted by the Board of Education by the following roll call vote:

Approval of Stipulation of Settlement Agreement: K.T. o/b/o J.T.

ROLL CALL: Ayes: Mr. Feigenbaum, Mrs. Garnes, Mr. Petigrow, Mrs. Kyle, Mrs. Casalino

Abstain: None

CERTIFICATE

I, Jerry P. Tarnoff, Superintendent of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on March 12, 2007, has been compared by me with the original minutes as officially recorded in the office of the Business Administrator in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 14th day of March 2007.

Jerry P. Tarnoff
Superintendent

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 5976-06
AGENCY REF. NO. 130-4/06

RECEIVED
2007 MAR 15 P 3:40
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

K.T., ON BEHALF OF MINOR CHILD, J.T.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws the petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) Petitioner's brother will be permitted to attend school in respondent's district so long as the requirements of school eligibility under law are met.

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by the Commissioner of Education. The remaining four payments of $500 shall be due at 30-day intervals after the first payment is due.

(5) If petitioner does not make any of the above payments by their due dates, respondent shall be entitled to the entire amount of tuition for J.T. from February 6, 2006 to the end of the 2006-2007 school year, less any payments previously made.

(6) This settlement is subject to approval by the Commissioner of Education.

(7) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated: 3/6/07

Kurleigh Thomas, Petitioner

Dated: 3/6/07

Joseph A. Fortunato, Esq.,
Petitioner's Attorney

Attest:

Secretary

Board of Education of
The Township of West Orange

By: _____
President

consideration of the underlying facts as already found in the Initial Decision, but including the modifications contained in this Order of Remand, the ALJ shall determine whether any remaining alleged defects constitute nonconformities that continue to exist, and whether petitioner is entitled to Lemon Law relief, based upon the supplemented record.

Stephen B. Nolan, Acting Director
Division of Consumer Affairs

152-07

DOUGLAS AUSTIN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner claimed tenure in the position of principal, assistant principal and vice-principal in respondent's school district, alleging that his termination violated his tenure and seniority rights. The Board claimed petitioner's termination was permissible because he had not accrued sufficient time in either the position of principal or vice principal – which is "one and the same" as assistant principal – to achieve tenure. Both parties filed motions for summary decision.

The ALJ found, *inter alia*, that: the material facts are not in dispute, and the matter is ripe for summary judgment; petitioner's tenure in the district began to accrue after he received his provisional certificate as a principal/supervisor in November 2000; petitioner's tenure as principal began to accrue from August 1, 2002, when the position he had been filling on a temporary basis became vacant; and petitioner was, therefore, employed for a sufficient period of time to acquire tenure as a principal and was unlawfully terminated from his position. The ALJ ordered the Board to restore petitioner to the position of principal and pay him lost salary and benefits retroactive to his termination date of August 18, 2005.

The Commissioner modified and amplified the Initial Decision of the OAL. She concurred with the ALJ that the petitioner had acquired tenure, and was therefore removed from his position in violation of his rights, but found, *inter alia,* that – pursuant to *N.J.S.A.* 18A:28-6 – such tenure was attained on August 1, 2004, rather than on August 1, 2005, as stated by the ALJ, and that petitioner had also acquired tenure in the positions of assistant principal and vice principal – positions which are separately tenurable as a matter of law. The Commissioner directed the Board to restore petitioner to a position as principal and reimburse him for lost salary and benefits retroactive to August 18, 2005, less mitigation as appropriate; or, if no such position is available due to the greater seniority of the district's incumbent principals, to accord him the appropriate placement on a preferred eligibility list and proceed thereafter to honor his tenure and seniority rights as vice principal and assistant principal.

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

April 26, 2007

OAL DKT. NO. EDU 8923-05
AGENCY DKT. NO. 286-10/05

DOUGLAS AUSTIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply of the Board of Education (Board) filed pursuant to *N.J.A.C.* 1:1-18.4.

On exception, while petitioner fully concurs with the Administrative Law Judge (ALJ) that he acquired tenure as a principal in the Willingboro school district and was dismissed in violation of that right, he contends that the ALJ erred by: 1) failing to address his claim of tenure in the position of vice principal; and 2) finding that he acquired tenure as a principal on August 1, 2005 rather than on August 1, *2004*, since *N.J.S.A.* 18A:28-6 – which applies in this instance since petitioner was promoted to the position of principal from another tenure-eligible position in the district – requires *two* years' service for acquisition of tenure, not three. (Petitioner's Exceptions at 1-3)

In reply, the Board rejects petitioner's claim of tenured status as a vice principal on grounds that his service as interim principal from January 2002 to

August 1, 2002 cannot count toward acquisition of tenure in any position, since he was serving in a substitute capacity during that time. (Board's Reply at 1)

Upon consideration, the Commissioner adopts the Initial Decision with modification and amplification as set forth below.

Initially, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that petitioner did, in fact, acquire tenure as a principal in the district and was removed from that position in violation of his rights. However, the Commissioner also concurs with petitioner that the ALJ erred in calculating the date on which such tenured status was obtained. In this regard, the record is clear that petitioner was promoted to the position of principal from the tenure-eligible position of vice principal, thus triggering the following provision of *N.J.S.A.* 18A:28-6, omitted by the ALJ in his recitation and application (Initial Decision at 4-5) of that statute:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of *two consecutive calendar years* in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;*** (*emphasis supplied*)

Consequently, under the plain language of controlling statute, petitioner acquired tenure as a principal on August 1, 2004 – after the passage of two consecutive calendar years – rather than on August 1, 2005, after passage of three years as stated by the ALJ (*Id.* at 9).

See *Alan R. Sitek v. Board of Education of the Southern Regional High School District, Ocean County*, 1988 *S.L.D.* 2247; affirmed State Board of Education. 1989 *S.L.D.* 3079.

Moreover, petitioner is correct in asserting that the Initial Decision did not squarely address his claim with respect to the position of vice principal, and the Commissioner further notes that his claim to tenure in the position of assistant principal – as raised in the Petition of Appeal and argued in petitioner's Brief in Support of Motion for Summary Judgment – is similarly omitted, notwithstanding that petitioner did not object to such omission on exception.[1] Additionally, the ALJ appears not to have contemplated the possibility that there may not be a principal position in the district held by a nontenured or less senior principal so as to enable petitioner to obtain the relief ordered for having prevailed in this matter. The Commissioner, therefore, finds it appropriate to address the question of petitioner's status as assistant principal and vice principal.

In this regard, the record shows that petitioner began accruing time toward acquisition of tenure in the position of assistant principal upon his receipt of provisional certification in November 2000, and as vice principal upon his appointment to that position on December 1, 2000. Thus, given his subsequent continuous service within the district – together with the clear language of *N.J.S.A.* 18A:28-6 providing that "the period of employment in [a] new position to which a tenure-eligible employee is promoted or transferred] shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member" – petitioner had, at the time of his unlawful termination, unquestionably satisfied the requirements of *N.J.S.A.* 18A:28-5 and 18A:28-6, respectively, for acquisition of tenure as both an assistant principal and a

[1] See Note 2 below.

vice principal.[2] The Commissioner rejects, as entirely without merit, the Board's contention that petitioner could not accrue tenure in *any* position while serving as interim principal; while he clearly could not accrue tenure as a *principal* as a result of such service, *N.J.S.A.* 18A:16-1.1, there can be no question that he continued to accrue tenure as an assistant principal and vice principal while acting as principal, the latter circumstance correctly noted by the ALJ. (Initial Decision at 8)

Accordingly, as modified and amplified above, the Initial Decision of the OAL is adopted as the final decision in this matter. The Willingboro Board of Education is directed to restore petitioner to a position as principal and reimburse him for lost salary and benefits retroactive to August 18, 2005, less mitigation as appropriate; or, if no such position is available due to the greater seniority of the district's incumbent principals, to accord him the appropriate placement on a preferred eligibility list and proceed thereafter to honor his tenure and seniority rights as vice principal and assistant principal.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/26/07

Date of Mailing: 4/26/07

[2] Notwithstanding the Board's stance to the contrary (Brief in Support of Cross-Motion for Summary Disposition at 1) and petitioner's apparent acquiescence to it for purposes of this proceeding (Letter Memorandum of May 16, 2006 at 1, together with omission of references to tenure as assistant principal in all subsequent submissions), these positions are – as correctly noted by the ALJ – separately tenurable as a matter of law. (Initial Decision at 5)

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8923-05S
AGENCY REF. NO. 286-10/05

DOUGLAS AUSTIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Respondent.

Robert M. Schwartz, Esq., appearing for petitioner
James F. Schwerin, Esq., appearing for respondent (Parker McCay, attorneys)

Record Closed: February 2, 2007 Decided: March 21, 2007

BEFORE **ISRAEL D. DUBIN**, ALJ:

On August 22, 2005, the Willingboro Board of Education terminated Douglas Austin's employment as a vice principal. Austin filed a petition of appeal claiming that he had accrued tenure not just as a vice principal, but also as a principal, and that the termination had therefore violated his tenure and seniority rights under N.J.S.A. 18A:28-5 and -6. The Board answered that the termination had been permissible because Austin had not accrued sufficient time in either position to achieve tenure. For the

reasons set forth below, Austin's motion for summary decision is granted and the Board's cross-motion is denied.

Austin filed his petition of appeal on October 6, 2005, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on December 2, 2005. N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. During a prehearing conference conducted on January 31, 2006, the parties agreed that the material facts were not in dispute and that the matter could proceed with the filing of a stipulation of facts and cross-motions for summary decision in accordance with N.J.A.C. 1:1-12.5. A briefing schedule was established and the record was initially closed on September 6, 2006, upon receipt of the parties' respective reply briefs.

Following two extensions of the forty-five-day statutory period within which to file an initial decision, the record was reopened when it became apparent that additional information concerning the circumstances under which Austin had been appointed to serve as interim principal was needed. A supplemental certification providing the requested information was submitted on January 31, 2007, and the record was ultimately closed on February 2, 2007, upon receipt of a final letter brief from Austin's attorney.

The one-sentence stipulation of facts executed by the parties on March 7, 2006, provides that "Austin's employment with the Board is accurately reflected by the Board's personnel card for Austin, a copy of which is attached hereto as Exhibit A." The personnel card, entitled "Douglas Austin's Employment Record," discloses the following chronological history of Austin's employment by the Board:

Year	Title	Salary
9/01/99	Assistant Principal	$65,837
9/01/00	Reappointment – Assistant Principal	$68,141
12/01/00	Appointment – Vice Principal	$74,000
9/01/01	Reappointment – Vice Principal	$77,700
1/02/02 – 6/30/02	Interim Principal at $3,000 additional stipend	
7/01/02	Reappointment – Vice Principal	$80,808

7/01/02	Appointment Interim Principal at additional $500 per month	
6/27/02	Appointment – Interim Principal	$84,500
8/27/02	Appointment – Principal	$87,000
7/01/03	Appointment – Principal	$89,710
7/01/04	Reappointment – Principal	$89,610 + $100L
8/18/05	Transfer to Assistant Principal at W.H.S.	
8/23/05	Terminated	

[Stipulation of Facts, Exhibit J-1, pg. 2]

Documentation submitted by the Board on June 14, 2006,[1] established that Austin held only a certificate of eligibility as a principal/supervisor from September 1999 through and including October 2000, and obtained his provisional certificate as a principal/supervisor in November 2000.

In the supplemental certification submitted on January 31, 2007, Lorene W. Moore, the Board's Interim Director of Human Resources, stated that "[w]hen Austin was appointed as Interim Principal, first for the period January 1-June 30, 2002, and continuing through July, he was substituting for Trudy Austin, no relation, who was on leave. Effective August 1, 2002, Trudy Austin was transferred to another position. Douglas Austin remained as Interim Principal until his appointment as Principal on August 27, 2002." Moore Certification, Exhibit R-4.

After careful review of the record, I am satisfied that the material facts giving rise to this matter are not in dispute. Therefore, in accordance with N.J.A.C. 1:12.5 and Brill v. Guardian Life Ins. Co. of America, supra, 142 N.J. 520, I find that this matter is ripe for summary disposition.

The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teaching staff members are entitled to the security of tenure. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 72 (1982); Zimmerman v. Newark Bd. of

[1] The documentation included correspondence dated June 12, 2006, from Department of Education's Office of Licensure and Credentials (Exhibit R-1); Austin's Certificate of Eligibility issued August 1998 (Exhibit R-2); and Austin's Standard Certificate issued January 2005 (Exhibit R-3).

Educ., 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963). Tenure arises only upon compliance with the precise conditions articulated in the statute. Picogna v. Board of Education of Cherry Hill, 143 N.J. 391, 400 (1996).

N.J.S.A. 18A:28-5 grants tenure to enumerated teaching staff members, including principals, assistant principals, vice-principals, and assistant superintendents, who meet the statutory requirements. By the express terms of this statute, a teaching staff member is entitled to tenure if he or she (1) works in a position for which a teaching certificate is required; (2) holds the appropriate certificate; and (3) has served the requisite period of time. Spiewak v. Board of Educ. of Rutherford, supra, 90 N.J. at 74.

Generally, a teaching staff member is entitled to tenure once he or she has been employed in a school district for (a) three consecutive years, or (b) three consecutive academic years and the first day of the next academic year, or (c) the equivalent of more than three academic years within any four academic years. N.J.S.A. 18A:28-5; Dennery v. Board of Education of the Passaic Cty. Reg. High Sch. Dist., 131 N.J. 626, 633 (1993). However, tenure in an administrative or supervisory position can accrue only during the period of time the individual is actually employed in that particular position. N.J.S.A. 18A:28-5. And the tenure accrued in that position cannot be extended to any other administrative or supervisory position. Ibid.

Special tacking provisions apply to non-tenured teaching staff members who are voluntarily transferred or promoted to a new tenure-eligible position before reaching tenure in their former position. When a teaching staff member eligible to obtain tenure is transferred or promoted with his or her consent to another tenure-eligible position,

> the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would

> have been entitled during the period of such transfer or promotion.
>
> [N.J.S.A. 18A:28-6.]

Here, Austin was initially employed as an assistant principal on September 1, 1999, and remained in that position until December 1, 2000, when he was appointed to the position of vice principal. There can be no question that the fifteen months he served as an assistant principal was insufficient to achieve tenure in that position. Yet, the Board has asserted, albeit in a footnote, that "[i]n actuality, Vice-Principal and Assistant Principal are the same." Board's Brief in Support of Cross-Motion for Summary Decision, May 3, 2006, pg. 1, fn. 1. In other words, the two titles are, in its view, interchangeable.

It is unclear why the Board has taken this position when it should know that the Commissioner of Education has held that it is "contrary to the clear and specific language of the statute (N.J.S.A. 18A:28-5) which separately enumerates the two positions." Schweber v. Board of Education of the City of Trenton, Mercer County, EDU 6469-96, Final Decision, Commissioner (June 10, 1998), <http://lawlibrary.rutgers.edu/oal/search.html>. I can only assume the Board did so to make the point that even Austin's combined service time as an assistant principal and vice-principal of two years and eleven months, fell one month short of the three years required by the statute. Still, it need not have done so because Austin did not possess the necessary certification to accrue tenure during the first fourteen months he served as an assistant principal.

A "teaching staff member" is defined as

> a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications for such office, position, or employment, require him to hold a valid and effective **standard, provisional or emergency certificate**, appropriate to his office, position or employment, issued by the state board of examiners....

[N.J.S.A. 18A:1-1 (emphasis supplied)]

What is more, N.J.S.A. 18A:28-4 provides that "[n]o teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the state board of examiners." Therefore, it is virtually axiomatic that the period of time a teacher serves in a position without the benefit of a valid and appropriate teaching certificate and any specific endorsement that may be required by the position cannot be counted toward the accrual of tenure or seniority in that position. See e.g. Cooker v. Brigantine Bd. of Educ., 91 S.L.D. 1202, aff'd., Commissioner, 91 S.L.D. 1224, aff'd., N.J. Superior Court, App. Div., Docket No. A 2128-91T1 (1992) (teacher lacking a valid and appropriate certificate was denied tenure rights after ten years in her position).

Nor can a late-acquired certificate or endorsement retroactively qualify earlier service. See, e.g., McAneny v. Chatham Bd. of Educ., 91 S.L.D. 794 (late-acquired elementary school teacher's certificate did not qualify thirteen years of supplemental service by a teacher holding only home economics endorsement); and Gelsomino v. Belleville Bd. of Educ., 80 S.L.D. 541 (time served in departmental position for evaluation of teachers prior to acquisition of supervisor's endorsement did not count toward tenure).

Here, Austin did not obtain his provisional certificate as a principal/supervisor until November 2000. I therefore find that the first fourteen months he served as an assistant principal (September 1999 – October 2000) did not count towards the accrual of tenure or seniority rights in that position and that he actually accrued only one month of tenure-eligible service as an assistant principal before his promotion to vice-principal.

Austin was appointed to the position of vice-principal on December 1, 2000. He served in that position until January 2, 2002, when he was appointed to serve as an interim principal, an appointment that continued through to the end of July. During that period of time, Austin was substituting for the principal, Trudy Austin, who was on leave. Effective August 1, 2002, Trudy Austin was transferred to another position, but it was

not until August 27, 2002 that Douglas Austin was appointed as principal to succeed her. It is this twenty-seven-day period (August 1 – August 27, 2002), that appears to be the bone of contention between the parties.

N.J.S.A. 18A:16-1.1 provides that

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The acts of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for who such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

The Appellate Division had occasion to discuss the difference between a "temporary employee" or substitute on one hand, and a teaching staff member actually holding a tenure-eligible position on the other, in Sayreville Educ. Ass'n v. Board of Educ., Etc., 193 N.J. Super. 424 (App. Div. 1984). In the decision written by the Hon. Sylvia Pressler, J.A.D., the court construed N.J.S.A. 18A:16-1.1 as applying

> when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is,

> moreover, in accord with the observation in Spievak v. Rutherford Bd. of Ed., supra, 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again, the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.
>
> [Id. at 428]

In the present matter, it is undisputed that Austin's appointment as interim principal was for a six-month period of time from January 2, 2002, through and including June 30, 2002. As it happens, the interim appointment continued through to the end of July. Throughout that period of time it was anticipated that Trudy Austin would reclaim her position when her leave of absence was over. Therefore, the principal's position was not vacant, but only temporarily unoccupied, for the first seven months of 2002 and any tenure Douglas Austin accrued while serving as interim principal was in the position of vice-principal.

However, Trudy Austin was transferred to a different position in the school district on August 1, 2002. From that point on, Douglas Austin was no longer filling Trudy Austin's place, but rather a vacant place, and he began to accrue tenure as a principal. The fact that the Board did not formally appoint Austin to the position of principal until August 27, 2002, does not change the fact that he became the principal the moment Trudy Austin's transfer became effective. Therefore, he began to accrue tenure as a principal on August 1, 2002, and not August 27, 2002, as the Board has argued.

Austin continued to serve as principal until August 18, 2005, when he was transferred and "returned" to his original position of assistant principal. Five days later he was terminated. However, the fact remains that he filled the vacant position as interim principal for twenty-six days and continued to serve as principal in his own right for an additional thirty-five months and twenty-two days. As of the day of he was transferred, he had served as principal for thirty-six months and seventeen days, seventeen days more than the three-year requirement to achieve tenure.

Undisputed facts establish and I therefore conclude that Austin was employed for a sufficient period of time to acquire tenure as a principal in the Willingboro school district and was terminated in violation of his tenure and seniority rights. Accordingly, Austin is entitled to entry of summary decision in his favor.

Based upon the foregoing, it is **ORDERED** that the Board restore Austin to the position of principal and promptly pay him all lost salary and other benefits retroactive to August 18, 2005, subject to appropriate mitigation, if any.

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

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

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

March 21, 2007
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

March 22, 2007

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 28 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/cmo

APPENDIX

EXHIBITS

Joint Exhibits:

J-1 Stipulation of Facts

For Petitioner:

None

For Respondent:

R-1 Letter from Veronica Geyer to James Schwerin, Esq.
R-2 Austin Certificate of Eligibility
R-3 Austin Standard Certificate
R-4 Certification of Lorene W. Moore

153-07

#153-07

OAL DKT. NO. EDU 10503-06
AGENCY DKT. NO. 247-7/06

MARK PERKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed stipulation of settlement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/26/07

Date of Mailing: 4/26/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10503-06
AGENCY DKT. NO. 247-7/06

MARK PERKINS,

Petitioner,

v.

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

Respondent.

Timothy R. Smith, Esq., for petitioner

Marc H. Zitomer, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: February 7, 2007 Decided: March 14, 2007

BEFORE **RICHARD McGILL,** ALJ:

Mark Perkins filed a petition with the Commissioner of Education requesting reimbursement from the Board of Education of the City of East Orange (respondent) for legal fees and costs associated with the defense of a criminal complaint. The matter

was transmitted to the Office of Administrative Law on October 16, 2006, for determination as a contested case.

Prior to hearing, the parties submitted written Stipulation of Settlement and Release. Thereafter, respondent submitted a certified copy of its resolution approving the settlement agreement.

Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Mar. 14, 2007
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

3-16-07
DATE

UPS
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 20 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

FEB 07 20

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Monday, January 8, 2007 at 6:08 p.m.

The following members of the Board were present:

Ms. Theresa Combs, Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mr. Arthur Wright, and Mrs. Bibi Stewart Garvin

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mr. Reginald Davis, and adopted by the Board of Education:

RESOLUTION

RESOLVED, that the Board hereby approves the Settlement Agreement/Release in the employee indemnification matter, Mark Perkins v. East Orange Board of Education, Agency Reference #247-7/06 which is currently before the Commissioner of Education, in the amount of $5,225.48.

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement Agreement/Release in the above matter on behalf of the Board and a copy thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSENT: 2

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Mark Kramer, Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Monday, January 8, 2007 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 5th day of February 2007.

Mark Kramer

Mark Kramer, CPA, Board Secretary

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
Tel. (973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent, East Orange
Board of Education.

JAN 31 2007

MARK PERKINS, Petitioner, vs. EAST ORANGE BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REFERENCE NO. 247-7/06 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (hereinafter the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Mark Perkins, whose address is P.O. Box 4122, East Orange, New Jersey 07019 (hereinafter the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on March 28, 2006, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on March 28, 2006, while Petitioner was in the employ of the Board; and

WHEREAS, on May 8, 2006, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about July 12, 2006, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on or about August 30, 2006, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

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

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

1. The Board will pay to the Petitioner the sum of Five Thousand Two Hundred Twenty-Five Dollars and Forty-Eight Cents ($5,225.48) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy Smith, Esq. of Timothy R. Smith & Associates, LLC, 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and

judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new

instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

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

FOR THE RESPONDENT EAST ORANGE BOARD OF EDUCATION:

By: Bibi Stewart Garvin
Bibi Stewart-Garvin, Board President

By: Jamie Ader
, Witness

Date: 1/24/07

PETITIONER:

Mark S. Perkins
Mark Perkins

Date: 9/26/2006

Sworn and subscribed before me this
26 day of Sept, 2006

Notary Public

NUMAN PERRY
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 20, 2009

RESOLUTION

Resolved, that the Board hereby approves the Settlement Agreement and Release in the employee indemnification matter, Mark Perkins v. East Orange Board of Education, Agency Reference No. 247-7/06, which is currently before the Commissioner of Education, in the amount of $5,225.48; and

Be it Further Resolved that the Board President is hereby authorized to execute the Settlement Agreement/Release in the above matter on behalf of the Board and a copy thereof shall be included in the permanent minutes of this meeting.

156-07

OAL DKT. NO. EDU 3601-07
AGENCY DKT. NO. 88-3/07

D.C., on behalf of minor child, M.C.,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION ON
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on April 4, 2007 – along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ's determination, for the reasons stated in her Order, that petitioner has failed to satisfy any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner declines, however, to reach to the ALJ's recommendation that M.C.'s participation in the Youth Guidance Council's 5-hour car wash on April 21, 2007 be credited toward the 30-hours of community service imposed by the Board, as she determines that resolution of this issue is not appropriately accomplished in an emergent application.

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL - along with briefs of the parties in connection with petitioner's motion for summary decision filed with the Agency - for plenary hearing.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/27/07

Date of Mailing: 4/27/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 03601-07

AGENCY DKT. NO. 88-3/07

D.C. ON BEHALF OF M.C.

Petitioner,

v.

WEST ESSEX REGIONAL SCHOOL BOARD OF EDUCATION

Respondent.

Stephen M. Latimer, Esq. appearing for petitioner (Loughlin & Latimer)

Jocelyn M. Frank, Esq. appearing on behalf of respondent (Fogarty & Hara)

Record Closed: April 4, 2007 Decided: April 5, 2007

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, D.C., brought an application for emergent relief to compel respondent, the West Essex Board of Education, (WEBOE) to permit M.C. to participate in extra curricular activities and to reduce the amount of time M.C. is to participate in a community service.

On March 29, 2007, the matter was transmitted to the Office of Administrative Law (OAL) for an emergent hearing or a preliminary injunction until a plenary hearing could be held. The parties submitted written arguments on the emergent issues and oral arguments were heard on April 4, 2007.

FINDINGS OF FACT

The following basic facts are not in dispute and for purposes of the emergent hearing which was held on April 4, 2007, the parties agreed to the following **FACTS:**

M.C. is a tenth grade student at West Essex Regional High School. On January 12, 2007, M.C. and a friend were found by the North Caldwell Police in a car on a street behind the school, during school hours, engaging in a narcotics related activity. Based on this incident, on January 19, 2007, M.C. was suspended for ten (10) days. He was suspended from January 19, 2007 until February 2, 2007. Following this suspension, it came to the WEBOE's attention that on January 12, 2007, M.C. also had in his possession a four (4) inch hunting knife considered to be a weapon in possession and contrary to school policy. This knife is commonly known as a buck knife.

On February 8, 2007, M.C. was again suspended for having had a "buck knife" in his possession on January 12, 2007. This time M.C. was suspended pending a WEBOE formal hearing, said hearing took place on March 7, 2007. At the conclusion of that hearing the WEBOE found that M.C. had in his possession a knife on school premises on January 12, 2007, and that he further violated the terms of his suspension when he came onto school grounds on February 13, 2007.

The WEBOE determined that M.C. would be re-admitted to the district on a probationary basis through the end of the 2006-2007 school year under certain terms. The WEBOE imposed nine (9) conditions and/or penalties of M.C.'s probationary

return to school. Out of the nine (9) items imposed petitioners are appealing two (2) which are the subject of the instant emergent hearing.

Petitioners appeal on an emergent basis that: 1) M.C. shall not be permitted to participate or attend any athletic, co-curricular and/or extracurricular activity sponsored by the WEBOE either on or off campus. 2) M.C. is to perform thirty (30) hours of community service.

LEGAL DISCUSSION AND CONCLUSION

Resolution of the emergent relief requested is governed by the provisions of N.J.A.C. 1:6A-12.1. Emergent relief shall be granted if it is determined from the proofs that:

i. Petitioner will suffer irreparable harm if the requested relief is not granted.

ii. The legal rights underlying the petitioner's claim is settled.

iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

iv. When the equities and interest of the parties are balanced the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. N.J.A.C. 6A: 3-1.6(b).

It is well settled that a petitioner must meet these four criteria in order to prevail on an emergent application. See Crowe v. DeGioia, 90 N.J. 126 (1982). Regarding the first prong requiring a showing of irreparable harm; petitioner presents that to deprive M.C. of the opportunity to participate in extra curricular activities is damaging to his standing with his fellow students because it is stigmatizing and ostracizing and that it will affect his college admissions and impact on his future employment. Participation in extra curricular activities is a privilege and not a right, it has been held that students do not suffer irreparable harm if they are prohibited from participating in extra curricular activities. BOE of the City of Trenton v. N.J.S.I.A.A., 91 N.J.A.R. 2d (EDU) 158. Also, there is no indication that petitioner is an active participant or is actively involved

in any extra curricular activity. Petitioner has failed to provide a showing of how performing thirty hours (30) of community service will cause M.C. to sustain irreparable harm. I **FIND** that it is speculative to say what, if any, affect this prohibition and/or requirement will or may have on his college admissions or employment. I **CONCLUDE** that there is no proof of irreparable harm.

Petitioner must show that the legal right underlying his claim is settled. I **FIND** that there has been nothing provided to show that this matter is so clean cut. I **CONCLUDE** from petitioner's arguments that such a claim is anything but settled.

It is well settled law that the actions of a Board of Education which lie within the area of discretionary powers, especially in discipline matters, may not be upset unless there is a showing that the discipline imposed was arbitrary, capricious and without a rational basis or was induced by improper motives. J.M. vs. Hunterdon Central RE. High School, 96 N.J.A.R. 2d (EDU) 415, 419 (citing Kopera v. West Orange Bd. of Educ. 60 N.J. Super. 288 (App. Div 1960)). Respondent submitted a certification from the district's superintendent that he imposes thirty (30) hours of community service as a standard penalty, only one exception with grounds was cited in the certification. Therefore, I **CONCLUDE** that petitioner has not demonstrated the likelihood of success on the merits as based on the record before me.

When one balances the equities I **FIND** that the Board's need to implement and to enforce school regulations outweighs the petitioner's need or desire to attend extra curricular activities or to refrain from performing thirty hours of community service. I **FIND** that compliance with the disciplined imposed is not, for this emergent matter, unduly burdensome. Therefore, I further **CONCLUDE** that petitioner has not demonstrated that M.C. will incur any substantial harm, at least substantial enough as to create an imbalance necessitating immediate relief.

During the hearing the parties acknowledged that M.C. is an active participant in the Youth Guidance Council of Roseland; this organization is not related to school.

The Youth Guidance Council is sponsoring a five (5) hour car wash on April 21, 2007. The proceeds of the car wash are to go to the family of a Newark police officer that died in the course of duty. The WEBOE is permitting M.C. to attend this activity but M.C. must make up those five (5) to the WEBOE at a later date. I, **RECOMMEND** that if M.C. participates in the car wash he is credited with five (5) hours towards the thirty (30) hours he has to serve. The WEBOE is to obtain the appropriate proof as to M.C.'s five (5) hour attendance and participation in that car wash.

ORDER

The petitioner has not met the criteria for granting emergent relief, this application is hereby **DENIED.** The petition for emergent relief is hereby **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 5, 2007
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency:

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

157-07

157-07SEC

AGENCY DKT. NO. 85-3/07
(Amendment to Agency Dkt. No. 407-11/06)

IN THE MATTER OF ARETHA DOOLEY MALLOY, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended revised penalty of censure, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the revised penalty of censure recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite disclosure statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act. In addition, the Commissioner echoes the Commission's dismay regarding the Newark School District's failure to properly process respondent's disclosure statement once it was provided on October 2, 2006.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/07

Date of Mailing: 4/27/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

RECEIVED BY
CONTROVERSIES
& DISPUTES
2007 MAR 23 AM 11:05

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

March 23, 2007

TO: Kathleen Duncan, Director
Controversies and Disputes

FROM: Lisa James-Beavers, Executive Director
School Ethics Commission

RE: In the Matter of Aretha Dooley Malloy
School Ethics Commission Decision Docket No. D07-06
Agency Docket No. 407-11/06

Attached is a letter and amended resolution regarding the above school administrator who failed to file her disclosure statement on time. It appears that the Newark School District never filed her disclosure statement with the county and never notified the Commission that she had filed despite being copied on the decisions of the School Ethics Commission and the Commissioner. The statement was finally filed with the county office on January 26, 2007. Ms. Malloy had filed with the district on October 2, 2006. The Commission is still recommending that she be censured; however, because she ignored the many letters and decisions that made it clear that the disclosure statement had never been properly filed. Her disregard of these documents resulted in a colossal waste of time and effort on the part of the staff of the School Ethics Commission and the staff of Controversies and Disputes.

Please do hesitate to contact me at 4-6941 if you have any questions.

Attachments

RECEIVED
CONTROVERSIES
& DISPUTES
2007 MAR 23 AM 11:05

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

March 23, 2007

Ms. Aretha Dooley Malloy
6 Fitzrandolph Road
West Orange, NJ 07052

RE: In the Matter of Aretha Dooley-Malloy, State Operated School District of the City of Newark, Essex County, SEC Docket No. D07-06

Dear Ms. Malloy:

On January 3, 2007, the Newark Board of Education advised the School Ethics Commission that you had filed your disclosure statement on October 2, 2006 with the Newark School District. However, this was after the Commission had rendered its decision finding you in violation of N.J.S.A. 18A:12-25 and 26 of the School Ethics Act for failing to file your disclosure statement and after the Commissioner of Education rendered its decision concurring with the Commission's recommended penalty, which suspended you until your disclosure statement was filed, provided that if the statements were not filed within 30 days of the mailing date of the decision, you would be removed from office.

Following receipt of this message, the Commission undertook an investigation to determine why no one in the Newark School District or in the county office notified the Commission of the receipt of the statement despite the Commission's decision sent to you on October 31, 2006, the Commissioner's decision imposing the penalty sent to you on December 12, 2006 and the Commission's resolution of suspension sent to Perry Lattiboudere and copied to you on December 21, 2006. The Commission determined that the Newark Board of Education received your statement, but did not file it with the Essex County Office of Education as required. Rather, it was not received in the County Office until January 26, 2007.

Based on the foregoing information, the Commission voted at its meeting of February 27, 2007 to rescind the Resolution of Suspension that was sent for reading to the Newark School District on December 21, 2006. Apparently, the Resolution is the only reason that the Commission was ever notified of the District's receipt of the statement. The Commission first considered your attempt to file, which was unsuccessful because filing does not occur until the statement is received in the county office. The

Commission next considered the extraordinary waste of administrative and adjudicative time spent by State education officials due to your failure to timely file your statement and your choice to ignore the many documents sent to you clearly indicating that your statement was never filed with the county office. Weighing each of these factors, the Commission voted to instead recommend a penalty of censure to the Commissioner of Education. The Commission is dismayed that the Newark school officials to whom these decisions and the resolution were sent chose to ignore them rather than file the statement properly and inform the Commission of the District's receipt. We trust that such an oversight will not recur in the future.

A draft amended resolution is enclosed herewith that will be adopted by the Commission if the Commissioner concurs with the recommendation.

Sincerely,

Lisa James-Beavers, Executive Director
School Ethics Commission

Enclosure
c: Perry Lattiboudere
Kathleen Duncan (w/enclosures)

RECEIVED
CONTROVERSIES
& DISPUTES
2007 MAR 23 AM 11:05

DRAFT

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D07-06**
ARETHA DOOLEY MALLOY, STATE OPERATED SCHOOL DISTRICT, CITY OF NEWARK ESSEX COUNTY	:	**AMENDED RESOLUTION FOR FAILURE TO FILE DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Aretha Dooley Malloy is a Vice Principal for the Newark City School District and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the School Ethics Commission was advised by the Essex County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on August 29, 2006, indicating that if the completed statement was not filed by September 15, 2006, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on September 28, 2006, directing Ms. Malloy to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its October 24, 2006 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, at its meeting of October 24, 2006, the Commission adopted a decision concluding that Ms. Malloy violated N.J.S.A. 18A:12-25 and 26 and recommending that the Commissioner impose a penalty of suspension until Ms. Malloy files disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision on penalty, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

WHEREAS, by decision of December 12, 2006, the Commissioner concurred with the penalty recommended by the Commission; and

WHEREAS, the School Ethics Commission adopted a resolution of suspension at its meeting of December 19, 2006 stating that Ms. Malloy is suspended as of December 12, 2006 until such disclosure statement is filed; provided, however, that if such statement is not filed by January 11, 2007, Aretha

Dooley-Malloy is removed from office and sent this to the District for reading at a public meeting on December 21, 2006 in accordance with N.J.A.C. 6A:28-6.10(d); and

WHEREAS, the Newark City Board of Education was ordered to read this resolution at its next public meeting following the Commission's adoption on December 19, 2006 and to post it in such places as the board posts its public notices for 30 days; and

WHEREAS, the Newark School District never read or posted the resolution, but notified the Commission on January 3, 2007 that the District had received Ms. Malloy's disclosure statement on October 2, 2006; and

WHEREAS, the Essex County Office of Education did not receive Ms. Malloy's statement until January 26, 2007 making such date the actual date of filing under the Act; and

WHEREAS, the Commission recognizes that using such a filing date would result in Ms. Malloy's removal from her position pursuant to the Commissioner's decision of December 12, 2006, which would be unduly harsh in light of her attempt to file; and

WHEREAS, the Commission voted at its meeting on February 27, 2007 to rescind the resolution of suspension/removal that had been sent to the District and to instead recommend to the Commissioner of Education that Ms. Malloy be censured for violating the School Ethics Act in light of the extraordinary waste of time she has caused by filing late and ignoring all of the decisions and the resolution that had been sent to her;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission hereby adopts this resolution rescinding its prior resolution of suspension/removal sent on December 21, 2006 and adopts this amended resolution, in accordance with the decision of the Commissioner, censuring Ms. Malloy as a school official having violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act; and

BE IT FURTHER RESOLVED that the State Operated School District of Newark is ordered to read this resolution at its next public meeting following the Commission's adoption and to post it in such places as the board posts its notices for 30 days.

_____
Paul C. Garbarini, Chairperson
School Ethics Commission

Dated:

I hereby certify that the above Resolution was duly adopted by the School Ethics Commission at its public meeting on _____.

_____
Lisa James-Beavers
Executive Director

158-07

BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY

PETITIONER,

V.

PHILIP TULLY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board of Education of the Township of Cedar Grove filed a Petition of Appeal, with request for emergent relief, seeking removal of Board member Philip Tully for alleged conflict of interest as the result of a Tort Claim Notice filed by respondent against the Board. Oral argument was presented in an emergent relief hearing in December 2006, after which the respondent was immediately suspended pending a full hearing on the merits. Subsequently, the Board filed a motion for summary decision, to which respondent did not respond.

The ALJ found that the respondent has an actual claim against the Board, which is expressly prohibited pursuant to *N.J.S.A.* 18A:12-2, and no facts exist to show that there is a genuine issue of material fact requiring further hearing in this matter. The ALJ concluded that respondent is disqualified from serving on the Board as a matter of law, and so ordered.

The Commissioner adopts the recommended order of the ALJ as the final decision in this matter, concurring with the ALJ that respondent is disqualified as a matter of law from serving on the petitioning Board of Education, in view of the conflict of interest created by his tort claim against the Board. Accordingly, the Commissioner ordered respondent removed as a member of the Cedar Grove Board of Education as of the date of this decision, and directed the County Superintendent to fill the resulting vacancy pursuant to *N.J.S.A.* 18A:12-15a.

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

April 30, 2007

OAL DKT. NO. EDU 11663-06
AGENCY DKT. NO. 453-12/06

BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, ESSEX COUNTY PETITIONER, V. PHILIP TULLY, RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that respondent is disqualified as a matter of law from serving on the petitioning Board of Education, in view of the conflict of interest created by his tort claim against the Board. *N.J.S.A.* 18A:12-2; *Berlin v. Lee, supra; Aldom v. Borough of Roseland*, 42 *N.J. Super* 495, 502 (App. Div. 1956); *S&L Associates, Inc. v. Washington Township,* 61 *N.J. Super.* 312, 329 (App. Div. 1960); *Board of Education of the Township of Holmdel, Monmouth County v. Stephen O'Connell*, 1990 *S.L.D.* 674; *Board of Education of the Township of Jackson, Ocean County v. Gustav Acevedo, II,* 92 *N.J.A.R.*2d 163; *Taliaferro vs. Hawthorne Board of Education,* 94 *N.J.A.R.*2d (EDU) 197; and *Board of Education of the Borough of Palmyra, Burlington County v. Robert Marinnie,* decided by the Commissioner June 8, 2005. See also, *Board of Education of the City of Sea Isle, Cape May County v. William J. Kennedy*, decided by the Commissioner June 30, 2005, affirmed State Board of Education January 4, 2006.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and Phillip Tully – who has been suspended from service as a Board member since December 22, 2006, pursuant to the Commissioner's Order on the Board's Application for Emergent Relief – is hereby removed as a member of the Cedar Grove Township Board of Education as of the filing date of this decision. Pursuant to *N.J.S.A.* 18A:12-15a, the Essex County Superintendent of Schools is directed to fill the resulting vacancy for the remaining length of Mr. Tully's term, which is due to expire upon the Board's reorganization following the April 2008 annual school election.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/07

Date of Mailing: 4/30/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11663-06
AGENCY DKT. NO. 453-12/06

BOARD OF EDUCATION OF CEDAR GROVE TOWNSHIP, ESSEX COUNTY,
Petitioner,
v.
PHILIP TULLY,
Respondent.

John G. Geppert, Jr., Esq., appearing for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Philip Tully, appearing for himself

Record Closed: March 6, 2007 Decided: March 21, 2007

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

SUMMARY

Tully, a member of the Board of Education, filed a tort claim against the Board. Does such a claim prohibit Tully from serving on the Board? I conclude that it does. The statute governing the qualifications of board members, N.J.S.A. 18A:12-2, states that no board member may have an interest in a claim against the board on which the

member serves. Moreover, interpretive administrative decisions adopted by the Commissioner of Education have specifically held that the statute encompasses tort claims.

PROCEDURAL HISTORY

On December 8, 2006, the Board of Education moved for emergent relief to suspend Tully from its board by its next meeting, which was scheduled for December 12, 2006.

On December 12, 2006, I held an emergent hearing. The Board of Education had submitted a legal memorandum in support of its motion and presented oral argument. Tully did not submit any papers in opposition to the motion but did appear to oppose it. After reviewing the Board of Education's moving papers, and after considering the parties' oral arguments, I granted the motion and ordered the emergent relief. As a result, I ordered that Tully was immediately suspended from serving on the Board of Education pending a full hearing on the merits.

On December 22, 2006, the Commissioner of Education adopted my initial order.

On February 27, 2007, the Board of Education filed this motion for summary decision.

FINDINGS OF FACT

Based upon the moving papers, I **FIND** the following facts:

On November 30, 2006, Tully and his wife filed a notice of tort claim with the Board of Education. The notice states that Tully suffered serious and permanent injuries as a result of the Board of Education's failure to properly maintain the seating area around the high school football field for which Tully seeks unliquidated personal damages.

On December 5, 2006, the Board of Education notified Tully that his claim against it constitutes a conflict of interest under N.J.S.A. 18A:12-2 and asked him to resign from the Board of Education or withdraw his claim. When Tully did neither, the Board of Education filed its application for emergent relief.

CONCLUSIONS OF LAW

A motion for summary decision may be rendered if no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law. When the motion is supported, the adverse party must set forth specific facts showing that there is a genuine issue of material fact, which can only be determined in an evidentiary proceeding. "If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." N.J.A.C. 1:1-12.5(b).

In this case, Tully, the adverse party, did not respond. As a result, no specific facts exist showing that there is a genuine issue of material fact, which can only be determined in an evidentiary proceeding. Indeed, the Board of Education is entitled to prevail as a matter of law.

Under the statute governing the qualification of board members, no member of a board of education may have an interest in a claim against it, see N.J.S.A. 18A:12-2, and under interpretive administrative decisions, tort claims are considered to be such a claim, see Board of Education of the Borough of Berlin v. Charlotte Lee, 2002 WL 991700 (N.J. Adm), aff'd by Comm. 2002 WL 32590940l.

More specifically, in Berlin v. Lee, the administrative law judge explained that a tort claim is not merely an inchoate claim that might be pursued at some future date but an actual claim that may be settled:

> [N]otice of a tort claim is not merely an inchoate claim that may be pursued at some future date, but represents an actual claim against a public entity which may be subject to settlement and, failing that, may be the subject of a future court action against the public entity.
>
> [Id. at 5]

He also explained that the statute specifically prohibits an interest in a "claim" as opposed to an "action" or "pending litigation." Ibid. Thus, the administrative law judge concluded that Lee was disqualified from serving as a board member. Id. at 6.

In this case, Tully is still pursuing a tort claim against the Board of Education. As such, Tully has an interest in an actual claim against the Board, which is expressly prohibited. Therefore, I **CONCLUDE** that Tully is disqualified from serving on the Board of Education as a matter of law.

ORDER

Based on my findings of fact and conclusions of law, I **ORDER** that Tully is disqualified from serving on the Board of Education.

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

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

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

3/21/07
DATE

Barry Moscowitz
BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: March 21, 2007

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 22 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

da

159-09

159-07R

OAL DKT. NO. EDU 1361-07
(EDU 1166-06 ON REMAND)
AGENCY DKT. NO. 367-12/05

J.C. on behalf of minor children J.D. and K.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/07

Date of Mailing: 4/30/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1361-07
AGENCY DKT. NO. 367-12/05

J.C. o/b/o MINOR CHILDREN J.D.
and K.R.,
Petitioner,
v.
ALPINE BOARD OF EDUCATION,
Respondent.

ON REMAND
OAL DKT. NO.: EDU 1166-06

Ronald Schwartz, Esq. for petitioner

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

Record Closed: March 7, 2007 Decided: March 9, 2007

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 10, 2006 for determination as a contested case.

Prior to hearing, the parties agreed to amicably solve the matter and submitted a Stipulation of Settlement. The Board of Education Resolution was submitted with the Settlement Agreement, but inadvertently no language was included to designate and

authorize the Board President and Board Secretary to execute the Agreement on behalf of the Board. The Board Resolution has been reworded to include the previously omitted portion, and has been certified. Having reviewed the record, the certified reworded resolution and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

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

March 9, 2007
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency:

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 9 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

ALPINE SCHOOL DISTRICT
500 HILLSIDE AVENUE
ALPINE, NEW JERSEY 07620

Elizabeth Herries
President
Board of Education

Donna Alonso
Business Administrator/
Board Secretary

RESOLUTION OF THE BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, ALPINE, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Alpine, in the County of Bergen, New Jersey convened in a Regular meeting on Thursday, August 17, 2006. The following members of the Board of Education were present: Ms. Elizabeth Herries, Mr. Walter Roura, Mr. Richard Serko, Mr. Philip Simotas and Mrs. Joyce Sonpal.

The following resolution was offered by Mrs. Sonpal, seconded by Mr. Roura:

DO382 Moved by Mrs. Sonpal, seconded by Mrs. Roura BE IT RESOLVED that the Alpine Board of Education hereby accepts the settlement agreement made between the Alpine Board of Education and J.C. o/b/o minor children J.D. and K.R. in the amount of $3,500. Students' address is corrected. The Board President and Board Secretary are hereby authorized and directed to execute the settlement agreement and any other document necessary to effectuate said settlement.

Roll Call:

Ayes: 5 Ms. Elizabeth Herries, Mr. Walter Roura, Mr. Richard Serko Mr. Philip Simotas and Mrs. Joyce Sonpal.

Nays: 0

I, Donna Alonso, Secretary of the Alpine Board of Education, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the regular meeting of the Board of Education of said district, fully called and held on Thursday, August 17, 2006, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Alpine Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 18th day of August, 2006.

Donna Alonso
Board Secretary

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
SEP 19 2006

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Attorneys for Respondent,
Alpine Board of Education
Our File No. 112

J.C. o/b/o minor children J.D. and K.R., Petitioners, v. ALPINE BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO. 267-12/05 OAL DOCKET NO. EDUOS-01166-2006N **SETTLEMENT AGREEMENT**

THIS AGREEMENT is made between: (1) the Alpine Board of Education (hereinafter referred to as the "Board") with offices located at 500 Hillside Ave, Alpine, New Jersey; (2) J.C. (hereinafter referred to as "Petitioner") whose address is currently 379 Anderson Avenue, Alpine, New Jersey; and (3) A.D. and S.R. (hereinafter referred to as the "Parents"), whose address is currently 379 Anderson Avenue, Alpine, New Jersey.

WHEREAS, J.D. and K.R. are pupils who were residing with J.C., and are now residing with their parents S.R. and A.D., in the Alpine School District (hereinafter referred to as the "District"); and

WHEREAS, the J.C. sought to enroll J.D. and K.R. as pupils in the District for a tuition-free public education based upon his claim that J.D. and K.R. were "affidavit students" within the meaning of N.J.S.A. 18A:38-1; and

WHEREAS, the Board denied the enrollment of J.D. and K.R., finding that they did not meet the standards to qualify as "affidavit students" within the meaning of N.J.S.A. 18A:38-1; and

WHEREAS, Petitioner filed a verified petition of appeal seeking a declaration that J.D. and K.R. were eligible for tuition-free attendance in the District; and

WHEREAS, the Board enrolled J.D. and K.R. in the District and provided them with a tuition-free public education; and

WHEREAS, the Board counterclaimed against Petitioner for the costs of tuition for the period of J.D. and K.R.'s ineligible attendance in the District; and

WHEREAS, the Parents/Guardians and the Board would like to reach an amicable resolution on all issues to avoid the time and expense associated with the litigation of this matter.

NOW, THEREFORE, the Parents and Board herein agree to the following terms, covenants and promises:

1. SETTLEMENT TERMS AND EXECUTION OF DOCUMENTS.

   A. Petitioner and the Parents agree to pay the Board three thousand five hundred dollars ($3,500.00) as a compromise of this disputed claim. Said payment shall be made no later than June 30, 2006.

   B. The parties agree that if the Petitioner and/or the Parents fail to make such payment by June 30, 2006, the Board shall have the right to initiate litigation to recover the outstanding amount against the Petitioner and/or the Parents jointly and severally, and shall be entitled to recover reasonable attorneys' fees and costs of suit incurred in the prosecution of such litigation.

   C. Upon the signatures of all parties and approval by the Board, this Agreement shall be submitted to the Office of Administrative law to be incorporated into a final order, approved by an Administrative Law Judge, and shall be governed by the laws of the State of New Jersey. The

parties agree to refrain from filing any proceeding regarding the issues that are the subject of the instant verified petition of appeal. However, both parties expressly reserve the right to bring a claim to enforce their rights under the terms and conditions of this Agreement.

2. NO RELIANCE. The parties hereto represent and acknowledge that, in executing this Settlement Agreement, they have not relied upon any representation or statement, written or oral, made by any of the parties' agents, attorneys or representatives with regard to the subject matter, basis or effect of this Settlement Agreement or otherwise.

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

4. REPRESENTATION BY COUNSEL. Each party is represented by competent counsel of its choosing and that they have signed this Settlement Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. NO ADMISSION. This Settlement Agreement and compliance with this Settlement Agreement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

6. GOVERNING LAW. This Settlement Agreement and all provisions hereof shall be governed by and construed under the law of the state of New Jersey without reference to conflicts of law principles.

7. MODIFICATION. No amendment, modification or attempt to supersede or cancel any of the terms, covenants or conditions hereof shall be effective unless such amendment, modification or direction to supersede or cancel such term or covenant is in writing and executed by all of the parties hereto or, in the case of a waiver, by or on behalf of the party waiving compliance. The failure of any party at any time or times to require performance of any provision hereof shall in no way affect the right at a later time to enforce the same. No waiver by either party of the breach of any term or covenant contained in this Settlement Agreement, in any one or more instances, shall be deemed to be, or construed as, a further or continuing waiver of any such breach or a waiver of any breach of any other term or covenant.

8. SUCCESSORS. All of the terms, agreements, covenants and conditions of this Settlement Agreement shall be binding upon, and inure to the benefit of and be enforceable by, the parties hereto and their respective successors, heirs and other legal representatives.

9. ENTIRE AGREEMENT. This Settlement Agreement and the documents referred to herein set forth the entire agreement and the understanding of the parties in respect of the transactions contemplated hereby and thereby and supersede all prior agreements, arrangements and understandings relating to the subject matter hereof. No representation, promise, inducement or statement of intention has been made by the parties which is not embodied in this Settlement Agreement or in the documents referred to herein, and none of the parties shall be bound by or liable for any alleged representation, promise, inducement or statement of intention not so set forth.

10. COUNTERPARTS. This Settlement Agreement may be signed in counterparts, which, when taken together, shall constitute but a single document when executed by all parties. This Settlement Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

11. FURTHER ASSURANCES. The parties shall execute any document(s) required in the future to manifest the intent and purpose of this Settlement Agreement.

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

WITNESS:

ALPINE BOARD OF EDUCATION

_____

By: _____

Ms. Donna Alonso
Board Secretary/
School Business Administrator

Mrs. Joyce Sonpal
Board President

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

_____

By: _____

Mr. John Chou

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

_____

By: _____

Mr. Anthony Ding

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

_____

By: _____

Ms. Seishu Ran

Dated:

Dated:

** TOTAL PAGE.06 **

10. COUNTERPARTS. This Settlement Agreement may be signed in counterparts, which, when taken together, shall constitute but a single document when executed by all parties. This Settlement Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

11. FURTHER ASSURANCES. The parties shall execute any document(s) required in the future to manifest the intent and purpose of this Settlement Agreement.

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

WITNESS:

Ms. Donna Alonso
Board Secretary/
School Business Administrator

Dated: 6/21/06

ALPINE BOARD OF EDUCATION

By: Elizabeth Herries
~~Mrs. Joyce Sempel~~ Elizabeth Herries
Board President

Dated: 6/21/06

WITNESS:

By:
Mr. John Chou

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

By:
Mr. Anthony Ding

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

By:
Ms. Seishu Ran

Dated:

Dated:

** TOTAL PAGE.06 **

** TOTAL PAGE.09 **

162-07

162-07

SCOTT EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ATLANTIC CITY BOARD OF EDUCATION, VENTNOR CITY BOARD OF EDUCATION, MARGATE CITY BOARD OF EDUCATION, LONGPORT BOARD OF EDUCATION, BRIGANTINE BOARD OF EDUCATION, AND DANIEL LOGGI, ATLANTIC COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, a member of the Atlantic City Board of Education, sought a ruling that the sending district members of the Atlantic City Board are prohibited from voting on the selection of a board attorney pursuant to *N.J.S.A.* 18A:38-8.1. Respondent Ventnor City Board of Education filed a motion for summary decision, and was joined by the Brigantine, Margate and Longport boards in its request for relief.

The ALJ found that: the right of a sending district member to vote on the choice of a board attorney is not found within the voting rights enumerated in statute; prior decisions rendered by the Commissioner have expanded the role played by sending district members to allow non-enumerated voting powers over board procedure and organizational matters; voting on the choice of a board attorney cannot, however, be construed among the voting rights necessary for the internal organization of the board; therefore, sending district members do not have voting rights in the appointment of a board attorney. The ALJ denied respondents' motion for summary decision.

The Commissioner concurs fully with the ALJ that sending district board members are not entitled to vote on the selection of a board attorney, finding that the question has previously been considered and resolved by two previous Commissioner's decisions. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

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

May 1, 2007

162-07

162-07

SCOTT EVANS,

PETITIONER,

V.

ATLANTIC CITY BOARD OF EDUCATION, VENTNOR CITY BOARD OF EDUCATION, MARGATE CITY BOARD OF EDUCATION, LONGPORT BOARD OF EDUCATION, BRIGANTINE BOARD OF EDUCATION, AND DANIEL LOGGI, ATLANTIC COUNTY SUPERINTENDENT OF SCHOOLS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a member of the Atlantic City Board of Education, sought a ruling that the sending district members of the Atlantic City Board are prohibited from voting on the selection of a board attorney pursuant to *N.J.S.A.* 18A:38-8.1. Respondent Ventnor City Board of Education filed a motion for summary decision, and was joined by the Brigantine, Margate and Longport boards in its request for relief.

The ALJ found that: the right of a sending district member to vote on the choice of a board attorney is not found within the voting rights enumerated in statute; prior decisions rendered by the Commissioner have expanded the role played by sending district members to allow non-enumerated voting powers over board procedure and organizational matters; voting on the choice of a board attorney cannot, however, be construed among the voting rights necessary for the internal organization of the board; therefore, sending district members do not have voting rights in the appointment of a board attorney. The ALJ denied respondents' motion for summary decision.

The Commissioner concurs fully with the ALJ that sending district board members are not entitled to vote on the selection of a board attorney, finding that the question has previously been considered and resolved by two previous Commissioner's decisions. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

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

May 1, 2007

162-07

OAL DKT. NO. EDU 4116-06
AGENCY DKT. NO. 190-5/06

SCOTT EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ATLANTIC CITY BOARD OF EDUCATION, VENTNOR CITY BOARD OF EDUCATION, MARGATE CITY BOARD OF EDUCATION, LONGPORT BOARD OF EDUCATION, BRIGANTINE BOARD OF EDUCATION, AND DANIEL LOGGI, ATLANTIC COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Ventnor City Board of Education, the Margate City Board of Education and the Borough of Longport Board of Education were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, as were the reply exceptions of petitioner. All of these submissions were considered by the Commissioner in reaching her determination herein.

The exceptions of each of the Boards essentially recast and reiterate the arguments advanced in their submissions below. The Commissioner determines that such arguments were fully addressed and considered by the Administrative Law Judge (ALJ) in her decision and, therefore, will not be revisited here.

Upon a full and independent review, the Commissioner is in full agreement with the ALJ that – in light of *N.J.S.A.* 18A:38-8.1, the legislative history of this provision and

applicable case law – sending district board members are not entitled to vote on the selection of a board attorney.

As recognized by the ALJ, *N.J.S.A.* 18A:38-8.1 accords a sending district representative membership on the receiving district's board and, at the same time, circumscribes the voting rights of such member. In an effort to reconcile the tension created by the limiting of these individuals' voting rights and their statutory duties and responsibilities as members of a board of education, the Commissioner has, over time, attempted to broadly construe the governing statutory provision to permit these individuals to function effectively on the board, while at the same time remaining cognizant of the limits inherent in the overall statutory scheme and its legislative history. Such endeavor has resulted in an expansion of sending district board member rights over and above the substantive rights expressly specified in statute. However, these additional rights are not unlimited, parameters for them having been established by prior decisional law. (See Initial Decision, pages 4-8) This said, the Commissioner finds and determines that the question at issue in this matter – the entitlement of a sending district board member to vote on the selection of a board attorney – has previously been considered and resolved by the Commissioner on two separate occasions. The first of these, as discussed by the ALJ on pages 5-6 of her decision, was in *Callowhill v. Board of Education of Atlantic City*, 96 *N.J.A.R.* 2d (EDU) 693, and – more recently – in *Board of Education of the Borough of Bloomingdale, Passaic County v. Board of Education of the Borough of Butler, Morris County*, decided by the Commissioner June 17, 2004. In both instances the Commissioner determined that the rights afforded to sending district members on receiving boards of education in effectuation of their status as board members, over and above the substantive voting rights expressly enumerated in statute, did not extend to voting for the selection of a board attorney.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, as amplified above.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/01/07

Date of Mailing: 5/01/07 & Faxed

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4116-06

AGENCY DKT. NO. 190-5/06

SCOTT EVANS,

Petitioner,

v.

ATLANTIC CITY BOARD OF EDUCATION,
VENTNOR CITY BOARD OF EDUCATION,
MARGATE CITY BOARD OF EDUCATION,
LONGPORT BOARD OF EDUCATION,
BRIGANTINE BOARD OF EDUCATION,
AND DANIEL LOGGI, ATLANTIC COUNTY SUPERINTENDENT OF SCHOOLS,

Respondents.

Phillip G. George, Esq., for petitioner (Bernstein and Associates, attorneys)

Scott M. Zauber, Esq., for respondent Longport Board of Education (Subranni, Ostrove & Zauber, attorneys)

Enid L. Hyberg, Esq., for respondent Brigantine Board of Education (Youngblood, Corcoran, Lafferty & Hyberg, attorneys)

Augustine A. Repetto, Jr., Esq., for respondent Margate Board of Education

Joan H. Langer, Esq., for respondent Ventnor Board of Education (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys)

John B. Comegno II, Esq., for respondent Atlantic City Board of Education (Comegno Law Group, attorneys)

Carolyn Labin, Deputy Attorney General, for respondent Daniel Loggi, Atlantic County Superintendent of Schools (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: February 7, 2007 Decided: March 26, 2007

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF CASE

This matter arises out of a petition filed by Scott Evans, a member of the Atlantic City Board of Education. The only remaining issue is his request for a ruling that the sending district members on the Atlantic City Board are prohibited from voting on the selection of Board solicitor pursuant to N.J.S.A. 18A:38-8.1.

PROCEDURAL HISTORY

On May 25, 2006, Scott Evans, a member of the Atlantic City Board from Atlantic City, filed a verified petition and request for emergent relief with the Director of the Bureau of Controversies and Disputes of the Department of Education (DOE). The petition contained two counts. The first count challenged the Atlantic County Superintendent of Schools' certification of an additional representative from the sending districts of Brigantine, Ventnor, Margate, and Longport to sit on the receiving board of Atlantic City. The second count concerned the right of the sending district representatives to vote on the choice of the receiving district's solicitor.

On May 25, 2006, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case. In petitioner's initial filing, only the Atlantic City Board of Education was named as a respondent. Petitioner subsequently filed amended pleadings and served the sending districts of Ventnor, Longport, Margate, and Brigantine, as well as the Atlantic County Superintendent of Schools

(Superintendent), as parties to this action. The amended petition did not request emergent relief. Prehearing conferences were held on June 7, 2006, June 23, 2006, July 24, 2006, August 14, 2006, November 3, 2006, and January 4, 2007. On October 20, 2006, respondents' motion to dismiss the petition was denied.

By letter of January 12, 2007, petitioner Scott Evans withdrew his request for relief based on the first count of the amended petition challenging the Superintendent's certification of an additional sending district representative to the Atlantic City Board. Respondent Ventnor has filed a motion for summary decision on the remaining issue in this case, whether the sending district representatives are entitled to vote on the appointment of the Board solicitor. Brigantine, Margate, and Longport joined in Ventnor's request for relief. The Superintendent, through his counsel, the Department of Law and Public Safety, took no position on the issue. Counsel for the Atlantic City Board also took no position on the issue, citing the divided status of the Board.

The petitioner did not file a cross motion for summary decision. However, he did advise the court that he joined in the respondents' request that the remaining issue in this matter be decided on the record and legal arguments submitted to date by the parties.

STATEMENT OF FACTS

The parties are in agreement that the material facts are not in dispute. The Atlantic City school district is a receiving school district for high school students, grades 9 through 12, from the receiving school districts of Brigantine, Ventnor, Margate, and Longport. Constituted as a nine-member body, the Atlantic City Board had an additional two members from its sending districts until May 2006. At that time, another member from the sending districts was certified to the Board by the Superintendent, pursuant to N.J.S.A. 18A:7-8 and N.J.S.A. 18A:38-8.1. That action created a twelve-member Board, which immediately became deadlocked on a number of issues.

For at least the past decade, it has been the custom of the Atlantic City Board to include the sending district representatives in the vote for Board solicitor. At an organizational meeting in the spring of 2006, after the third sending district representative had joined the Board, the Board deadlocked on the appointment of a Board solicitor. The Board remained without a solicitor until a compromise was reached among members and an "interim" solicitor was retained in the summer of 2006. As a result of the deadlock, petitioner filed his request for a ruling on whether the sending district members had a right to vote on the choice of Board solicitor.

LEGAL DISCUSSION

The facts in this matter are not in dispute, and pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), the matter is appropriate for summary decision. The request for relief by the petitioner also is in the nature of a request for a declaratory ruling. Pursuant to N.J.A.C. 6A:3-2.1, any interested person may petition the Commissioner for a declaratory ruling "with respect to rights, responsibilities and status arising from any statute or rule" within his or her jurisdiction. See also N.J.S.A. 52:14B-8.

In seeking a ruling on whether sending district representatives may vote on the appointment of a receiving board's solicitor, petitioner cites N.J.S.A. 18A:38-8.1:

> In addition to the members of the board of education of a Type I and Type II school district provided by law, in a school district which is receiving pupils from another district or districts pursuant to N.J.S.A. 18A:38-8, there shall be an additional member as provided pursuant to section 2 of this act to represent the board of education of each sending district. Any additional member shall be a member of the board of education of a sending district designated annually by the board of that district and shall be eligible to vote on the following matters before the receiving district board of education:
>
> > a. Tuition to be charged the sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance

> of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;
>
> b. New capital construction to be utilized by sending district pupils;
>
> c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administrative staff; and
>
> d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district.[1]

The statute formalizes the relationship between a sending school district and a receiving school district. It provides for representation for the sending district on the receiving district's board, while limiting the voting rights of the sending district representative to some, but not all, matters before the board. By limiting the voting rights of the sending district's member, the statute creates a tension between that member's duties and responsibilities as a member of a board of education and his or her limited voting rights.

This inherent tension has resulted in several decisions by the Commissioner of Education that explore the role of the sending members and the parameters of their voting rights. The first, Callowhill v. Board of Education of Atlantic City, 96 N.J.A.R.2d (EDU) 693, involved Atlantic City and its sending district members in a dispute similar to this matter. In a petition for emergent relief, sending district members requested inclusion in the board's discussions and votes on a number of matters. The decision allowed participation by the sending district representatives in the selection of the district superintendent and the school business administrator, finding them within the scope of N.J.S.A. 18A:38-8.1. However, the decision did not grant the sending district

[1] The legislation was enacted in 1995 and was effective January 12, 1995. It was amended in 1996 with the amendments effective on August 19, 1996. For a comprehensive review of its legislative history see Board of Education of Lincoln Park v. Board of Education of Boonton, 97 N.J.A.R.2d (EDU) 592.

members the right to participate in or vote on the contract for board solicitor, simply noting that "no entitlement to vote on the underlying contract had been shown."

In a decision rendered shortly after Callowhill, the Commissioner affirmed an initial decision rendered by an administrative law judge in Board of Education of Lincoln Park v. Board of Education of Boonton, 97 N.J.A.R.2d (EDU) 592. Rejecting a narrow interpretation of the statute, the Commissioner allowed the sending district member to participate in deliberations regarding business before the board. Additionally, the member was entitled to information and documents distributed to other board members, even regarding matters on which the sending district member was not entitled to vote. The decision affirmed the sending district member's status as a full-fledged member of the receiving district board, albeit one with limited voting powers.

Shortly after Lincoln Park, the Commissioner once again rejected a narrow approach to the role of the sending district member. In Board of Education of Little Ferry v. Board of Education of Ridgefield Park, Agy. Dkt. No. 149-5/97 (July 24, 1997) <http://www.nj.gov/njded/legal>, the issue was whether a sending district representative had the right to vote on the election of board officers and other procedural matters related to the orderly conduct of board operations. In ruling that a sending district member could vote on such matters, the Commissioner found:

> [I]t is undeniable that, notwithstanding that the representative of a sending district has limited voting rights on substantive matters which arise before the board, in all other respects such representative, by virtue of the statutory entitlement to a seat on the receiving district board, is empowered to function as a full member of the board. . . .
>
> . . . [E]ligibility for full participation, including voting rights, in those procedural and organizational matters necessary to ensure the effective operation of the board itself also inures to the sending district representative by virtue of that individual's board membership.
>
> [Little Ferry, supra, Agy. Dkt. No. 149-5/97 (July 24, 1997) <http://www.nj.gov/njded/legal>.]

In a more recent decision exploring the role of the sending district member and the limits placed on that member's voting power, the Commissioner, while adopting the underlying analytical framework of Little Ferry, nevertheless focused on the limited voting power conferred by the statute in reaching its decision. In Board of Education of Bloomingdale v. Board of Education of Butler, EDU 9367-03, Letter Order (May 14, 2004), rejected, Comm'r of Educ. (June 17, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner upheld the receiving district board's refusal to allow the sending district member a vote on a number of matters, including various professional appointments. Reviewing the statute and case law, the decision acknowledged that sending district members have voting rights "in effectuation of their status as board members" other than those "substantive voting rights expressly enumerated in statute." However, those rights "extend *only* to participation in deliberation, discussion and access to materials and information, and to voting on organization of the board . . . ." In rejecting the more expansive voting power requested by the sending district member, the Commissioner found:

> In other words, under controlling statute and case law, the sending district board member's right to vote on non-enumerated matters encompasses *internal procedural and organizational items only*, such as election of officers, parliamentary matters, approval of board minutes and officer reports, and the like, and does *not* encompass matters arising from the operation *of the school district*, as opposed to the operation of *the board itself*, such as voting on staff appointments or employment matters other than those enumerated in N.J.S.A. 18A:38-8.1c . . . .

In espousing a broader interpretation of the statute than that adopted by the Commissioner in Bloomingdale, the respondents argue that the position of Board solicitor is voted on at the organizational meeting of the Board and is integral to the operation of the Board. They assert it is one of the internal procedural or organizational matters on which sending district members have voting rights by virtue of their status as board members. Relying upon the "procedural and organizational" exception to the enumerated voting powers in the statute found in the earlier decisions of the Commissioner, respondents contend the exception is broad enough to include the Board solicitor appointment.

While respondents make a compelling case that the Board solicitor is integral to the operation of the Board and the school district as a whole, the extent of the sending member's voting rights ultimately must be controlled by the statute. The statute provides representation for the sending district on the receiving district's board, but limits the member's voting power. That statutory scheme is limiting on the member in a crucial way, and creates a tension with the statutory duties and responsibilities of a school board member. In reconciling the two statutory schemes, the Commissioner has construed N.J.S.A. 18A:38-1 broadly enough to allow the member to function effectively on the Board. By finding a reserve of non-enumerated voting powers over board procedural and organizational matters the Commissioner has construed the statute to allow a member to participate as fully as possible as a member of the board, while still respecting the legislature's clearly stated intention to limit his or her voting rights.

Given the specific enumeration of voting rights in the statute, any ruling on the extent of non-enumerated rights necessary for the effective functioning of the Board must take into account the limits inherent in the statutory scheme. In general, the prior decisions rendered by the Commissioner have expanded the role played by sending district members on a receiving board, but have found few additional voting rights. Such an approach is consistent with the duality inherent in the statute and its legislative history. The initial version of the bill passed by the Legislature allowed the sending district member "to vote on all matters before the receiving district board of education . . . except those matters pertaining exclusively to the grades of the receiving district in which no students from the sending district are enrolled . . . ." In her veto of the initial version of the bill, Governor Whitman recommended limited voting rights and the bill was amended to conform to her recommendation.[2]

The right of a sending district member to vote on the choice of board solicitor is not found within the enumerated voting rights in N.J.S.A. 18A:38-8.1. Nor can it be found in the voting rights necessary for the internal organization of a board. I **FIND** that the position of board solicitor, as integral as it may be for the functioning of a school

[2] Governor Whitman's Veto Message with Recommended Action, S.151, October 20, 1994

district, is not an appointment over which the Legislature has granted voting rights to a sending district representative.

Respondents' motion for summary decision is **DENIED**, and petitioner's request for a ruling that the sending district members on the Atlantic City Board are not entitled to a vote on the selection of Board solicitor pursuant to N.J.S.A. 18A:38-8.1 is **GRANTED**.

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

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

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

March 26, 2007
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

MAR 28 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt

#165-07

165-07

OAL DKT. NO. EDU 3068-07
AGENCY DKT. NO. 64-3/07

L.S.S., on behalf of minor child, W.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/08/07

Date of Mailing: 5/09/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03068-07

AGENCY DKT. NO. 64-3/07

L.S.S., ON BEHALF OF MINOR CHILD, W.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION CITY,

Respondent.

Marving L. Comick, Esq., for petitioner (Love & Randall, attorneys)

Rachel M. Caruso, Esq., for respondent (Weiner Lesniak, LLP, attorneys)

Record Closed: April 2, 2007 Decided: April 2, 2007

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

This matter was transmitted to the Office of Administrative Law (OAL) on March 5, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on March 23, 2007. On the date of hearing the parties settled the matter. The attached Settlement Agreement and Board Resolution were

submitted on April 2, 2007, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

April 2, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 4-4-07 / UPS

Mailed to Parties:

APR 4 2007
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

2007 MAR 23

OAL Docket No. EDU-3068-07
Agency Ref No. 64-3/07

The petition having been opened by L.S.S. on behalf of W.W. and The parties having amicably ~~settled~~ resolved The matter; It is hereby agreed

1. W.W. will resign from The Linden High School National Honor Society, effective March 23, 2007;

2. The ~~finding~~ charge of plagiarism related to W.W.'s Computer Science course will be removed from her student record and will not be documented on any transcripts from The Linden School District.

3. W.W. will remain in her computer science class, continuing it as an independent study course and not under the instruction of Ms. Holly Sepulveda, However, Ms. Sepulveda will be grading any and all assignments

4. There will be no Saturday detention

Based on the facts & circumstances of this cause 1 of 2 of action

This settlement reflects the complete agreement of the parties in full and final settlement of the matter, OAL Docket number EDU-3068-07.

This agreement is ~~&~~ executed this 23rd day of March, 2007, and ~~is~~ is subject to the approval of the Linden Board of Education. If the Bd fails to approve the subject settlement, the parties will return to the Office of Administrative Law for a plenary hearing.

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 MAR 23 A 10:43

L.S.S., Petitioner

Marvin Cornick, Esq.
Attorney for Petitioner

Rachel M. Caruso, Esq.
Attorney for Respondent,
Linden Board of Education

Minutes/Special Meeting
March 28, 2007

1. Approve the following resolution:

WHEREAS, on March 1, 2007, L.S.S. on behalf of student W.W. filed a petition with the Commissioner of Education seeking to appeal the District's imposition of discipline on W.W., and

WHEREAS, the parties appeared before the Honorable Mumtaz Bari-Brown on or about March 23, 2007; and

WHEREAS, to avoid the uncertainties of litigation, the parties have agreed to amicably resolve the matter entitled *L.S.S. on behalf of W.W. v. Linden Board of Education*, OAL Docket No. EDU-3068-07, Agency Ref. No. 64-3/07;

THEREFORE, BE IT RESOLVED, that the Board approves and consents to the settlement of the aforementioned matter pursuant to the terms of the March 23, 2007 stipulation of settlement as set forth on the record in the Office of Administrative Law.

Roll Call:

Board Member	Motion	Second	Aye	Nay	Abstain
Mr. Scaldino			X		
Mr. Topoleski		X	X		
Mr. Coplan			Absent		
Mrs. Hudak			X		
Mr. Tomko	X		X		
Mr. Motley			X		
Mr. Nigro			X		
Mr. Orlando			X		
Mr. Russell			X		

Motion Carried.

Certified to be a true and accurate copy of a resolution approved by the Linden Board of Education at a Special Meeting held on March 28, 2007.

Linden Board of Education

Date: 3/30/07

By: _____
Kathleen A. Gaylord
Business Administrator/Board Secretary

30-07

#30-07M

OAL DKT. NO. EDU 1240-07
AGENCY DKT. NO. 1-1/07

ALL CAN EXCEL (A.C.E.) ACADEMY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) on January 11, 2007, and the recommended Order of the Administrative Law Judge (ALJ) – received on January 17, 2007 – have been reviewed.

Upon such review, the Deputy Commissioner – to whom this matter has been delegated pursuant to N.J.S.A. 18A:4-33 – rejects the recommended Order granting a stay in this matter as he determines that the provision of this type of relief, at this point in time, is an impossibility. Contrary to the apparent perception of the ALJ, a stay in this matter cannot operate to determine *future* placement of A.C.E.'s former students. Such a determination is only possible after an adjudication of this case on its merits, where clarification of disputed facts will determine the propriety of the Department's action removing A.C.E.'s approval to operate as a private school for disabled students. Rather, the intendment of the emergent application of a stay is only to maintain the status quo until this ultimate resolution of the case is achieved. It is

uncontroverted on this record that on December 15, 2006 A.C.E. was unable to provide an approved, safe and stable facility in which its students could be appropriately educated. As a consequence, the Department removed A.C.E.'s approval as a provider and directed that its students be immediately placed in alternative educational institutions. Such alternative placements were promptly accomplished and these students are currently receiving the educational services to which they are entitled in approved, safe environments. It is further noted that – despite A.C.E.'s advancements that it has a facility which eminently will satisfy the requisites which will allow Department approval – as of the date of the OAL hearing in this matter, January 11, 2007, there is no such facility. Therefore, A.C.E.'s stay application in this matter – filed on January 3, 2007, *after* the relocation of its students – is not seeking to maintain the status quo but, rather, it seeks that students be pulled from the alternative educational institutions they are now attending, returned to what is recognized as an unapproved, inadequate location to await the completion of requisite approvals for its proposed facility. Such is not the intendment of a stay.

Even assuming, *arguendo*, that A.C.E.'s motion for stay had been filed prior to the relocation of its students, it would have required denial as A.C.E. has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably, that a balancing of the equities and interests of the parties inures to its favor. The Deputy Commissioner finds that the overriding consideration in this regard is and must remain the provision of educational services to these disabled children in an appropriate, safe environment: something that A.C.E. was not in a position to offer. Furthermore, as previously noted, there are many material facts in dispute in this matter; any finding of likelihood of success on the merits is not possible.

Accordingly, the recommended Order of the OAL is rejected and the instant application for stay is hereby denied. This matter shall proceed to plenary hearing on its merits.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 1/19/07

Date of Mailing: 1/19/07 (FAXED)

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 1240-07
AGENCY DKT. NO. 1-1/07

ALL CAN EXCEL (A.C.E.)
ACADEMY,
Petitioner,
v.
NEW JERSEY DEPARTMENT
OF EDUCATION, OFFICE OF
SPECIAL EDUCATION PROGRAMS,
Respondent.

Ronald C. Hunt, Esq., for petitioner
(Hunt, Hamlin & Ridley, attorneys)

Melanie M. Brookes, Deputy Attorney General, for respondent
(Stuart Rabner, Attorney General of New Jersey, attorney)

BEFORE **RICHARD McGILL**, ALJ:

All Can Excel (A.C.E.) Academy (hereinafter "petitioner") filed a verified petition with the Commissioner of Education challenging a determination by the Office of Special Education Programs of the New Jersey Department of Education (hereinafter "respondent") to revoke petitioner's approval to operate a private school because the existing facility is unsafe and petitioner failed to obtain a new facility in a timely manner. Petitioner seeks emergent relief in the form of a stay of the revocation.

Respondent advised petitioner of the revocation by memorandum dated December 15, 2006. The petition of appeal including the request for emergent relief was filed with the Bureau of Controversies and Disputes on January 3, 2007, and the

matter was transmitted to the Office of Administrative Law on January 8, 2007, for determination as a contested case. An oral argument in regard to the motion for emergent relief and request for a stay was held on January 11, 2007, at the Office of Administrative Law in Newark, New Jersey.

As set forth in N.J.A.C. 6A:3-1.6(b), an application for emergent relief will be granted only if it meets the following four requirements:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The first requirement is that the denial of the requested relief will cause irreparable harm. Petitioner identifies several types of harm. First, petitioner is losing substantial revenue in the form of tuition on a daily basis. Second, the closure will undermine confidence in the school and damage its reputation. Third, the children will also suffer in that they will travel to schools farther from home.

Respondent contends that harm is generally considered irreparable if it cannot be redressed adequately by money damages. Further, because this situation involves a purely monetary loss, petitioner has not demonstrated that the revocation will cause irreparable harm.

Petitioner's arguments are more persuasive. Petitioner is suffering a substantial loss of revenue, and there is no realistic prospect of monetary damages. Further, the revocation is likely to impair the school's reputation. It follows that petitioner will suffer irreparable harm as a result of the revocation.

The second consideration is whether the legal right underlying petitioner's claim is settled. The applicable legal standard is set forth in N.J.A.C. 6A:14-7.10(b), which provides as follows:

> When an approved private school is determined to be in noncompliance, Department of Education actions may include, but are not limited, to the following:
>
> 1. The Department of Education may issue a conditional approval status when noncompliance is demonstrated with State or Federal statute or rules and/or implementation of the corrective action plan.
>
> i. An approved private school which is issued a conditional approval status may not accept new students;
>
> 2. The Department of Education may revoke approval effective at the end of a school year, when chronic or systemic noncompliance is demonstrated; and
>
> 3. The Department of Education may immediately remove program approval when it is documented that the health, safety or welfare of the students is in danger.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. The reasons for the revocation were set forth in the memorandum dated December 15, 2006, from respondent. In regard to respondent's current facility at 71 Sanford Street in East Orange, reference was made to an early memorandum dated December 6, 2006, which raised concerns about insufficient educational space, lack of a certificate of occupancy for the second floor, and potential fire hazards in several areas of the school.

The concerns about safety were based on an evaluation completed on November 2, 2006, by the Essex County School Business Administrator, who found a total of twenty-one deficiencies. The serious deficiencies from a safety standpoint relate to fire hazards. But petitioner presented a certificate from an inspection on September 19, 2006, indicating that the Fire Official of East Orange found satisfactory compliance with applicable fire safety requirements. It would be difficult to disregard the assessment by the Fire Official in regard to questions of fire safety. In addition, many of the deficiencies noted by the Business Administrator seem as though they could easily be

abated. The other concerns would seem to warrant a less drastic measure such as a corrective action plan as opposed to a revocation.

More importantly, petitioner has made substantial progress toward obtaining a new facility located at 760 Clinton Avenue in Newark. The memorandum dated December 6, 2006, gave petitioner nine days to obtain a new facility. Despite the fact that efforts to obtain a new facility were already in progress, the period of time is obviously very short. Since the new facility required construction work, it was impossible for petitioner to meet the deadline. The construction work is now complete, and petitioner expects to obtain a certificate of occupancy during the week of January 15, 2007. The availability of the new location is likely to resolve concerns related to the facility. It follows that petitioner has a likelihood of ultimately prevailing on the merits.

In regard to the equities and interests of the parties, respondent is properly concerned about the safety of the pupils. But petitioner has made substantial progress to alleviate these concerns by locating a new facility. Since the pupils have been dispersed to other schools, presumably they will not return to petitioner's program until the new facility receives approval. With the safety concerns alleviated by the new facility, there will be insufficient reason to revoke petitioner's approval to operate a private school.

Accordingly, it is **ORDERED** that petitioner's request for a stay is granted, provided that petitioner will not reopen its school until it receives approval of its new facility.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

1/12/07

DATE

RICHARD McGILL, ALJ

166-07

#166-07

OAL DKT. NO. EDU 2109-06
AGENCY DKT. NO. 45-1/06

ADRIENNE M. BELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Additionally, in light of petitioner's receipt of unemployment benefits as set forth in Term No. 7 of the agreement, a copy of this decision shall be forwarded to the Department of Labor, Division of Unemployment Compensation, so as to facilitate any reimbursement due the State.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/08/07
Date of Mailing: 5/09/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2109-06

AGENCY DKT. NO. 45-1/06

ADRIENNE M. BELL,

Petitioner,

v.

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

Respondent.

Jason E. Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent

Record Closed: March 22, 2007 Decided: March 23, 2007

BEFORE **ISRAEL D. DUBIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 22, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Settlement Agreement indicating the terms thereof, which is attached

and fully incorporated herein. Also attached is the Trenton Board of Education's Meeting Minutes verifying the Board's approval of the settlement.

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

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

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

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

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

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

March 23, 2007
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

MAR 29 2007
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cmo

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150 West State Street
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Attorneys for Petitioner

2007 FEB 26 A 11:57
OFFICE OF ADMIN. LAW

ADRIENNE M. BELL, Petitioner, v. TRENTON BOARD OF EDUCATION, MERCER COUNTY, Respondent.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDUOR 02109-2006S AGENCY REF. NO.: 45-1/06 **STIPULATION OF SETTLEMENT AND SETTTLEMENT AGREEMENT**

The parties to this matter, Adrienne Bell and the Trenton Board of Education, having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the petition of appeal shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the petition of appeal, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new,

revised, or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner shall withdraw the petition of appeal.

3. Rationale for Settlement

A. On or about January 26, 2006, petitioner filed her petition of appeal with the Commissioner against the respondent.

B. The petition of appeal alleges that petitioner was wrongly terminated by respondent and denied her tenure and seniority rights as a result of the respondent failing to provide the necessary documents and information to the Department of Education in order for petitioner to obtain her Standard Certificate. In addition, the petition of appeal alleges that respondent purported to terminate petitioner's employment without proper legal authority in the form of prior Board of Education action effectuating the termination, and ignoring that petitioner did obtain her Standard Certificate prior to the date of the respondent's purported termination of petitioner's employment.

C. In the course of their investigation and discovery in the case, information was exchanged between the parties which demonstrates that documents and information which were available were not transmitted to the Department of Education, which would have resulted in Petitioner obtaining her Standard Certificate, and that respondent may not have known that petitioner obtained her Standard Certificate prior to the date of respondent's purported termination of petitioner's employment.

D. Both parties acknowledge that they are desirous of resolving the matters addressed by this agreement, and upon review of all the circumstances, it is in the best interests of both parties and the public, and it being consistent with applicable law, to resolve this matter by this settlement agreement.

4. The parties agree that respondent will provide a full-time employment position to petitioner for the 2007-2008 school year commensurate with her standard certification as a teacher of Preschool through Grade 3. Both parties acknowledge that respondent has not and can not delineate the specific full-time employment position to which petitioner will be assigned for the 2007-2008 school year at this time, but when the first position becomes available for the 2007-2008 school year commensurate with petitioner's certification, petitioner will have the right of first refusal with respect to that position, and that irrespective of respondent's inability to delineate the specific position at this time, petitioner will be appointed to an appropriate position for the 2007-2008 school year.

In addition, both parties acknowledge that petitioner is desirous of teaching Preschool at a school within the district for the 2007-2008 school year, and if a Preschool position is not available, then a Kindergarten position, and if a Kindergarten position is not available, then a First Grade position, and that respondent will attempt to place petitioner in a full-time Preschool position at a school within the district for the 2007-2008 school year, and if a full-time Preschool position is not available, then a full-time Kindergarten position, and if a full-time Kindergarten position is not available, then a full-time First Grade position.

5. The parties agree that respondent will recognize petitioner's right to tenure in a full-time position of employment with respondent as of December 5, 2005, the date the New Jersey State Board of Examiners issued petitioner a Standard Certificate as a Teacher of Preschool through Grade 3. The parties further agree that respondent will recognize petitioner's entitlement to seniority in all applicable categories as a consequence of her service and employment with respondent, both before her purported termination and as the result of her employment resulting from this agreement, and that petitioner shall also receive seniority credit for the time period from the date of the purported termination until her return to employment with respondent.

6. The parties agree that respondent will place petitioner on and petitioner's salary will be in accordance with Step 8 of the salary guide for the 2007-2008 school year included within the collective bargaining agreement applicable to teachers.

7. The parties acknowledge that respondent will pay petitioner's salary from November 9, 2005, the date petitioner was informed by respondent that it was terminating petitioner from her employment with respondent, through January 3, 2006, the date petitioner started employment with another school district, provided that payment will be subject to any and all applicable deductions and a set-off of any payments petitioner received in unemployment insurance benefits from the State of New Jersey, provided however, that if the State of New Jersey seeks reimbursement of any unemployment insurance benefits, respondent shall reimburse petitioner for any monies that she must reimburse or repay the State. In addition, respondent will provide petitioner with all benefits and emoluments that petitioner would have received if she

had been employed by respondent for the period of November 9, 2005 through January 3, 2006, including, but not limited to, pension credit for November and December 2005, and personal and sick leave days.

8. The parties agree that respondent will pay petitioner $2,775. 60. This amount represents the difference in salaries petitioner earned and will earn from employment with another school district from January 3, 2006 through June 30, 2007 and what petitioner would have earned if she remained employed with respondent over the same time period.

9. The parties agree that if petitioner does not accept a position of employment from respondent for the 2007-2008 school year under paragraph 4 of this agreement, respondent will still be required to adhere to the terms under paragraphs 7 and 8 of this agreement.

10. By settling this matter, petitioner acknowledges that she is waving her right to a hearing before the Office of Administrative Law and Commissioner of Education, in which she could seek an adjudication on the merits of the petition of appeal. Petitioner further acknowledges that she understands and agrees to the terms of this agreement and that she is satisfied with the legal representation that she received in this matter.

11. The parties agree that in the event that the Commissioner of Education does not accept any provision of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for a hearing without prejudice to either parties' position and without waiver of any of either parties' legal rights.

12. The respondent board of education has approved the terms of this settlement as acknowledged by the attached resolution.

Robert Revelle, President of the Trenton Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on ~~January~~ Feb. 12, _____, 2007, Robert Revelle, President of the Trenton Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Thomas W. Sumners, Jr

Rodney Lofton, Superintendent of Schools
Trenton Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on ~~January~~ February 12, _____, 2007, Rodney Lofton, Superintendent of the Trenton Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Thomas W. Sumners, Jr

Adrienne Bell

Adrienne Bell, Petitioner

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on December 19, 2007, Adrienne Bell, petitioner in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

Carrie Jo R Herbert

CARRIE JO R. HERBERT
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 12/5/2008

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

TRENTON BOARD OF EDUCATION
108 North Clinton Avenue
Trenton, New Jersey 08609
BOARD CONFERENCE MEETING MINUTES
Monday – February 12, 2007 - 6:30 P.M.

Motion by Ms. Eure to accept the settlement for Adrienne Bell. Seconded by Dr. Campbell.

ROLL CALL	**YES**	**NO**	**ABSTAIN**
Dr. Ali	absent		
Dr. Campbell	X		
Ms. Eure	X		
Dr. Guzman	X		
Ms. Kasabach	absent		
Ms. Kersey	X		
Mr. Luna	X		
Mr. Shelton	X		
Mr. Revelle	X		

Motion Passed

Motion by President Revelle to adjourn the Board Conference Meeting of February 12, 2007, at 9:08 pm. Moved by Ms. Eure. Seconded by Dr. Guzman.
All in Favor
Motion passed.

Respectfully submitted
Minutes by Mary Bailey
Admin II Secretary
To the Assistant Board Secretary

2007 MAR 22 P 3:10
OFFICE OF ADMINISTRATION

167-07

CAROL SCHUENEMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teacher employed by the Board, contends that the Board violated *N.J.S.A.* 18A:30-2.1 when it deducted accumulated sick days to cover the hours she was absent from work between March and May 2005, after she returned to teaching on a part-time basis following a work-related injury in October 2004.

The ALJ found that the language of the governing statute is specific. It conditions an employee's receipt of one year of service related sick leave – without liquidation of the employee's accumulated contractual sick leave – upon the employee's receipt of temporary workers' compensation benefits. The ALJ further found that the workers' compensation benefits do not extend to a return to work on a part time basis. Thus, in the ALJ's judgment, petitioner did not meet the standard set in *N.J.S.A.* 18A:30-2.1 and respondent consequently was permitted to draw down petitioner's contractual sick leave benefits for her un-worked hours upon her return to work on a part-time basis.

The Commissioner found, *inter alia,* that: under the principles set forth in previous decisions on this issue, petitioner was eligible for benefits under *N.J.S.A.* 18A:30-2.1 through mid-May 2005, even though her workers' compensation benefits had stopped upon her return to part-time service in March 2005. The Commissioner further found that petitioner should not be penalized for her voluntary return to part-time employment when she could have declined to return to work until she was fully healed. Accordingly, the Initial Decision of the OAL is rejected, and respondent is directed to restore 29.5 days of sick leave to petitioner's account.

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

May 9, 2007

OAL DKT.NO. EDU 4522-05
AGENCY DKT. NO. 115-5/05

CAROL SCHUENEMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and petitioner's exceptions have been reviewed.

Petitioner appealed respondent's deduction of 29.5 of her accumulated sick days for the un-worked portions of school days between March 15, 2005 – when she returned to work on a part-time basis after an absence due to a work-related injury – and mid-May 2005, when she returned to full-time status. Because there were no material issues of fact, the parties consented to disposition upon summary decision.

By way of background, the parties agree that petitioner suffered a knee injury arising out of her employment duties on October 18, 2004, and was awarded temporary disability by the workers' compensation court. On March 15, 2005, she asked the workers' compensation-authorized physician whether she could return to work, and was cleared to do so – on a half-time basis only. It is undisputed that petitioner's knee was not sufficiently healed at that time to allow a return to full-time work. Her return to full-time employment occurred in mid-May.

When petitioner returned to part-time duties, of her workers' compensation payments ceased. For the period from March 15 through mid-May, petitioner received her full salary amount, but respondent compensated petitioner for the un-worked hours by drawing down her accumulated sick days.

In support of her position that she should have received full pay for the period in question, without forfeiture of accumulated sick days, petitioner relied upon *N.J.S.A.* 18A:30-2.1. That statute provides, in pertinent part:

> Sick leave payment for service connected disability; satisfactory service
>
> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S.18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received *or was eligible to receive* a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> (Emphasis added.)

Respondent, on the other hand, argued that the (underlined) second sentence of *N.J.S.A.* 18A:30-2.1(a) moderated its obligation to pay petitioner full salary without liquidation of sick leave, by restricting the period of time during which petitioner could receive such full benefits to the period of time that petitioner received workers' compensation temporary disability benefits. It maintained that since petitioner had stopped receiving such benefits on

March 15, 2005, when she commenced a part-time teaching schedule, she was no longer eligible to receive the full salary – without liquidation of sick leave – mandated by *N.J.S.A.* 18A:30-2.1(a).

The Administrative Law Judge (ALJ) reluctantly agreed with respondent. The Commissioner notes, however, that the issue has been previously considered and decided to the contrary.

In *John Theodore v. Board of Education of the Town of Dover, Morris County,* decided by the Commissioner March 15, 1983, the question of entitlement to benefits under *N.J.S.A.* 18A:30-2.1 after workers' compensation payments have ceased was addressed. Custodian John Theodore's workers' compensation benefits had stopped on August 21, 1980, but he nonetheless petitioned to receive his full year of salary, without sick leave liquidation, under *N.J.S.A.* 18A:30-2.1. It was necessary for the Commissioner to determine whether Theodore was still "eligible" to receive workers' compensation disability benefits even though he was no longer actually receiving them. A finding of "eligibility" would, under the second sentence of *N.J.S.A.* 18A:30-2.1(a), require the respondent board of education to pay Theodore the prorated amount of his annual salary from August 21, 1980 to February 15, 1981, without liquidation of sick leave.

At the outset, the Commissioner agreed with the ALJ that statutes in support of workers who have been accidentally injured on the job should be liberally construed to the fullest extent allowable. He further agreed that to accept the view that petitioner's salary would be payable pursuant to *N.J.S.A.* 18A:30-2.1 only while workers' compensation benefits were being received, because cessation of benefits equals ineligibility, absent such an express limitation in the law, would lead to an absurd result, which is not favored in the law. *State v. Provenzano,*

34 *N.J. Super.* 435 (App. Div. 1961); *LaPolla v. Bd. of Chosen Freeholders of Union City*, 71 *N.J. Super.* 264 (Law Div. 1961).

Seeking a more reasonable determinant of whether Theodore was still eligible to receive workers' compensation benefits, even though they had actually been terminated, the ALJ reviewed *N.J.S.A.* 34:15-38, which explains how to calculate the amount of disability payable to claimants. It states, in pertinent part:

> To calculate the number of weeks and fraction thereof that compensation is payable for temporary disability, determine the number of calendar days of disability from and including as a full day the day that the employee is first unable to continue at work by reason of the accident, including also Saturdays, Sundays and holidays up to the first working day that the employee is able to resume work and continue permanently thereat. . . .

Theodore's affidavit, attached to his brief, had indicated that in the 12-month period following the February 1980 accident, he had been employed temporarily for a one-month period as a security guard, earning $ 1,126.64, but was not able to continue at work for the Dover Board of Education because of the disability received from the on-the-job accident. In other words, he had been unable to continue to work or be employed permanently during the year following his accident.

Accordingly, the ALJ found that Theodore was "eligible" to receive temporary disability benefits for the 12 months after his injury (from February 15, 1980 to February 15, 1981) because that injury prevented him from continuing his work for the Board during that period. Having been found eligible, he was entitled under *N.J.S.A.* 18A:30-2.1 to his full salary , without sick leave liquidation, for the twelve months after his injury - minus his workers' compensation payments, minus salary received from the Board and minus the salary he

received for the one-month temporary job as a security guard. The Commissioner adopted the ALJ's analysis and conclusions as the final decision in the case.

Eight years later the issue was once again put before the Commissioner - in *Jaques Verneret v. Board of Education of the City of Elizabeth*, 92 *N.J.A.R.* 2d (EDU) 191; *aff'd* as modified, State Board, 95 *N.J.A.R.* 2d. 134, 135. Subsequent to a workplace injury, Verneret – a bus driver/utility person – had been granted only a nine-week period of temporary disability by the Workers' Compensation court. It was undisputed in the proceedings before the Commissioner of Education, however, that Verneret's disability had prevented him from returning to work after the nine weeks. He consequently argued that even though he had stopped actually receiving workers' compensation benefits and had not appealed their cessation, he had nonetheless been "eligible" to receive them. Thus, he reasoned, he was entitled to the year of full salary available under *N.J.S.A.* 18A:30-2.1.

Based on the precedent established in *Theodore*, the Commissioner agreed that, notwithstanding the cessation of workers' compensation disability benefits, Verneret was entitled – under *N.J.S.A.* 18A:30-2.1 – to his salary for one full year from the date of his injury, since he was undisputedly unable to return to work for the respondent board after the date of the injury.[1] As in the case of *Theodore*, *supra*, petitioner's entitlement to full salary was mitigated by workers' compensation benefits, salary already paid by respondent, and any salary he may have received from temporary work during his period of eligibility for the sick leave benefits.

In the present case, it is undisputed that petitioner's knee injury prevented her from fully resuming her teaching responsibilities until mid-May 2005. It appears from the record that it was a workers' compensation-authorized doctor who made this determination. Under the

[1] The respondent board ultimately terminated Verneret (effective September 1, 1990) based upon his inability to perform the duties of his job, despite having reached maximum medical recovery.

principles set forth in *Theodore* and *Verneret*, petitioner was thus "eligible" for disability benefits through mid-May 2005, even though those benefits stopped upon her return to part-time service on or about March 15, 2005. Accordingly, during the period between March 15, 2005 and mid-May 2005, petitioner was entitled to the salary benefits available under *N.J.S.A.* 18A:30-2.1(a), without sick leave liquidation.

Finally, the Commissioner agrees with petitioner that she should not be penalized for her voluntary return to part-time employment, particularly when she could have continued to receive full salary – without sick leave liquidation – had she declined to return to work until she was fully healed. Such a penalty could indeed serve as a disincentive to dedicated employees who might consider returning to work prior to being released for full time duty.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is rejected. Petitioner's appeal is granted, and the Delran Township Board of Education is directed to restore 29.5 days of sick leave to petitioner's account.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/07

Date of Mailing: 5/09/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4522-05

AGENCY DKT. NO. 115-5/05

CAROL SCHUENEMANN,

Petitioner,

v.

DELRAN TOWNSHIP BOARD OF EDUCATION,

Respondents.

Barbara E. Riefberg, Esq., for petitioner (Baron & Riefberg, attorneys)

John T. Barbour, Esq., for respondent

Record closed: January 2, 2007 Decided: February 8, 2007

BEFORE **PATRICIA M. KERINS,** ALJ:

STATEMENT OF THE CASE

Petitioner appeals respondent Delran Township Board of Education's decision to deduct her accumulated sick days for the portions of the days she was unable to work due to an employment related injury. Her appeal is based on the argument that she was entitled to partial sick leave benefits for those days pursuant to N.J.S.A. 18:30-2.1.

PROCEDURAL HISTORY

Petitioner filed her appeal from the decision of the Delran Township Board of Education (Delran) on May 12, 2005, with the Commissioner of Education of the State of New Jersey. The matter was transmitted to the Office of the Administrative Law as a contested case on June 24, 2005. The petitioner subsequently filed a motion for

Summary Decision and Oral Argument was heard on the matter. The record remained open to allow information on the status of petitioner's pending Workers' Compensation matter to be submitted to the Court.

STATEMENT OF FACTS

The material facts are not in dispute in this matter, most of which are set forth in petitioner's certification filed in support of her Motion for Summary Decision (P-1). On October 18, 2004, petitioner Carol Schuenemann fell at her employment as a teacher for Delran. Her left knee was seriously injured, and as a result she received extensive treatment, including surgery. She received benefits through Worker's Compensation for the injury. While she was out of work for a number of months from October 18, 2004, until March 15, 2005, she received her full salary pursuant to N.J.S.A. 18A:30-2.1, without losing any of her accumulated sick leave. In March 2005, she received permission from her physician to return to work on a part-time basis. However, once she returned to work on a part-time basis, she was no longer eligible for temporary Worker's Compensation benefits. The Board paid her full salary from March 15, 2005, until the end of the school year. However, since she was no longer eligible for Workers' Compensation benefits, the Board took the position that her accumulated sick days would be deducted for the portions of the day when she was not at work. As a result of the Board's decision, during the 2004-2005 school year, petitioner lost a total of 29.5 sick leave days from March 15, 2005, until the end of the school year.

The parties agree that once petitioner was cleared by her physician to return to work on a part time basis, her eligibility for temporary Workers' Compensation benefits ceased. They also submit that nothing in the Workers' Compensation matter (P-2) or in a concurrent arbitration proceeding (P-3) addressed the issue of whether she should have been charged sick leave time after her return to work on a part time basis.

LEGAL DISCUSSION

The parties are in agreement as to the facts in this matter and the case is therefore appropriate for determination by way of Motion for Summary Decision. N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Company of America, 520, 523

(1995). The parties submit that the only issue in this matter is the correct application of N.J.S.A. 18A:30-2.1 to the facts at hand.

In her appeal, petitioner argues that N.J.S.A. 18A:30-2.1 should be construed broadly to entitle her to payment for the time she was not present at her employment due to her service related injury, and that her sick days should not have been deducted. N.J.S.A. 18A:30-2.1 sets out standards for the payment of sick leave to school employees for an employment related disability. As cited by petitioner, it provides:

> (a) whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged the annual sick leave or the accumulated sick leave provided in N.J.S.A. 18A:30-2 and 18A:30-3.

As respondent points out, however, N.J.S.A. 18A:30-2.1 further provides:

> ...Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15 Title 34 Labor and Workmen's Compensation of the revised statutes.

Delran based its decision to charge her accumulated sick time for the days during which she worked on a part-time basis on the second sentence of N.J.S.A. 18A:30-2.1(a). Since petitioner had returned to work, albeit on a part-time basis, she was not eligible to continue receiving Worker's Compensation benefits, and Delran chose to only pay her for the time she actually worked. Respondent argues that the clear language of the statute limits its duty to pay sick leave benefits to petitioner to the time period specified in the statute.

N.J.S.A. 18A:30-2.1 is a complement to Worker's Compensation benefits and insures that school employees receive a full salary during temporary disability arising out of service related disability for up to a year. Magaw v. Middletown Bd. of Educ. 323

N.J. Super., 1, 17 (App. Div. 1999). It serves to "complement workers'compensation benefits for a strictly limited time period." Theodore v. Dover Bd. of Educ., 183 N.J. super. 407, 416 (App. Div. 1982).

Petitioner argues that Delran's action flies against the intent of the statute and requests that the N.J.S.A. 18A: 30-2.1 be construed liberally to provide maximum coverage to the petitioner. She also analogizes to N.J.S.A. 4A:6-1.6, the regulation which governs payment of sick leave benefits to state employees for employment related disability. Under that regulation, any employee who could return to work on a part-time basis is compensated for hours actually worked, and receives sick leave benefits for the time missed due to the disability

In this matter however, the language of the statute is specific. While it grants service related sick leave for a period up to a year, it assumes that such sick leave benefits "shall" be awarded during the period in which the employee is eligible for temporary workers compensation benefits. The statute seeks to make the employee whole, but it is also specific as to the time allowed for the benefit. In enacting the award of this benefit, the legislature also chose to use eligibility for the receipt of temporary workers compensation benefits as one of the parameters for the award of the benefit. Since the workers' compensation benefit does not extend to a return to work on a part time basis, a school employee who returns on that basis is not covered by the language of the statute governing the award of this benefit. While the statute is imperfect in its goal of making the employee whole, the courts have held that sick leave injury benefits, "just like any other remedial legislative program, may be attended by reasonable limitations." In the Matter of Dykas, 261 N.J. Super. 626, 632 (A.D. 1993).

A similar statutory scheme was enacted for state employees, however, it differs in certain key aspects. N.J.S.A. 11A:6-8 governs the award of sick leave benefits due to injury or illness arising out of state employment. Its terms are not as specific as N.J.S.A. 18A: 30-2.1, and it provides that the terms for such leave "shall be governed by rules of the board." In implementing that legislative delegation of authority, the Department of Personnel chose to enact N.J.A.C. 4A:6-1.3 et seq., a series of detailed regulations governing the award of sick leave to state employees. N.J.A.C. 4A:6-1.6 and 1.7 govern leave for service related disability. N.J.A.C. 4A 6-1.6(b)1 addresses the

return to work by an employee on a part time basis and allows the benefits to continue for the portion of the day not worked.

Petitioner has analogized her situation to that of a state employee similarly situated. However, in implementing the broad delegation of authority granted to it by the legislature, the Department of Personnel chose to promulgate regulations which allow for award of benefits in a case such as petitioner's. The statute governing the similar benefit for school employees does not contain such a broad delegation of authority, but instead references the eligibility to receive benefits from the workers' compensation system as one of its criteria.

Although the result in this case may be inequitable, with petitioner losing accumulated sick time while recovering from a service related disability, N.J.S.A. 18A:30-2.1 sets out a standard for the receipt of the benefit which petitioner simply did not meet. I **FIND** that respondent was not required to extend petitioner's sick leave benefits for her service related disability upon her return to work on a part time basis.

DECISION AND ORDER

Based upon the foregoing, I **CONCLUDE** that respondent's action charging petitioner's accumulated sick time for 29.5 days from March 15, 2005, until the end of the school year did not contravene N.J.S.A. 18A:30-2.1 and should be **AFFIRMED**. Petitioner's Motion for Summary Decision is **DENIED** and her appeal is **DISMISSED.**

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

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

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

February 8, 2007
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 8, 2007
DATE

Mailed to Parties:

FEB 15 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

bdt

EXHIBITS

P-1 Certification of Carol A. Schuenemann in support of Motion for Summary Decision

P-2 Letter from Glenn A. Savarese to Barbara E. Reifbert, Esq., dated January 16, 2006

P-3 Arbitration decision, dated November 1, 2005

168-07

PETER BARRY,	:	
PETITIONER,	:	COMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner sought reimbursement for tuition payments made to respondent Board for a period of time in which it is alleged that petitioner's children attended schools in Mendham while residing out of district. Respondent filed a motion for summary decision on the basis that petitioners are not entitled to any relief in view of the fact that the payments were made pursuant to the terms of a prior settlement agreement between the parties.

The ALJ found, *inter alia*, that: petitioner entered into a settlement agreement with respondent, the terms of said agreement being clear and unambiguous; petitioner agreed to pay a reduced amount of tuition in three installments in order to avoid litigation; the intendment of the agreement was to provide a full and final resolution of the tuition issue; nothing in the record evidences an expressed or apparent intent on the part of the parties to permit petitioners to later seek reimbursement of the monies paid; the settlement agreement is valid and binding upon the parties; and petitioner has failed to raise any genuine issue of material fact that would preclude summary decision in this matter. The ALJ granted respondent's motion for summary judgment, and dismissed the petition with prejudice.

Upon careful and independent review of the record, the Commissioner concurs with the ALJ that the parties reached and fulfilled a valid settlement of their underlying dispute, and petitioner is thus barred from seeking further relief with respect to it. Accordingly, the Initial Decision of the OAL, dismissing the petition, is adopted as the final decision in this matter.

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

May 9, 2007

OAL DKT. NO. EDU 3894-06
AGENCY DKT. NO. 72-2/06

PETER BARRY,	:	
PETITIONER,	:	COMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely filed and are consequently not considered herein.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge that the parties to this matter reached and fulfilled a valid settlement of their underlying dispute, thus barring petitioner from seeking further relief with respect to it.

Accordingly, the Initial Decision of the OAL, dismissing the Petition of Appeal, is adopted for the reasons well and fully set forth therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/07

Date of Mailing: 5/09/07

[1] Pursuant to *N.J.A.C.* 1:1-18.4, exceptions were due thirteen days from the April 2, 2007 mailing date of the Initial Decision. Petitioner's exceptions bore a face date of April 15, 2007, but were postmarked April 23, 2007 and received by the Department on April 25, 2007.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 03894-06
AGENCY DKT. NO. 72-2/06

P.B. and L.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MENDHAM, MORRIS COUNTY,

Respondent.

P.B. and L.B., petitioners, pro se

Scott W. Carbone, Esq., for respondent (Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: February 12, 2007 Decided: March 29, 2007

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

STATEMENT OF THE CASE

In this matter, petitioners seek reimbursement of tuition payments made to the respondent, the Board of Education of the Borough of Mendham (the Board), for a period of time in which it is alleged that petitioners' children attended schools in Mendham Borough while residing in Bernardsville. The Board has filed a motion for summary decision on the basis that petitioners are not entitled to any relief in view of the fact that the payments, which are the subject of petitioners' reimbursement claim, were made pursuant to the terms of a prior settlement between the parties.

PROCEDURAL HISTORY

On or about February 14, 2006, petitioners filed the within matter seeking reimbursement of monies paid to the Board, in the amount of $6,321, representing tuition for their two children during the 2004-2005 school year. Petitioners allege that reimbursement is warranted pursuant to N.J.S.A. 18A:38-1(d). The Board filed an Answer and Affirmative Defenses on March 24, 2006. Among other defenses, the Board's fifth affirmative defense asserts that "Petitioner's claims are barred by the doctrine of accord and satisfaction and any applicable settlement agreements between the parties." The Department of Education transmitted the matter to the Office of Administrative Law where, on April 5, 2006, it was filed for hearing as a contested case. The matter was scheduled for hearing on October 30, 2006. On October 25, 2006, the Board filed a motion for summary decision or, in the alternative, to compel settlement. The undersigned adjourned the hearing in order to address the Board's motion and to provide petitioners an opportunity to submit a written response to the motion. Petitioners opposed the motion and submitted a letter certification in support of their position. The Board filed a reply brief, which was accompanied by a certification of Stewart McClure (McClure Cert.), who serves as a member of the Board, and a certification of Lester Aron, Esq. (Aron Cert.), who served as the Board's attorney during the relevant timeframe. Subsequently, petitioners submitted a letter certification in further support of their position. The Board was afforded the opportunity to respond to this submission, after which the record was closed.

FINDINGS OF FACTS

Based upon a review of the documentation submitted in support of, and in opposition to, the within motion including the various certifications, I **FIND** the following undisputed material facts:

In January 2005, a dispute arose between the Board and petitioners regarding petitioners' domicile and tuition payments relating to petitioners' two children. (Aron Cert. at ¶3; McClure Cert. at ¶2). Based upon the Board's review of the matter, the Board determined that petitioners were not properly domiciled in Mendham Borough

between September 2004 and January 2005 and, therefore, owed the Board tuition charges relating to the attendance of petitioners' children in the Board's schools during this period. (Ibid.).

Petitioners disputed the Board's allegation that they were not domiciled in Mendham Borough and the Board's assessment of tuition charges. (Aron Cert. at ¶4). Petitioners requested, and were afforded, an opportunity to meet with the Board on January 25, 2005 concerning the matter. (McClure Cert. at ¶3). Mr. B. addressed the Board at its January 25, 2005 meeting in an effort to persuade the Board that petitioners were properly domiciled in Mendham Borough and that no tuition was owed. (Aron Cert. at ¶4; Exhibit C attached to the Board's initial brief). After the meeting, the Board did not change its position regarding the domicile issue and, accordingly, affirmed its tuition charge assessment for the period of September 2004 to January 2005. (Aron Cert. at ¶5; McClure Cert. at ¶3).

On January 27, 2005, Mr. Aron sent a letter to petitioners informing them of the Board's determination that petitioners were obligated to pay tuition for their two children commencing September 2004 since the family was not properly domiciled within the Borough. (Aron Cert. at ¶7; Exhibit A attached to the Board's initial brief). The letter enclosed an invoice, dated January 26, 2005, representing "Tuition at Mendham Borough Schools for the months of September 2004 through January 2005" in a total amount of $10,535. (Exhibit B attached to the Board's initial brief).[1]

Petitioners retained the services of an attorney. On February 4, 2005, petitioners' attorney sent a letter to Mr. Aron setting forth petitioners' legal and factual position with regard to the domicile/tuition dispute. (Aron Cert. at ¶8; Exhibit 1 attached to the Board's reply brief). The letter concluded by stating "we appeal to your good offices and sense of equity under the circumstances to help us find a way to resolve this matter fairly, quickly and amicably."

[1] Although the certifications submitted by the Board refer to tuition charges in the amount of $10,267, the invoice attached to the Board's initial brief reflects total tuition due in the amount of $10,535.

Over the next two months, Mr. Aron had various discussions with the Board and petitioners' attorney regarding the domicile/tuition dispute in which a possible settlement of the matter was discussed. (Aron Cert. at ¶9; McClure Cert. at ¶4). On April 28, 2005, Mr. Aron had a telephone discussion with petitioners' attorney, during which terms of a settlement were agreed upon. (Aron Cert. at ¶10). Under the terms of the settlement, petitioners agreed to make three payments to the Board of $2,107, for a total of $6,321. In exchange, the Board agreed not to institute litigation against petitioners in an effort to collect the tuition that it believed was properly due and owing. (Aron Cert. at ¶10). Mr. Aron reduced these items to writing in a letter to petitioners' attorney dated April 28, 2005. (Ibid.). That letter states in pertinent part:

> In confirmation of our telephone call earlier today the Board of Education has agreed to settle with your clients Mr. and Mrs. [B] for the tuition for their children during the 2004-2005 school year at a total amount of $6,321.00. Based on that Agreement, the [Bs] are to make three equal payments of $2,107.00....
>
> Thank you in advance for your cooperation in resolving this matter.
>
> [Exhibit D attached to the Board's initial brief; emphasis added].

On or about April 28, 2005, Mr. Aron advised the Board that petitioners had agreed to settle the matter by making three payments to the Board of $2,107, for a total of $6,321 and, in exchange for petitioners' payments, the Board agreed to forego any litigation against petitioners seeking tuition payments. (McClure Cert. at ¶5; Aron Cert. at ¶12). The certifications submitted on behalf of respondent reflect the understanding and belief of Board attorney Aron and Board member McClure that performance of the terms of the agreement, as set forth in the April 28, 2005 letter to petitioners' attorney, would constitute a full and final settlement of the dispute between the Board and petitioners regarding the domicile/tuition matter, the agreement resolved the entire domicile/tuition matter and it concluded the dispute between the parties. (Aron Cert. at ¶11; McClure Cert. at ¶6). In a letter dated April 29, 2005, petitioners' attorney informed Mr. B: "The enclosed is as we discussed by telephone. Please copy Les Aron, Esq. and

me on your letters transmitting the three payments. It has been a pleasure assisting you in this matter." (Exhibit 2 attached to the Board's reply brief).

On May 5, 2005, an updated invoice was generated and sent to petitioners reflecting the settlement terms, i.e. tuition due in the amount of $6,321 to be paid in three installments. (Aron Cert. at ¶12; Exhibit E attached to the Board's initial brief). Consistent with the settlement terms that Mr. Aron had negotiated with petitioners' attorney, petitioners issued three checks to the Board in the respective amounts of $2,107 totaling $6,321. (Aron Cert. at ¶13; Exhibit F attached to the Board's initial brief). The last check submitted by petitioners includes a notation stating "Section 18A:38-1 reimb. due to [petitioners] no later than 1/31/06." (Exhibit F attached to the Board's initial brief).

LEGAL DISCUSSION

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. The summary judgment procedure is designed to provide a "prompt" and "inexpensive" method of disposing of a case, which does present any genuine issue of material fact requiring disposition at a hearing. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, supra., 17 N.J. at 75. However, the plain language of the rule "dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Insurance Co., 142 N.J. 520, 529 (1995) (citation

omitted). See N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court has cautioned that, "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, ... '[f]anciful, frivolous, gauzy or merely suspicious'..., he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Judson, supra, 17 N.J. at 75 (citation omitted). Stated differently, the "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, supra, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid. Further, even if the pleadings themselves appear to raise a factual dispute, summary decision should not be denied where the papers pertinent to the motion "show palpably the absence of any issue of material fact...." Judson, supra, 17 N.J. at 75. See Martin v. Rutgers Casually Insurance Co., 346 N.J. Super. 320, 323 (App. Div. 2002) (finding that, where the record was barren of evidence that the plaintiff had a driver license "other than her own self-serving assertion to that effect," this "is clearly insufficient to create a question of material fact for purposes of a summary judgment motion"); Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (holding that "bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment").

In judging whether or not summary decision is appropriate, the court must "engage in the same type of evaluation, analysis or shifting of evidential materials as required by Rule 4:37-2(b) [governing an involuntary dismissal] in light of the burden of persuasion that applies if the matter goes to trial." Brill, supra, 142 N.J. at 539-40. In this regard, the New Jersey Supreme Court has provided the following guidance:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a

> genuine issue for trial'. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,'... the trial court should not hesitate to grant summary judgment.
>
> [Brill, supra, 142 N.J. at 540 (citations omitted)]

It is well settled that the "'[s]ettlement of litigation ranks high in [the] public policy'" of New Jersey. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961), certif. denied, 35 N.J. 61 (1961)). See Lahue v. Pio Costa, 263, N.J. Super. 575, 595 (App. Div. 1993), certif. denied, 134 N.J. 477 (1993); Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983), certif. denied, 94 N.J. 600 (1983). There is a strong public policy in this State in favor of settlements. Department of the Public Advocate, Division of Rate Counsel v. N.J. Bd. of Public Utilities, 206 N.J. Super. 523, 528 (App. Div. 1985); Bistricer v. Bistricer, 231 N.J. Super. 143, 147 (Ch. Div. 1987). Indeed, "courts will strain to give effect to the terms of a settlement wherever possible." Department of the Public Advocate, supra, 206 N.J. Super. at 528. And, second thoughts by a party unhappy with the bargain reached "are entitled to absolutely no weight as against our policy in favor of settlement." Id. at 530.

The courts have recognized that an agreement to settle a lawsuit is a contract. Nolan, supra, 120 N.J. at 472; Pascarella, supra, 190 N.J. Super. at 124. Equally recognized is that settlement agreements should be honored "absent a demonstration of 'fraud or other compelling circumstances'...." Pascarella, supra, 190 N.J. Super. at 125 (citation omitted). The courts "have refused to vacate final settlements absent compelling circumstances" and require "clear and convincing proof" that a settlement agreement should be vacated. Nolan, supra, 120 N.J. at 472. Moreover, a court "will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a compromise settlement fairly and deliberately made." Pascarella, supra, 190 N.J. Super. at 125.

That an agreement to settle is orally made is of no consequence. Pascarella, supra, 190 N.J. Super. at 124. Rather, "an 'agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court and even in

the absence of a writing.'" Ibid. (quoting Green v. John H. Lewis & Co., 436 F.2d 389, 390 (3d Cir. 1971)). See Good v. Pennsylvania Railroad Co., 384 F.2d 989, 990 (3d Cir. 1967) (holding that a "settlement agreement which was entered into by duly authorized counsel expressed the intention to settle the case for the agreed amount and was valid and binding despite the absence of any writing or formality"). Likewise, "[t]hat an agreement was to be memorialized in writing makes it no less a contract...." Pascarella, supra, 190 N.J. Super. at 126. "Where the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue, supra, 263 N.J. Super. at 596. See also Moss v. McDonald's Corp., 2006 U.S. Dist. LEXIS 13936 (D. N.J. 2006); Williams v. Vito, 365 N.J. Super. 225 (Law Div. 2003) (ruling that plaintiff's authorization of his attorney to accept defendant's settlement offer and the attorney's communication of the acceptance to the opposing counsel and the court created an enforceable settlement agreement, irrespective of whether a subsequent writing was contemplated).

In general, an accord and satisfaction will be found where there is a bona fide dispute as to the existence of liability or an amount due, payment by one party of a sum less than the whole amount in satisfaction of the disputed claim and its acceptance by the other with the intention that it will operate as full satisfaction of the entire disputed obligation. Zeller v. Markson Rosenthal & Co., 299 N.J. Super. 461 (App. Div. 1997); Decker v. George W. Smith & Co., 88 N.J.L. 630 (E. & A. 1916); Loizeaux Builders Supply Co. v. Donald B. Ludwig, Co., 144 N.J. Super. 556 (Law Div. 1976). The doctrine of accord and satisfaction resulted in the dismissal of petitioner's petition in Scelba v. Board of Education of the Town of Montclair, EDU 628-80, Initial Decision (February 18, 1981), adopted, Comm'r (April 6, 1981) (cited in and attached to the Board's submission).

In Scelba, the petitioner, a tenured teacher/administrator, held the administrative position of Advisory Specialist in the Arts until 1978 when it was abolished by the board of education. That same year, the board created a new position, Director of the Arts and Career Education, which the board filled with another applicant. The petitioner alleged that the new position involved duties similar to his abolished position and that petitioner's

transfer to a teacher position violated his tenure rights. The petitioner pressed his claims with the district's assistant superintendent for instruction and, upon request, outlined in writing the terms and conditions for settlement of his claims. In consideration for certain listed teaching and administrative duties, coupled with a designated salary and title, petitioner indicated that he would be willing to stop his efforts to investigate the violation of his property and tenure rights as an administrator. In October 1978, the assistant superintendent for personnel services confirmed the petitioner's terms and conditions by a letter to the petitioner and enclosed an employment contract for the 1978-79 year which the petitioner signed. The petitioner filed a petition approximately fourteen months later when his then position was abolished for the 1979-80 school year. The Administrative Law Judge (ALJ) found that the petitioner and the board "reached an accord" by which the petitioner would be paid an unreduced salary for 1978-79 and would serve as the Coordinator of Music in addition to his teaching duties and, by the terms of the accord, petitioner agreed to give up his efforts to investigate and vindicate the alleged violation of his property and tenure rights. The ALJ further found that the existence of the dispute between the board and the petitioner established consideration to support the accord reached, the accord was satisfied by mutual performance of obligations during 1978-79 and, accordingly, the petitioner's petition for relief was barred by the accord achieved in 1978 and fulfilled in 1978-79. In so ruling, the ALJ explained:

> What is an accord and satisfaction? It is a method of discharging a contract or cause of action whereby parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, an 'accord' being the agreement and 'satisfaction' its execution or performance....An accord and satisfaction, like any other contract, must, in order to be valid and effectual, be founded upon a proper consideration....The consideration need not be adequate, nor will courts inquire into its reasonableness, as distinguished from its existence. So even a slight modification of the status of the parties resulting from the terms of the new agreement is sufficient consideration....In general, any lawful claim or demand, whether or not tenable or enforceable in law, may be the subject of an accord and satisfaction....
>
> ***
>
> What is the legal effect of an accord and satisfaction? Absent fraud, mistake, duress or rescission, and after satisfaction, the original demand is extinguished and action thereon, as in the form of the present claim petition, is debarred. Debarment is sometime regarded as an estoppel.... But it is in absolute defense. (citations omitted).

The Commissioner adopted the initial decision dismissing the petition. The Commissioner concluded that an agreement between the petitioner and the board was negotiated and consummated by the parties, the agreement constituted a good faith effort on the part of the parties to reach an amicable resolution of the matter between them and the accord reached and fulfilled barred the petitioner's request for further relief.

ANALYSIS AND CONCLUSIONS OF LAW

In this matter, petitioners seek reimbursement of monies paid to the Board for tuition for the period of September 2004 to January 2005, during which the Board had maintained, and petitioners disputed, that petitioners were not domiciled in Mendham Borough. The foundation of the Board's summary decision motion is that a legally enforceable settlement was reached regarding the domicile/tuition dispute and the parties fully performed under the terms of that settlement. Accordingly, the Board contends that, because the settlement agreement should be enforced, there is no remedy available to petitioners warranting dismissal of this action.

In opposition, petitioners do not challenge the facts, series of events or the documentary evidence submitted by the Board, including the letter between counsel memorializing the settlement reached. Equally absent is any claim by petitioners that their attorney was not authorized to accept the settlement terms set forth in that letter. Indeed, petitioners acknowledge that they paid the reduced tuition assessment because they "did not want to be named as defendants in a lawsuit." However, petitioners purport to show in the offered letter certifications that the agreement to pay the tuition, and the payment thereof, did not preclude their ability to later seek reimbursement. Petitioners assert "[i]t was our understanding that we would pay the money to the Board and not give up our rights to seek reimbursement...." It is further maintained that petitioners "made it clear that [they] intended to seek reimbursement of all monies paid and never intended that the payment would end our dispute." Petitioners also argue that "[t]he Board has not proven that the payment of tuition negates" their "rights to seek

reimbursement under the statutes of the law" in view of the absence of evidence suggesting that petitioners have not been properly domiciled in Mendham Borough since January 31, 2005.[2]

A settlement agreement is a contract between the parties and, as such, is subject to the law governing the interpretation of contracts. In construing a contract, it is necessary to "'determine the intention of the parties 'as disclosed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are to be regarded.'" Dontzin v. Meyer, 301 N.J. Super. 501, 507 (App. Div. 1997) (citation omitted). To discover the meaning of the terms of a contract, extrinsic evidence may be used only to "shed light on the mutual understanding of the parties" if the contract terms are vague or not specific. Hall v. Jefferson Bd. of Educ., 125 N.J. 299, 305 (1991). In other words, "[e]xtrinsic evidence is admissible as an aid to understand the significance of the contract language, but not to give effect to an intent at variance with that language." Dontzin, supra, 301 N.J. Super. at 507. "'So far as the evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant.'" Ibid. (citation omitted). The function of the court is to "'consider what was written in the light of the circumstances under which it was written, and to give the language a rational meaning consistent with the expressed general purpose.'" Ibid. (citation omitted). Further, "the intent which controls the contract is the 'intention common to both [parties]'" and "'it is not the real [subjective] intent but the intent expressed or apparent in the writing that controls." Ibid. (citations omitted). A party's "unexpressed intent not to be bound is also immaterial." Brawer v. Brawer, 329 N.J. Super. 273, 283 (App. Div. 2000), certif. denied, 165 N.J. 138 (2000). Rather, "[a] contracting party is bound by the apparent intention he or she outwardly manifests to the other party" and "[i]t is immaterial that he or she has a different, secret intention from that outwardly manifested." Ibid.

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[2] In their petition and submissions in opposition to the Board's motion, petitioners rely on N.J.S.A. 18A:38-1(d) in support of their reimbursement claim. N.J.S.A. 18A:38-1(d) states: "Public schools shall be free to the following persons over five and under 20 years of age....Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section."

Against this backdrop, the undisputed facts disclose that a dispute existed between the parties in January 2005 regarding petitioners' domicile and tuition owed stemming from the attendance of petitioners' children at the Board's schools during the period of September 2004 to January 2005. Petitioners retained the services of an attorney to address the domicile/tuition issue. The record reveals that an "accord" was reached pursuant to which petitioners would pay to the Board, and the Board would accept, $6,321 in three installments and the Board would forego its claim to the full amount of tuition believed to be due and owing. This agreement is explicitly memorialized in the letter between counsel in April 2005. The existence of the dispute between the Board and petitioners established consideration to support the "accord" reached. And, the "accord" was satisfied by mutual performance of the agreement, i.e. petitioners' payment of the three installments and the Board's acceptance of the reduced tuition assessment as full satisfaction of the entire disputed obligation. In short, the undersigned embraces the Board's stance that it is clear by the actions of the parties and their representative attorneys that a legally enforceable settlement had been reached and the parties fully performed consistent with the terms of that settlement.

I **FIND** that the intent of the parties in entering into the settlement agreement is apparent because the terms of the agreement as set forth in counsel's letter are clear and unambiguous. I **FIND** that the meaning of the agreement between the parties is evident from the circumstances under which it was written as described above and that the intendment of the agreement was to provide a full and final resolution of the tuition issue. Following the disputed claim between the parties regarding petitioners' liability for the tuition payments, the Board relinquished its right to seek the full tuition believed to be owed and, in turn, petitioners agreed to pay the reduced amount in three installments in order to avoid litigation. There is nothing in the letter memorializing the settlement which evidences an expressed or apparent intent on the part of the parties to permit petitioners to later seek reimbursement of the monies paid. Rather, there is no doubt from the plain language of the memorialized agreement that the specified terms would end the dispute. Clearly, the Board's consideration for its concession included freedom from future litigation concerning the tuition issue. Since the intent of the parties

as expressed in the letter memorializing the settlement is clear and unambiguous, it is unnecessary to look beyond the four corners of the expressed agreement.

Beyond this, the record fails to support petitioner's assertion that a full and final settlement was not reached. No documentation supports a conclusion that the bargain struck between the parties was merely an intermediary step, which did not end the tuition dispute and did not preclude a later claim for reimbursement. That petitioners' last check refers to reimbursement does not somehow undo the settlement reached months earlier.[3] The record is bereft of any evidence suggesting that petitioners' attorney objected to the terms set forth in the Board attorney's April 28, 2005 letter or, thereafter, sent a letter making clear that petitioners reserved their right to seek reimbursement at a later juncture. Apart from petitioners' notation on the last check, petitioners' ability to later seek reimbursement of the monies paid, which plainly would have been a material term of the agreement, is neither expressed nor implied in any documentation surrounding the settlement. Succinctly stated, petitioners' letter certifications, when considered in the context of the intent of the parties as derived from a consideration of the situation of the parties and the attendant circumstances under which the agreement was entered, as well as the entirety of the language of the agreement, attempt to "give effect to an intent at variance" with the plain language of the memorialized settlement and suggest an "intention wholly unexpressed in the writing." Dontzin, supra, 301 N.J. Super. at 507. Consequently, I **CONCLUDE** that this extrinsic evidence is irrelevant and should not be considered.

Based upon the foregoing facts and the applicable law, I **CONCLUDE** petitioners have failed to raise any genuine issue of material fact which would operate to preclude summary decision and necessitate an evidentiary hearing. I **CONCLUDE** that the parties entered into a valid settlement agreement regarding the underlying tuition claim, the agreement is binding upon the parties, the parties fully performed under that

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[3] It is observed that petitioners' petition attaches a letter from the Board's Business Administrator, dated September 13, 2005, acknowledging receipt of petitioners' check which, the letter states, "represents the final installment due for tuition for your children...under our agreement for the 2004-2005 school year." The letter further instructs that, "[w]ith this check, you have fulfilled your payment obligations under our agreement, and no reimbursement for this or any other tuition payment is due to you from the Board of Education."

settlement agreement, and the accord reached and fulfilled bars petitioners' request for further relief. The settlement between the parties is not only enforceable but it should be enforced. "If later reflection were the test of the validity of such an agreement, few contracts of settlement would stand." Pascarella, supra, 190 N.J. Super. at 126. The failure to give a clear settlement the conclusive effect intended would discourage parties from resolving disputes amicably by mutual consent and lead to unnecessary litigation and expense. In view of these conclusions, coupled with the absence of any cross-motion by petitioners, it is unnecessary to address the merits of petitioners' argument predicated on the provisions of N.J.S.A. 18A:38-1(d).

ORDER

It is **ORDERED** that respondent's motion for summary decision be and hereby is **GRANTED**.

It is further **ORDERED** that petitioners' petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 29, 2007
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: March 29, 2007

Mailed to Parties:
Laura Anderson
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 2 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

db/sej

169-07

169-07JO

OAL DKT. NO. EDU 2681-06
AGENCY DKT. NO. 137-4/06

C.M.R., on behalf of minor child, D.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY,	:	ORDER
RESPONDENT.	:	

On August 11, 2006, a final agency decision was rendered in this matter, wherein, the Commissioner adopted the parties' settlement agreement assessing petitioner, Christine M. Rhodes, $5,327.06 in tuition to compensate the Buena Board of Education for her child's period of ineligible attendance in the public schools of the district pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that petitioner had ceased compliance with the agreement after satisfying only $50.00 of the judgment against her, and it requested that the Commissioner seek entry of the unsatisfied portion of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Christine M. Rhodes is now subject to entry of a judgment by the court in the amount of $5,277.06 – which represents the $5,327.06 payment ordered at the conclusion of the contested case before the Commissioner, less the $50.00 previously remitted – with interest to accrue as provided by law.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/07
Date of Mailing: 5/09/07

171-07

OAL DKT. NO. EDU 8924-05
AGENCY DKT. NO. 297-10/05

HENRY SOLARES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/07

Date of Mailing: 5/09/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8924-05

AGENCY DKT. NO. 297-10/05

HENRY SOLARES,

Petitioner,

v.

BOARD OF EDUCATION
OF THE CITY OF NEW BRUNSWICK,
MIDDLESEX COUNTY,

Respondent.

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

George F. Hendricks, Esq., for respondent (Hendricks & Hendricks, attorneys)

Record Closed: March 12, 2007 Decided: March 30, 2007

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on December 2, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 30, 2007
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:

APR - 4 2007
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mamf

LIST OF EXHIBITS

Jointly submitted:

J-1 Stipulation of Settlement and Release

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 201
South Orange, NJ 07079
Attorney for Henry Solares

RECEIVED
2007 MAR 12 A 11:01
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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ws
3-12-07

HENRY SOLARES vs. NEW BRUNSWICK BOARD OF EDUCATION	OAL Docket No.: EDUOA 08924-2005S **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the New Brunswick Board of Education (the "Board") with administrative offices located at 268 Baldwin Street, Third Floor, New Brunswick, New Jersey 08901 and Henry Solares ("Solares"), whose address is 6 Pine Grove Avenue, Somerset, New Jersey 08873. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on June 19th, 2003, Solares was employed as a school teacher by the Board; and

WHEREAS, on that date, Solares was charged with a criminal action for certain acts alleged to have occurred while Solares was in the employ of the Board; and

WHEREAS, on July 15, 2005, the criminal complaint/indictment against Solares was dismissed by the Middlesex County Superior Court; and

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Solares' defense counsel forwarded a demand letter to the New Brunswick Board of Education, on or about August 15th, 2005,

seeking reimbursement from the Board for Solares' attorney's fees and cost associated with the legal defense of the criminal action with which Solares was charged; and

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

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

1. The Board will pay to Solares the sum of Thirty Thousand Dollars ($30,000.00) in full and complete satisfaction of the amount Solares is claiming to be due and owing to him from the Board for Solares' attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Solares' legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Solares, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the demand for reimbursement, now and forever, except to enforce the terms of this Stipulation of Settlement and Release.
4. Solares acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the

terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.

5. Solares, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to withdraw without prejudice the above-docketed Petition for Reimbursement before the Commissioner of Education.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

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

FOR THE NEW BRUNSWICK BOARD OF EDUCATION:

By: _____
Dale Caldwell, Board President

Date: 2-15-07

By: _____
Witness
Corey Herrod, Esq.
Board Atty

FOR HENRY SOLARES:

_____
Henry Solares

Date: 1-2-07

Sworn and subscribed to before me this
2nd day of February 2007

_____
Notary Public

RESOLUTION

WHEREAS, George F. Hendricks, Board Attorney has represented the New Brunswick Board of Education on a litigation matter; and

WHEREAS, the Court Order settlement requires the district to pay Timothy R. Smith & Associates, LLC $30,000.

NOW THEREFORE BE IT RESOLVED, the New Brunswick Board of Education approves payment to Timothy R. Smith & Associates, LLC in the amount of $30,000.00.

Dale G. Caldwell
Board President

Richard D. Jannarone
Business Administrator/Board Secretary

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ADOPTED: January 16, 2007

CERTIFIED TO BE
A TRUE COPY

SIG George HENDRICKS
Board Atty.

res_settlement_agreement_0107.doc

Hendricks & Hendricks
COUNSELLORS AT LAW

GEORGE F. HENDRICKS
CERTIFIED BY THE SUPREME COURT OF NEW JERSEY
AS A CIVIL TRIAL ATTORNEY

PETER J. HENDRICKS

PATRICIA M. LOVE
MEMBER OF NJ & NY BAR

73 PATERSON STREET
NEW BRUNSWICK, N.J. 08901

(732) 828-7800
FAX (732) 828-9088
staff@hendrickslaw.com

March 28, 2007

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2007 MAR 29 A 10: 50

VIA FACSIMILE (609) 588-6574
AND REGULAR MAIL
Hon. John Futey, A.L.J.
Office of Administrative Law
Quakerbridge Plaze, Bldg 9
Mercerville, New Jersey 08625-0049

Re: Solares vs. New Brunswick Board of Education
Docket No.: 8904-2005S

Dear Judge Futey:

Enclosed please find the New Brunswick Board of Education Resolution regarding the settlement of the above referenced matter.

Respectfully yours,

GEORGE F. HENDRICKS

GFH/klb
Enc.

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 201
South Orange, NJ 07079
Attorney for Henry Solares

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OFFICE OF ADMIN LAW

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3-12-07

HENRY SOLARES vs. NEW BRUNSWICK BOARD OF EDUCATION	OAL Docket No.: EDUOA 08924-2005S **STIPULATION OF SETTLEMENT AND RELEASE**

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WHEREAS, on that date, Solares was charged with a criminal action for certain acts alleged to have occurred while Solares was in the employ of the Board; and

WHEREAS, on July 15, 2005, the criminal complaint/indictment against Solares was dismissed by the Middlesex County Superior Court; and

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Solares' defense counsel forwarded a demand letter to the New Brunswick Board of Education, on or about August 15th, 2005,

seeking reimbursement from the Board for Solares' attorney's fees and cost associated with the legal defense of the criminal action with which Solares was charged; and

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

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

1. The Board will pay to Solares the sum of Thirty Thousand Dollars ($30,000.00) in full and complete satisfaction of the amount Solares is claiming to be due and owing to him from the Board for Solares' attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Solares' legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Solares, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the demand for reimbursement, now and forever, except to enforce the terms of this Stipulation of Settlement and Release.
4. Solares acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the

terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.

5. Solares, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to withdraw without prejudice the above-docketed Petition for Reimbursement before the Commissioner of Education.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

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

FOR THE NEW BRUNSWICK BOARD OF EDUCATION:

By: _____
Dale Caldwell, Board President

Date: 2-15-07

By: _____
Witness
George Heddrick
Board Atty

FOR HENRY SOLARES:

_____
Henry Solares

Date: 1-2-07

Sworn and subscribed to before me this
2nd day of February 2007

_____
Notary Public

RESOLUTION

WHEREAS, George F. Hendricks, Board Attorney has represented the New Brunswick Board of Education on a litigation matter; and

WHEREAS, the Court Order settlement requires the district to pay Timothy R. Smith & Associates, LLC $30,000.

NOW THEREFORE BE IT RESOLVED, the New Brunswick Board of Education approves payment to Timothy R. Smith & Associates, LLC in the amount of $30,000.00.

Dale G. Caldwell
Board President

Richard D. Jannarone
Business Administrator/Board Secretary

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ADOPTED: January 16, 2007

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George HENDRICKS
Board Atty.

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 727-06

AGENCY DKT. NO. 392-12/05

JENNIFER BOYCE,

Petitioner,

v.

OCEAN CITY BOARD OF EDUCATION

AND CAPE MAY COUNTY SUPERINTENDENT

OF SCHOOLS,

Respondents.

Ned P. Rogovoy, Esq., for petitioner

Michael P. Stanton, Esq., for respondent, Board of Education of the City of Ocean City (Taht, Stanton & McCrosson, attorneys)

Cynthia Raymond, Deputy Attorney General, for respondent, Cape May County Superintendent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: March 5, 2007 Decided: April 11, 2007

BEFORE **LILLARD E. LAW,** ALJ, T/A

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, in a three Count Petition of Appeal, contends that she achieved tenure status with the Board of Education of the City of Ocean City, Cape May County, (Board) and seeks an order of reinstatement to her teaching position and seniority

rights by the Commissioner of Education (Commissioner) together with monetary damages for her illegal termination, plus costs of suit.

The Board contests petitioner's assertion contending, among other things, that petitioner was the holder of an elementary certificate endorsement and served as a long-term substitute as a media specialist under an emergency certificate where, among other things, petitioner taught Character Education and, therefore, is not eligible for tenure status.

The Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The hearing was held on December 1, 2006, at the Atlantic City OAL, Atlantic City, New Jersey. The parties submitted post-hearing briefs. The hearing record closed on March 5, 2007, with receipt of the last document.

ISSUES TO BE DETERMINED

The issues to be determined by this administrative tribunal were set forth on the hearing record as follows:

1. Whether the Board improperly dismissed petitioner in her dual capacity as an elementary teacher and/or as an emergency educational media specialist?

2. Whether or not petitioner had acquired tenure status with the Board under her elementary teaching certificate?

3. Whether the Board violated the sixty-day clause of the contract entered into by petitioner and the Board?

It is noted here that Count Three of the Petition of Appeal was withdrawn and dismissed at the opening of the hearing,

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Dr. Lyle Alverson, the former Superintendent of the Ocean City Public Schools who retired from the Board's employ in the year 2000, testified that he and Thomas Campo, the vice principal of the intermediate school, interviewed and recommended that petitioner be employed as the intermediate school media specialist. Both Alverson and Campo knew that petitioner had been an elementary teacher in the Atlantic City public schools. They also understood that petitioner did not have a permanent certificate as a media specialist; however, petitioner was in the process of enrolling in academic course work to qualify for the media specialist certificate.

Petitioner's employment commenced on October 15, 2001, at which time the Atlantic County Superintendent of Schools approved petitioner for an emergency certificate as a library media specialist upon the recommendation of the Ocean City Superintendent. Prior to petitioner's employment with the Board, the then Governor of New Jersey, James McGreevey, issued Executive Order #9, which initiated the program identified as "The New Jersey Character Education Partnership" (NJCEP). The initiative was voluntary and provided a stipend to school districts which participated. Petitioner's Brief, at page 2, sets forth the initiative, as follows:

> Character Education Program Selection
>
> Districts may expand implementation of their character education program model selection (*Program of Merit,* alternative program, homegrown program or combination of programs) or choose new programs to augment character education efforts that serve new schools or students. Please note that funding is not restricted to one program selection. Depending upon district priorities, staffing and student and program needs, schools may select additional program providers for materials, assemblies, staff training, curriculum infusion, community service or other related character education activities. (New Jersey Department of Education, Character Education Update. . .)

In her Brief, petitioner quoted a portion of the overview published by the state, as follows:

> 59% of the districts chose *Programs of Merit,* 11% selected alternative program providers, 18% developed their own homegrown programs and 12% used a combination of program choices (Character Initiation Update, supra) (Petitioner's Brief at page 2.)

Dr. Alverson testified that he did not contemplate petitioner's assignment to the Character Education program; however, subsequent to petitioner's employ, he determined that a certificated teacher should be assigned to its Character Education program. Dr. Alverson was aware that a New Jersey teaching certificate was not required for the initiative; however, he was determined to assign a certificated teacher to the program. Dr. Alverson was also aware petitioner was employed by the Board under her emergency library media specialist certificate. Moreover, he considered the availability of the then staff members and decided to assign petitioner to the Character Education program because she possessed an elementary teaching certificate. Also, his main consideration involved the convenience of scheduling the teaching staff members.

Dr. Alverson asserted that petitioner was required to prepare lesson plans, provide grades to the participating students and provide progress reports to parents while assigned to the Character Education program. He asserted that her assignment to the program was the same as other formal structured classes.

Dr. Alverson referred to documents entered into evidence as P-1 A through P-1 G. "Classroom Observation" and "Teacher Evaluation-Annual Report." The Classroom Observation, dated November 13, 2002, states as follows:

> Mrs. Boyce was hired this year as the media specialist for the Intermediate School. She has assumed all duties and responsibilities performed by the previous media specialist, and more. Mrs. Boyce also teaches formal classes in

> character education to our younger students to support the movement that has been initiated in the District. She has developed a strong rapport with her students.
>
> They responded well to her instruction and desire to perform for her. This quality results in student success.
>
> Mrs. Boyce has established a good working relationship with the teachers who utilize the library. She prepares pertinent materials for their use when they come to the library. The teachers feel welcome in the library and as a result the faculty has become a valuable resource for their instructional program. A very nice atmosphere has been created by Mrs. Boyce.
>
> Matters affecting the library are well attended to by Mrs. Boyce. She takes the initiative to properly inventory the content of the library and order appropriately based on the inventory. She also schedules classes in an efficient manner and remains flexible when others, such as administrators, schedule classes into the library unexpectedly. (P-1 A)

With respect to petitioner's Classroom Observation dated February 11, 2003 (P-1 B), Dr. Alverson testified that petitioner was observed teaching the Character Education program to forth, fifth, seventh and eighth grades pupils. He admitted that petitioner was not observed as the media specialist on February 11, 2003, but, rather, as a classroom teacher.

Dr. Alverson read into the hearing record from the petitioner's Classroom Observation dated November 3, 2003, as follows:

> As the 4th graders took their seats at the library tables for the Character Education lesson, Ms. Boyce took attendance. One by one, Ms. Boyce invited the class to sit on the floor in a circle. Ms. Boyce did likewise. She proceeded to have each student share his or her weekend's activity. With Friday being Halloween, candy and "trick or treat" were hot topics. Ms. Boyce asked good questions to lead students to elaborating on their stories. P-1 C, page 1)

Dr. Alverson testified that petitioner was observed as a classroom teacher, where all of her instruction presentation and teaching techniques were effective (P-1 C,

page 2). On page 3 of the document, Alverson referred to the observed statement that, "She also continues to enhance all aspects of the Library Media Program" (P-1 C, page 3). Dr. Alverson agreed there is a difference between the library media program and the Character Education program.

Dr. Alverson testified that petitioner's Classroom Observation, dated December 21, 2003, where he noted that petitioner was rated as "effective," the highest rating, in all of the observable areas of the classroom activities (P-1 D). On petitioner's Teacher Evaluation-Annual Report for the 2002-2003 school year, her instructional assignment is that of "Librarian" at the Board's Intermediate School (P-1 E). Dr. Alverson characterized the evaluation as good and referred to petitioner's professional growth as "proficient" and "advanced proficient" (P-1 E, page 3). He also observed that petitioner contributed to the overall school program (P-1 E, page 4). Dr. Alverson read on the hearing record, that portion of the Annual Report, entitled "Additional Information," as follows:

> Mrs. Boyce has transformed the library into a more greatly utilized resource for teachers and students. Although she is not a certified librarian, her knowledge and abilities as a teacher have benefited the library program and the school in general (P-1 E, page 4).

Dr. Alverson asserted he relied upon petitioner's skills as a certificated elementary teacher to perform the duties as the teacher of Character Education.

On cross-examination, Alverson testified he relied upon petitioner's availability as well as upon her elementary teaching certificate to teach the Character Education course. He asserted that petitioner's elementary teaching certificate was a strong consideration where children are concerned with her assignment to the Character Education program. Dr. Alverson did not want to place the burden of the Character Education program on the regular classroom teachers who were preparing their students for the scheduled state-wide testing program. Dr. Alverson admitted that

anyone could teach the Character Education course where no teaching certificate was required.

Dr. Alverson could not recall the petitioner's Job Code for the Board's Report of Certificated Staff to the New Jersey Department of Education (Department) as of October 15, 2002. When shown the document marked into evidence as R-1, he identified petitioner's name with the Job Code of 2850. The Job Code, 2850, is further identified under the category of Educational Support Services Personnel as "Educational Media Specialist." (R-1, page 24)

Dr. Alverson asserted that Catherine Bassett was the media specialist prior to petitioner's hire. Dr. Alverson testified that he probably would not have assigned Bassett the responsibility of teaching the Character Education program. He opined that Ms. Bassett would have found such an assignment offensive because it was not in her job description. He asserted, moreover, that petitioner taught library skills to the intermediate school pupils because such instruction is typically the librarian's responsibility. He also stated that Character Education was not a part of the core curriculum standards established by the Department.

On re-direct examination, Alverson contended that petitioner acted in a dual capacity and that it was reported as such on R-1. He reiterated his former testimony where he asserted that when he recommended petitioner's employment, he did not contemplate assigning her as the teacher of Character Education. Rather, it was his choice to assign a certificated teacher because he knew that a certificated teacher would perform as a professional, *i.e.;* prepares lesson plans and conduct student evaluations, among other things. He did not wish to have the regular classroom teachers assume any additional responsibilities, ergo, he assigned petitioner to teach Character Education.

Petitioner testified on her own behalf asserting, among other things, that she possessed a New Jersey Elementary Teacher's certificate. From the years 1992 through 2001, petitioner taught in the Atlantic City Public Schools. Petitioner testified

she was interviewed by Dr. Alverson for the media specialist position with the Board for the 2001-2002 school year. Petitioner was employed under an emergency media specialist certificate approved by the Cape May County Superintendent of Schools. Petitioner asserted that the Character Education program was not discussed at her interview for the position of media specialist. Petitioner cited the Employment Contract entered into by petitioner and the Board wherein it states, in pertinent part, that petitioner was to be employed as a Library Media Specialist, from the period of October 15, 2001 to June 30, 2002 (P-3).

Petitioner asserted that in the beginning of November 2001, Dr. Alverson approached petitioner and assigned her to teach the Character Education program. She testified that Dr. Alverson requested that petitioner teach the program to the fourth and fifth grade students and have it integrated it into the school's regular academic program.

Petitioner asserted, among other things, she prepared for teaching the Character Education program by using the Board's approved Elementary Curriculum Guide (Guide). From the Guide, petitioner then constructed lesson plans, among other things. Petitioner contended that when she was employed she did not know she would be required to prepare lesson plans for a program which differed from library media specialist lesson plans. In addition, petitioner prepared and issued progress reports, conducted tests, and prepared for "Back-to-School" night meetings with the students' parents engaged in the Character Education program. Petitioner stated that during her second year under her contract with the Board (2002-2003), her responsibilities did not differ from the prior school year.

Petitioner testified she taught the Character Education program sixty minutes per day for five days per week, for a total of 300 minutes. Petitioner asserted she devoted 400 minutes per week as the schools media specialist for a total of 700 minutes per week for both assignments. She stated that the Character Education program consumed 40 percent of her workweek.

Petitioner testified that Dr. Pamela Vaughan was appointed the principal of the Intermediate School for the 2003-2004 school year and that petitioner's schedule did not change from the previous two school years. However, for the 2004-2005 school year, the Character Education program had been discontinued and petitioner's teaching schedule changed. She asserted that she was not assigned solely to the media specialist position but, rather, Dr. Vaughan assigned petitioner to teach the PACE social studies program to the fourth and fifth grade students. The PACE program had nothing to do with petitioner's media specialist responsibilities. Petitioner stated that the PACE program was a part of the Gifted and Talented program where she taught the students on an alternating schedule. Schedule "A" met two times per week for 90 minutes with fourth grade students and 90 minutes per week with fifth grade students. Schedule "B" met 135 minutes per week with fourth grade students and 135 minutes per week with fifth grade students.

Petitioner testified that she was employed for the 2005-2006 school year as the library media specialist pursuant to the Employment Contract (P-3). Petitioner asserted that Dr. Vaughan assigned petitioner to the same PACE program responsibilities she held the prior school year, including the same amount of hours devoted to the program.

Petitioner asserted she began the 2005-2006 school year on or about September 1, 2005, and taught until September 15, 2005. Petitioner received a letter, dated September 22, 2005, from Dr. David H. Moyer, Superintendent of Schools, which stated, in pertinent part as follows:

> A recommendation will be given to the Ocean City Board of Education, at their September 28, 2005 meeting, to terminate your employment in the Ocean City School District effective as of September 29, 2005, due to your failure to meet Standard Certification requirements.
>
> A recommendation will also be made to terminate your employment as a Coach in the district effective as of September 29, 2005 (P-4).

Petitioner asserted she looked for other employment with other school districts; *e.g.,* the Blackhorse Pike and the Egg Harbor school districts, without success. She attended Drexel University full-time to complete the requirements for Library Media Specialist. She was subsequently employed in or about July 2006 and commenced work with the Ocean Township, Waretown Elementary School, as its Librarian Media Specialist.

On cross-examination, petitioner testified, among other things, that she worked in a team-teaching approach in the fourth and fifth grade PACE program. She worked together with Mr. Holder with the fourth grade students and with Mr. Porter with the fifth grade students. All three members of the team issued grades with respect to the student's progress. Petitioner also performed research as a part of the team.

Petitioner testified she understood the termination letter from Dr. Moyer (P-4) was due to the fact that she had not acquired full certification as a library media specialist. She opined that Dr. Moyer would not recommend to the Cape May County Superintendent of Schools for the issuance of an emergency media specialist certificate to petitioner.

Dr. Pamela Vaughan, the principal of the Intermediate School, replaced Dr. Alverson upon his retirement, and testified on behalf of the respondent Board. Vaughan asserted she observed and evaluated petitioner in petitioner's capacity as a media specialist on December 21, 2003 (P-1D). She also testified that beginning November 1, 2004, Vaughan assigned petitioner as a media specialist to the school's PACE program, which extended through June 2005.

Dr. Vaughan asserted she was familiar with the Character Education program, and that a teaching certificate was not required to teach the subject nor was Character Education within the Core Curriculum. She testified the school received a stipend of approximately $2,000 per year while the Character Education was performed. She understood that petitioner was a member of the Character Education committee, along with other teachers in the school district. Vaughan knew that petitioner had had prior

teaching experience and that petitioner was under an emergency certificate as a media specialist.

Dr. Vaughan referred to the document marked R-1 in evidence where, she asserted, the codes thereon represented the certificate the employee possessed during the period of her/his employment with the Board. Vaughan stated that the code for petitioner was that of a media specialist. Vaughan stated further, that petitioner was to complete the requirements for certification as a media specialist. Vaughan did not evaluate petitioner as an elementary classroom teacher.

On cross-examination, Vaughan admitted, among other things, that she had not been employed by the Board for the school years 2001-2002 or 2002-2003. Vaughan further admitted she had not discussed the Character Education program with Dr. Alverson.

Dr. Vaughan admitted that she was not aware that vice principal Thomas Campo and petitioner has taught together in another school district. Nor, she admitted, did she know that Campo advised Alverson with respect to the Character Education program. Vaughan asserted she made changes in the Character Education program subsequent to the start of the 2003-2004 school year; however, she contended, petitioner's duties did not change. Petitioner testified she was paid through September 29, 2005. Petitioner was assigned the extra curricular positions as coach of the junior high school girl's field hockey team, volleyball, and track and field sports. She stated she coached and was paid $4,000, the full amount for her field hockey assignment.

Dr. Vaughan was referred to document P-1 D, "Classroom Evaluation," dated December 21, 2003, Character Education-8th Grade where, she asserted, the evaluation had nothing to do with petitioner's teaching. She testified she did not know whether or not petitioner issued grades to the students but assumed that progress reports were results of the grades.

Dr. Vaughn stated that there was a change in the program in December 2003, to include the 8th grade in the Character Education program. Vaughan continued to assert that the state's money ceased after the 2004-2005 school year. Vaughan admitted she did not observe petitioner while she was involved in the PACE program. She contended that petitioner was not the teacher of record for the fourth and fifth grade PACE program. Nor, she asserted, did she believe that petitioner functioned in any way as an elementary teacher. She contended that petitioner did not teach any Social Studies classes and admitted that an individual was required to hold a teaching certificate to teach Social Studies.

Dr. Vaughan admitted she recommended petitioner for other employment and read her letter of recommendation addressed "TO WHOM IT MAY CONCERN," dated November 15, 2005, on the hearing record, as follows:

> I would like to recommend Ms. Jennifer Boyce for a teaching position in your school. As principal, I have observed Ms. Boyce teach character education, library skills, and Gifted and Talented. Her creativity infused into her lessons has given the students excitement and motivation in the classroom. Ms. Boyce also has strong knowledge of technology which she also uses in her instructional lesson.
>
> Besides contribution as a teacher, she has contributed to many student activities as coach and club advisor. As a professional, Ms. Boyce has always been a team player in whatever she was asked to complete.
>
> Again, I recommend Ms. Boyce for your teaching position. She will be a welcome faculty member to your staff. Please feel free to contact me for any further questions.
>
> Sincerely,
> (signed) Pamela A. Vaughan, Ed.D.
> Principal (P-5)

Walter Whittaker, Supervisor of Curriculum testified on behalf of the Board and stated the Character Education program was initiated for the 2000-2001 school year to provide opportunities to instruct students for good citizenship. The program afforded a small amount of funding, approximately $2,000 per year.

Mr. Whittaker stated that in the beginning, the Board employed a consultant and subsequently involved all the pupils and staff members of the Intermediate School. A good citizenship "trait" was identified for each month and a student was recognized who exemplified the trait; *e.g.,* "honesty." Whittaker worked with Alverson to implement the program at the Intermediate School, however, there became an issue of scheduling of the existing professional staff to carry out the recommended program.

Mr. Whittaker was aware that petitioner possessed a valid teaching certificate and also that petitioner was working under an emergency media specialist certificate. He was aware that petitioner had replaced the former librarian media specialist (Ms. Hartman) and that there were no fully certificated media specialists available to replace Ms. Hartman. He was also aware that the Character Education program did not require that an individual possess a valid teaching certificate.

Mr. Whittaker testified on cross-examination that the state funding for the Character Education program was open-ended and the money could be used in any fashion. After the state funding for the Character Education program ceased, the school district attempted to carry on and continue the program where the fourth and fifth grades students were instructed in the school's Media Center. He admitted he had never observed petitioner teaching the Character Education program. He further admitted that it made sense to employ an individual with a teaching certificate to instruct the pupils in the program.

Mr. Whittaker stated that subsequent to petitioner's termination, Mr. Robert Grey, the school district's Audio-Visual Specialist and certificated media specialist, replaced petitioner on a temporary basis. A fully certificated library media specialist was employed by the Board in January 2006 to replace petitioner.

Donald Dearborn, the Board's Superintendent of Schools in 2005, testified on behalf of the respondent asserting, among other things, that he knew petitioner was recommended to the media specialist position. Dearborn assumed petitioner possessed

a valid elementary teaching certificate, however, he never saw it. He was aware that petitioner had taught in other school districts.

Superintendent Dearborn testified that in the 2000-2001 school year, an application for the Character Education program was executed. The Character Education program was not a part of the Core Curriculum, nor was a teaching certificate required to teach the program. Dearborn asserted that Mr. Whittaker selected petitioner to teach the program and assigned as the school's media specialist. Dearborn stated that the media specialist provides support for all phases of the educational endeavor.

FINDINGS OF FACT

Based upon the testimony and documents in evidence offered at the hearing, and having given fair weight thereto, and having assessed the credibility of the witnesses, **I FIND** the following **FACTS:**

1. Prior to the 2001-2002 school year, the Board advertised for the position of librarian media specialist for its Intermediate School.

2. Petitioner, the holder of a valid elementary teaching certificate issued by the New Jersey Board of Examiners, applied for the position of library media specialist.

3. Petitioner was interviewed for the position by Thomas Campo, the principal of the Intermediate School, and the Superintendent of Schools, Dr. Lyle Alverson.

4. Both petitioner and Thomas Campo had previously been employed by the Atlantic City Public Schools, therefore, Campo knew of petitioner's reputation as a classroom teacher.

5. Petitioner was recommended by Alverson to be employed as the library media specialist at its Intermediate School and the Board accepted his recommendation.

6. Superintendent Alverson recommended to the Cape May County Superintendent of Schools that an emergency library media specialist certificate issue. The Cape May County Superintendent approved petitioner's emergency library media specialists certificate.

7. Petitioner commenced her employment with the Board on or about October 15, 2001.

8. Pursuant to Governor James McGreevey's issuance of Executive Order #9, The New Jersey Character Education Partnership (NJCEP) was created.

9. The hearing record discloses that a valid New Jersey teacher certificate was not required to teach the Character Education program, nor was it considered a part of the Board's Core Curriculum.

10. Notwithstanding, Alverson determined that the instructor of the Character Education program should possess a valid New Jersey teaching certificate.

11. Dr. Alverson assigned petitioner to instruct the Intermediate School students in the Character Education program due to her holding a valid New Jersey elementary teacher certificate.

12. Petitioner served as the school's library media specialist under her emergency certificate, in addition to teaching the Character Education classes.

13. Under the Character Education program, petitioner prepared lesson plans, prepared tests, submitted student grades, prepared and sent progress reports to parents and, presented the program to parents at the annual "Back-to-School" night.

14. Petitioner devoted 300 minutes per week with the fourth and fifth grade Character Education classes.

15. Petitioner was granted a subsequent contract for the 2002-2003 school year, under her emergency certificate library media specialists and also instructed the Intermediate School elementary students in the Character Education program.

16. In or about the 2004-2005 school year, the state financial subsidy for the Character Education program ceased.

17. Beginning with the 2004-2005 school year, and upon the retirement of Dr. Alverson, Dr. Pamela Vaughan became the principal of the Intermediate School.

18. Dr. Vaughan assigned petitioner to the school's PACE program for gifted and talented students in the fourth and fifth grade social studies curriculum.

19. On or about May 16, 2005, petitioner was awarded a contract for the 2005-2006 school year under her emergency library media specialist certificate, to begin September 1, 2005.

20. At its regular monthly meeting held on July 20, 2005, the "Board officially approved renewal of [petitioner's] emergency certificate for the 2005-06 school year. (Attachment "A" to petitioner's Petition of Appeal)

21. Petitioner began the 2005-2006 school year under the agreed upon contract.

22. In addition to petitioner's assignment as the library media specialist, petitioner coached the girl's field hockey, volleyball and track and field sports.

23. Petitioner was subject to classroom observations by her supervisors on November 13, 2002, February 11, 2003, November 3, 2003, December 21, 2003, January 13, 2005, and March 23, 2005 (P-1 A through F and P-1 F and G). All observations were conducted under petitioner's position as a librarian/media specialist.

24. Dr. Alverson executed an annual teacher evaluation of petitioner for the year 2002-2003, pursuant to her position as a librarian (P-1 E).

25. On September 22, 2005, Dr. David Moyer, Superintendent of Ocean City Schools, addressed a letter to petitioner advising petitioner that the Board terminated her employment at its regular September 28, 2005, meeting because petitioner had failed to meet standard certification requirements (P-4).

26. Seven days prior to September 22, 2005, letter, Dr. Vaughan told petitioner she was not to report for duty for the "Back to School" night.

27. Petitioner's termination was effective November 15, 2005. Petitioner was paid, in full, in the position as coach of the girl's field hockey team.

LEGAL ARGUMENTS OF THE PARTIES[1]

PETITIONER'S POSITION

BY ALL APPEARANCES, AND FOR ALL INTENTS AND PURPOSES, JENNIFER BOYCE WAS USED AS AN ELEMENTARY CERTIFIED TEACHER ON A SUFFICIENT PART-TIME BASIS THAT SHE ACQUIRED TENURE ON OCTOBER 16, 2004.

The Supreme Court in Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982), clearly ruled that while a Board of Education may call and characterize a part-time teacher as a supplemental teacher and, therefore, not subject to acquiring tenure,

[1] Legal arguments of the parties are reproduced from the submissions of counsel.

the Board's designation does not control. The tenure act, found at N.J.S.A. 18A:28-1 to 18, specifically defines the conditions by which teachers are entitled to secure tenure. As was said in Spiewak, supra., referring to the tenure statute,

> The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms.
>
> (at page 72)

And, further, on page 73, the Court specifically stated while the tenure act was enacted in 1909,

> . . .its purpose has not changed. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiation, . . . It protects teachers from dismissal for "unfounded, flimsy or political reasons."

Further, in overruling certain prior decisions such as Schultz v. State Board of Education, 132 N.J.L. 345; Biancardi v. Waldwick, at 139 N.J. Super. 175; and Kapella v. Camden City Vo Tech, the Court stated:

> To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong.
>
> (page 80)

Therefore, the question in the case at bar is not what the employment contract says as to what designation Jennifer Boyce is employed, but what function she was directed to perform as those functions apply to the appropriate certificate. This case is all about the objective appropriate characterization of how a district uses a teacher's learning and skills which she was taught while acquiring her certification. Dr. Alverson testified that a major consideration in choosing Jennifer Boyce to infuse the character education curriculum into his intermediate school was that she had an elementary certification which would allow her to use her skills and training in instruct fourth and fifth graders. Dr. Alverson's successor, Dr. Vaughan, specifically chose Jennifer Boyce to teach PACE social studies to gifted and talented elementary education students.

Jennifer Boyce taught elementary education in the same way she taught elementary education in all of her prior districts. She developed lesson plans, she developed testing, she monitored student's progression and sent home progress reports, she graded students, she was there for back to school night and she did everything that a certified elementary teacher does when she teaches elementary education. To say that she was functioning only as a media specialist is a Board subjective view and not an objective application of her assigned duties. She functioned as a part-time elementary teacher and any other characterization is a mischaracterization.

In part, this case concerns N.J.S.A. 18A:28-5, which provides:

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three

> academic years within a period of any four consecutive academic years.

"Teaching staff member" is defined at N.J.S.A. 18A:1-1, as follows:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.

By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.

The focus here should be upon the words on which the board of education relies; a professional staff member shall hold an appropriate certificate commensurate to his/her assigned employment. Certainly, what the Board through its agents, Alverson and Vaughan, clearly did was to rely upon Ms. Boyce's elementary certificate which was appropriate to the responsibilities they assigned to her employment. The duties define objectively what a teaching staff member is in fact. Since the Board relied upon that elementary certificate for her objective employment duties, she obtained tenure because (1) she worked in the position for which a teaching certificate commensurate with her duties required; (2) she did hold the appropriate elementary certificate; and (3) she served the requisite period of time. She is, therefore, entitled to tenure under her elementary certificate because the duties she was assigned as a teaching staff member were derived for that elementary certificate.

Objective performance of assigned duties overrides the subjective characterization by the Board of what functions an employee performs. See Dudzinski v. Borough of Franklin, 97 N.J.A.R.2d (EDU) 531.

The Board disputed in the Dudzinski matter that he did not acquire tenure as a guidance counselor since he never worked full-time in that position and, therefore, could not claim a full-time guidance position whereby he was ultimately demoted. The administrative law judge, in the decision which was ultimately adopted by the Commissioner, clearly agreed that even though he only worked part-time in guidance, there was enough factual basis to show that he performed the functions of a guidance counselor whereby the court determined that he had acquired tenure even at the Board's denial.

PETITIONER'S CONCLUSION

After Jennifer Boyce was hired as an emergency media specialist, the principal of the intermediate school became faced with the challenge of how to infuse the character education curriculum into his school. He testified that he chose Jennifer Boyce, relying heavily on the fact that she had already obtained and was an elementary certified teacher. While he may not have hired petitioner for that reason, his focus turned and her employment became based upon her learning, knowledge and experience acquired under her elementary certificate for the purpose of teaching fourth and fifth grade character education. Objectively, and for all intents and purposes, she was an elementary teacher when it came to forty-two percent of her teaching load in the intermediate school for almost three years for October 15th of 2001 through June 30th of 2003. Following, the new principal, Dr Vaughan, assigned her to teach elementary students in the PACE social studies gifted and talented curriculum. Again, objectively, her employment was forty-five percent based upon elementary education certificated principles. It is an admitted fact by the Board that she taught in those capacities for the requisite time, *e.g.,* three years and one day, to become tenured; their position is and has always been that she did not teach as an elementary teacher. To believe the Board's position, you must put form over substance and you must allow the Board to

engage in the principles of subjective characterization for their own contract benefit. Jennifer Boyce was clearly and objectively used in substance as an elementary certificated employee and, as such, should have been allowed upon her termination, to use her seniority rights in order to teach elementary education in the Ocean City Schools. Since she was not allowed to use her tenure rights, she should be compensated in monetary damages for her loss and reinstated as a tenured teacher.

In the alternative, and pursuant to Count Two of the Complaint, if for some reason the Court determines that she is not tenured and entitled to monetary damages and reinstatement, she should certainly receive sixty days compensation for the breach of contract for lack of sixty days notice.

THE RESPONDENT BOARD'S POSITION

1. JENNIFER BOYCE DID NOT ACQUIRE TENURE AS A RESULT OF HER TEACHING CHARACTER EDUCATION

A. THERE IS NO CERTIFICATION REQUIRED TO TEACH CHARACTER EDUCATIONAND, THEREFORE, TENURE CANNOT BE ACQUIRED TEACHING CHARACTER EDUCATION.

The Supreme Court in Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982) established the criteria necessary to claim tenure: (a) work in a position for which a certificate is required; (b) hold such certificate; and (c) work the required number of years in the position.

Under the Spiewak criteria one cannot acquire tenure for teaching character education because a certificate is not required to teach character education. Because Dr. Alverson assigned Ms. Boyce to teach character education and because, among other considerations, he knew she had a background in elementary education, has no significance as to whether or not tenure can be acquired as a result of teaching character education.

The Licensing Code at N.J.A.C. 6A:9, lists all authorized certificates and does not reference any certificate required to teach character education. Character education is simply the teaching of honesty, trust, etc., it is not a core curriculum content standard, but is embedded in all that good teaching does. "Guidance for School Districts in Fostering Character Education" encourages media services to incorporate character education in their work. (See Exhibit B).

Ms. Boyce taught character education during the 2001-2002, 2002-2003 and 2003-2004 school years while she was employed as a media specialist under her emergency certificate. Character education can be taught by a media specialist. You do not need an elementary certificate to teach character education. The petitioner, in her brief, cites Dudzinski, supra. However, there is one significant distinction: a certificate is required to work as a guidance counselor, whereas no certificate is required to teach character education. Were an elementary endorsement required to teach character education, the Dudzinski case would have relevance. The simple fact of the matter is that a media specialist is authorized to teach character education, whereas someone not holding the proper certificate cannot act as a guidance counselor.

B. SERVICE AS A LONG-TERM SUBSTITUTE DOES NOT COUNT TOWARD THE ACQUISITION OF TENURE.

Jennifer Boyce was hired as a long-term substitute for the 2001-2002 school year, starting on October 15, 2001, due to the Board approving a leave of absence for the Intermediate School media specialist. During the summer of 2002 the media specialist on leave advised the Board she would be retiring on September 1, 2002 and, therefore, would not be returning in September 2002.

Jennifer Boyce's service as a long-term substitute during the 2001-2002 school year, does not count toward the acquisition of tenure. See Lustberg v. Board of Education of the Borough of Tenafly, Bergen County, EDU 7080-03 (February 10, 2000) adopted, Comm'r. (April 12, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. In that case, the Board approved a tenured third grade teacher's child-rearing leave for

the 1999-2000 school year. Sylvia Lustberg was hired as a long-term substitute to teach third grade, during the 1999-2000 school year. On February 23, 2000, the Board was informed by the third grade teacher on leave she would not return to her teaching position in September 2000.

Subsequently, Sylvia Lustberg was hired as the third grade teacher. She remained so employed for the 2001-2002 and 2002-2003 school years. Prior to the 2003-2004 school year, she was notified that her employment would not be renewed. Lustberg then filed a petition challenging her non-renewal and alleged she had acquired tenure.

The administrative law judge (ALJ) stated that, under the facts presented, the only way Lustberg could have acquired tenure is if her service during the 1999-2000 school year is counted. Citing Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982), the ALJ explained that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who work the required number of years, are eligible for tenure unless they fall within an exception in N.J.S.A. 18A:28-5 or N.J.S.A. 18A:16-1.

N.J.S.A. 18A:16-1 provides that a person hired by the Board to act in the place of an employee during his/her absence cannot acquire tenure. The ALJ concluded that Lustberg's service as a long-term substitute did not count towards acquisition of tenure.

The Commissioner adopted the ALJ's findings and conclusion and ordered the petition dismissed with prejudice. The Commissioner found that Lustberg's service as a long-term substitute did not count toward tenure. Citing Lammers v. Board of Educ. of the Borough of Point Pleasant, 134 N.J. 264 (1993), where the Commissioner opined that entitlement to a position arises when a vacancy exists, and a leave of absence does not create a vacancy or temporary vacancy.

A vacancy in the present case did not arise until the media specialist on leave notified the Board that she would not be returning. Assuming Jennifer Boyce taught

Character Education under her elementary certificate and further assuming that the teaching of Character Education required a certificate, she would still not be eligible to tenure because her service during the 2001-2002 school year would not count towards the acquisition of tenure. She only taught character education for three years, which include the 2001-2002 school year, when she was initially employed as a long-term substitute.

N.J.S.A. 18A:28-5 requires that a teacher teach for three consecutive academic years, together with employment at the beginning of the next succeeding academic year. Therefore, Jennifer Boyce did not obtain tenure on October 16, 2004, as set forth in Petitioner's Brief. The earliest date she could have obtained tenure was October 16, 2005, and she was no longer working by that date.

2. JENNIFER BOYCE COULD NOT OBTAIN TENURE AS A MEDIA SPECIALIST BECAUSE SHE WAS NEVER ISSUED A PERMANENT EDUCATIONAL CERTIFICATE AS A MEDIA SPECIALIST.

Tenure cannot accrue, regardless of the length or type of service, unless an individual has been issued a permanent educational certificate, also called a standard certificate. N.J.A.C. 6:11-41. Ms Boyce failed to demonstrate she had completed the required course work as a library media specialist leading to a standard certificate. N.J.A.C. 6A:9-6.3, provides that "renewal [of an emergency certificate] is predicated on demonstration of progress towards successful completion of course work. . .required for issuance of a . . .standard certificate."

Ms. Boyce, in addition to teaching character education during the 2001-2002, 2002-2003 and 2003-2004 school years, taught research/library skills. The teaching of research skills is a function of a media specialist pursuant to N.J.A.C. 6A:9-13.14.

Starting in November of the 2004-2005 school year, and only for the remainder of that school year, Ms. Boyce taught research based projects and activities designed by the PACE teacher. Dr. Vaughan testified that Ms. Boyce was not the teacher of

record. PACE teachers would assign work and Ms. Boyce would assist the students in the library with that particular assignment.

All of the teaching was done pursuant to her job as a media specialist, for which was employed pursuant to her emergency certificate as media specialist. Part of the job of a media specialist is to teach research/library skills and to help students with research based projects, which is exactly what Ms. Boyce taught. However, Ms. Boyce never obtained a standard certificate as a media specialist and, therefore, is not eligible for tenure as a media specialist regardless of the number of years in that position.

THE RESPONDENT BOARD'S CONCLUSION

Ms. Boyce never taught under her elementary certificate. She was not hired as an elementary school teacher and never taught as an elementary school teacher. She was hired as a media specialist. She never provided the district with a copy of her elementary certificate for her personnel file because she was not hired as an elementary teacher. The district never reported her to the Department of Education in its "Report of Certified Staff Status" as anything but a media specialist.

Based on the foregoing, the petitioner did not obtain tenure either as an elementary teacher or as a media specialist.

PETITIONER'S REBUTTAL

It is admitted that Jennifer Boyce became employed on October 15, 2001, under an emergency certificate as a media specialist, with the administration knowing that she had an elementary education certificate. She taught from October 15, 2001, until the end of that school year which was June 2002; again she taught from 2002 through 2003 school year; 2003 through 2004 school year; and admittedly, in the 2004-2005 school year which was her fourth year of teaching she taught PACE Social Studies. The Board now argues that she was hired originally as a substitute, and therefore, it was not until the district knew that the absent media specialist was not going to return does the

time clock begin ticking toward tenure. There was never any testimony by any witness presented by the Board regarding who the absentee media specialist was, when the actual resignation occurred, and how by some creative brief writing, there is an attempt to create a scenario whereby Jennifer Boyce's actual teaching time in the 2001-2002 school year should not be counted toward her tenure clocking.

The Board waived that argument in opening statements which can be discerned from the record, but more telling, is the reason the Board waived that argument as follows:

As was stated on the record, the Ocean City Collective Bargaining Agreement specifically confers upon substitutes after teaching for 90 consecutive days, all benefits according to teachers. (Exhibit "A") This language in Article 21 of the Collective Bargaining Agreement was the exact reason why the Board abandoned any argument as to the substitute status of petitioner since it was well known to all parties that after Jennifer Boyce taught 90 days, she retroactively received all the benefits of a teacher which certainly includes the counting of her time employed toward her clocking for the receipt of tenure. Any case law is going to be superseded by the language of the Collective Bargaining Agreement and its application to the petitioner herein.

Jennifer Boyce taught in the Ocean City System for more than three years and one day and any argument which attempts to disqualify her because of the length of time which she taught is firstly waived because of the posture and record at trial, and secondly, not applicable as it relates to case law since it is superseded by contract which was the exact reason that the Board did not and could not make the substitute argument. I find the argument now an attempt to create within the law what is surely called a "red herring."

OTHER REPLIES

The Board seems to argue that because anyone could have taught character education, the actual facts as related by Dr. Alverson are of no moment. I am not going

to repeat the facts that were in my original Brief, specifically on page 3., only to say that it was clear that when Dr. Alverson was faced with the type and method of infusing character education into the intermediate school, he chose Jennifer Boyce in great part because she did possess an elementary certification and could and did instruct fourth and fifth graders in a program of merit. Therefore, when the Board agues in their Brief on page 3, "you do not need an elementary certificate to teach character education," it is respectfully suggested that the Board's argument misses the mark, since what was or was not needed in superseded by what was in fact done. The Board continues in that same argument in trying to distinguish the Dudzinski v. Board of Education of the Borough of Franklin, Sussex County, supra, since they argue the distinguishing fact with the case at bar is that Dudzinski had a certificate. Again, arguing from page 4. of Respondent's Brief, ". . .whereas no certificate is required to teach character education." The Board of Education in Dudzinski assigned him responsibilities of a guidance counselor and yet would not recognize that he was acting as a guidance counselor and of course, the Court looking at the totality of the circumstances ruled that since the Board assigned Dudzinski responsibilities commensurate with his certificate, he should be recognized as performing duties thereunder with all the privileges related thereto. Jennifer Boyce is also looked upon by the Board as not performing any duties as an elementary-certified teacher and therefore, the Board is not going to recognize that she has acquired any rights as a result of that certificate. This Court must look at Jennifer Boyce as did the Dudzinski Court and certainly realize that she performed the duties of an elementary certificated individual and therefore, she is entitled to all the emoluments of her effort.

The Board attempts to water down and diminish the amount of time Jennifer Boyce spent teaching character education by comparing a 35-hour work week with what petitioner characterized as student contact time. Certainly, the percentages are correct in regard to student contact time, however, the real key is that the ruling is Spiewak is that part-time service does not count toward tenure.

The Board concludes the Jennifer Boyce should not be viewed as teaching under her elementary certificate because, "she never provided the district with a copy of

her elementary certificate. . ." and that the district did not report her to the Department of Education as a elementary school teacher, but a media specialist. These are the subjective views of the Board only since objectively we know that Dr. Alverson knew and relied upon her elementary certification and I am further sure that the Board in Dudzinski did not report him to the Department of Education as being a guidance counselor.

Objectively, Jennifer Boyce was used as an elementary teacher, she taught for the prerequisite amount of time and with the prerequisite efficiency and dedication to become tenured and I argue the Court should so find.

CONCLUSIONS

The case of Spiewak, supra., grew out of the case of Point Pleasant Beach Teacher' Ass'n v.Callam, 173 N.J. Super. 11, certif. den., 84 N.J. 469 (1980). In Point Pleasant Beach, Title I, supplemental teachers appealed to the Commissioner of Education subsequent to the Board of Education having refused to grant the teachers with tenure after they each had been employed by the Board for the requisite period of time under the provisions of N.J.S.A. 18A:28-5. The Commissioner held for the Title I teachers; however, the State Board of Education reversed the Commissioner contending that the Title I teachers were funded by Title I federal funds, 20 U.S.C.A. §§ 236 to 241.1. The Appellate Division of Superior Court affirmed the State Board's decision and certification to the New Jersey Supreme Court was denied at 84 N.J. 469 (1980). Consequently, the Point Pleasant Beach holding became the law regarding supplemental teachers in the State of New Jersey.

Subsequently, Rita Spiewak, among other supplemental teaching staff members represented by other boards of education, appealed their denial of tenure, which denial was based upon the Point Pleasant Beach. Spiewak and the other litigants were denied tenure based upon the Point Pleasant Beach, decision 180 N.J. 312 (1981). In the opening paragraph of the Spiewak decision, the Supreme Court overturned Point Pleasant Beach, 90 N.J. 63 (1982).

The Court in Spiewak determined the statute, at N.J.S.A. 18A:28-5, controlled. The Court stated, among other things, that the Tenure Act was originally enacted in 1909, pursuant to L. 1909, c. 243. It observed that the Act had undergone a series of amendments; however, its purposes had not changed. It observed further, that the statute prevented school boards from abusing their superior bargaining power over teachers in contract negotiations citing, Trenton Bd. of Ed. v. State Bd. of Ed.,135 N.J.L. 611, 614 (S. Ct. 1941) and, that it protects teachers from dismissal for "unfounded, flimsy, or political reasons." Zimmerman v. Newark Bd. of Ed., 38 N.J. at 71.

The Court observed that by the express terms of N.J.S.A. 18A:28-5, an employee of a board of education is entitled to tenure if he/she (1) works in a position for which a teaching certificate is required; (2) holds the appropriate certificate; and (3) has served the requisite period of time. The Court further held that the only statutory exception is found at N.J.S.A. 18A:16-1.1, which denies tenure rights to substitute teachers and provides that:

> . . .[the] board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee... [However,] no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

The Spiewak Court observed that the tenure statute makes it a mandatory term and condition of employment. The Act, therefore, supersedes contractual terms, citing, among other cases, In the Matter of Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 893, 403-04 (1982); State v. State Supervisory Employees Ass'n., 78 N.J. 54, 82 n.7 (1978). The Court observed that it was well settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by statute. The Court specifically stated that the tenure provisions of N.J.S.A. 18A:28-5 constitutes a mandatory contractual terms that may not be waived or bargained away.

In the instant matter, petitioner was employed to replace the library/media specialist in the Board's Intermediate School. Petitioner did not have a standard certificate issued by the Board of Examiners to employment as a library/media specialist. Rather, petitioner was the holder of an emergency library/media specialist certificate issued by the Cape May County Superintendent of Schools. Petitioner did possess a valid elementary teacher certificate; however, she did not present the certificate to the Board during the period of her employment. The Cape May County Superintendent did not renew petitioner's emergency library/media specialist certificate for the 2005-2006 school year. The Board terminated petitioner's employment effective September 29, 2005, due to petitioner's failure to meet the Standard Certification requirements.

There is no doubt that petitioner participated in the Board's Character Education initiative. The herein record demonstrates that a valid teaching certificate was not necessary or required to carry out the functions of the Character Education program. The former Superintendent of Schools testified, however, that he assigned petitioner to the program because she had a valid elementary teacher certificate and that she was an experienced elementary teacher. Petitioner conducted the program as a classroom activity by providing tests and periodic progress reports to the parents of the fourth and fifth grade students enrolled in the program. The Character Education program was similar to an extra-curricular activity; e.g. coaching athletic programs, drama coach, Spanish club, and chess club, among other things. Tenure does not attach to extra-curricular programs, even though the programs may be conducted during the school day.

In administrative proceedings, the burden of persuasion lies with the petitioner and is determined by the standard of the preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number if witnesses,

but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnulo v. Bonnet, 16 N.J. 546, 554-55 (1954).

I CONCLUDE that the testimony of Dr. Alverson and petitioner, Jennifer Boyce to be credible. There is no doubt that Dr. Alverson wanted a certificated teaching staff member to be in charge of its adopted Character Education initiative, notwithstanding, that a valid teaching certificate was not required. Dr. Alverson was faced with a scheduling problem due to the other teaching staff members established schedules of the Intermediate School. Consequently, Dr. Alverson selected petitioner to perform the duties and tasks of the Character Education program.

It is unfortunate, moreover, that petitioner was employed to replace a teaching staff member (library/media specialist) who was granted a leave of absence by the Board and, therefore, her time spent as the replacement cannot be counted toward tenure. N.J.S.A. 18A:16-1.1. To the extent that petitioner participated with the school's PACE program, it appears petitioner acted more as a reference point in her capacity as the library/media specialist, rather than having complete control of the socials studies classes. It is not disputed petitioner participated with the PACE program, however, there is no evidence that she was the sole teaching staff member in charge.

I CONCLUDE, therefore, that petitioner, Jennifer Boyce, has not acquired tenure status with the Board by virtue of her employment under an emergency library/media specialist certificate as a replacement for a teaching staff member awarded a leave of absence by the Board, and, accordingly, no seniority attaches. N.J.S.A. 18A:16-1.1; Spiewak, supra.

I CONCLUDE, that petitioner presented insufficient evidence to demonstrate that she was, in fact, the teacher of record for the Board's PACE social studies program. **I FURTHER CONCLUDE** that petitioner's participation with the PACE social studies program was performed under her emergency library/media specialist certificate.

I CONCLUDE, therefore, that petitioner, Jennifer Boyce was not improperly dismissed by the Board.

With respect to the issue of the contractual sixty day clause, **I CONCLUDE** that the Board violated the terms of the agreed upon contract conditions and is responsible to award petitioner the amount due and owing under the contract.

In all other respects, **I CONCLUDE** that the herein Petition of Appeal be **DISMISSED.**

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

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

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

Lillard E. Law

April 11, 2007
DATE

LILLARD E. LAW, ALJ, T/A

Date Received at Agency: 4-11-07

Mailed to Parties:

APR 16 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES

For Petitioner:

Dr. Lyle Alverson
Jennifer Mary Boyce

For Respondent:

Dr. Pamela Vaughan
Walter Whittaker
Donald Dearborn

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1A Classroom Observation – November 13, 2002
P-1B Classroom Observation – February 11, 2003
P-1C Classroom Observation – November 3, 2003
P-1D Classroom Observation – December 21, 2003
P-1E Teacher Evaluation – Annual Report – Librarian – Year: 2002-2003
P-1F Classroom Observation – January 13, 2005
P-1G Classroom Observation – March 23, 2005
P-2 Employment Contract-October 15, 2001 (Letter attached)
P-3 Employment Contract-September 1, 2005 (Letter attached)
P-4 Letter, September 22, 2005, to Jennifer Boyce from David H. Moyer, Ed.D.
P-5 Letter, November 15, 2005, To Whom It May Concern

For Respondent:

R-1 Report of Certificated Staff as of October 15, 2002

R-2 Letter, December 21, 2002 addressed to Jennifer Boyce from Lyle G. Alverson, Ed.D.

R-3 Letter, October 29, 2004, Dear Parents of 4th and 5th Creative PACE Students

174-07

OAL DKT. NO. EDU 10994-06
AGENCY DKT. NO. 349-9/06

K.J., on behalf of minor child, Y.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon such review, the Commissioner observes that the Board Secretary has signed the Stipulation of Settlement on behalf of the Northern Valley Regional High School District Board of Education. In that neither the record nor the stipulation includes a copy of the Board's resolution approving the settlement and designating this individual to sign an agreement on the Board's behalf, nor, in the alternative, is the agreement signed by the Board attorney – who is the Board's duly authorized representative in this litigation – the Commissioner cannot approve the Stipulation of Settlement in its present form.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement or supplementation of the record consistent with the concerns set forth above. If the parties are unwilling or unable to effectuate such modification, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/10/07
Date of Mailing: 5/10/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10994-06

AGENCY DKT. NO. 349-9/06

K.J. O/B/O Y.W.,

Petitioner,

v.

BOARD OF EDUCATION OF NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

Joseph A. Raia, Esq., for petitioner

James L. Plosia, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attys.)

Record Closed: March 15, 2007 Decided: March 26, 2007

BEFORE **Joseph A. Paone**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 9, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on December 12, 2006. Prior to the hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference. Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

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

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

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

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

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

March 26, 2007
DATE

JOSEPH A. PAONE, ALJ

lr

Date Received at Agency: 3-30-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 2 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
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(908) 580-1776
Attorneys for Respondent
Northern Valley Regional Board of Education

K.J. o/b/o Y.W.,	:	STATE OF NEW JERSEY
	:	COMMISSIONER OF EDUCATION
Petitioners,	:	
	:	
v.	:	OAL Docket No.: EDU 10994-2006N
	:	Agency Ref. No.: 349-9/06
NORTHERN VALLEY REGIONAL BOARD OF EDUCATION,	:	
	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

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STATE OF N.J.
OFFICE OF ADMIN. LAW

The parties in the above-captioned matter, having agreed to resolve all issues in dispute between them in this matter, hereby agree to the settlement of this case pursuant to the following terms:

1. The Petitioners hereby dismiss their Petition of Appeal in this matter with prejudice.

2. The parties agree that, effective January 2, 2007, Y.W.'s parents shall be legal residents with the environs of the Northern Valley school district. As such, Y.W. will be entitled to a tuition-free education in the school district so long as she remains domiciled in the school district.

3. In full settlement of the district's claim for tuition against the Petitioners, the sum of $2,426.00 shall be paid by Petitioners to the Northern Valley Regional School District. This payment shall be made in the form of a check, made payable to "Northern Valley

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Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
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(908) 580-1776

Regional High School Board of Education", and shall be forwarded, prior to the submission of this Stipulation to OAL, to the Board's attorney, who shall hold the check in escrow pending the acceptance of this Stipulation as a Final Decision by the New Jersey Commissioner of Education.

4. The parties hereby release and waive against each other any claims, lawsuits, or causes of action they have or may have arising out of the facts which formed the basis of the Petition of Appeal and the Board's claim for tuition against Petitioners.

5. The parties hereby agree that they have entered into this Settlement voluntarily and willingly, and without being under any coercion or duress. They further aver that they had the opportunity to consult with respective counsel concerning the terms of this Settlement, and they acknowledge by their signatures below that they are satisfied with the representation provided to them by their respective attorneys.

KYUNG JEESONG

Dated:

HUI WANG

왕 희찬

Dated:

KYANG WANG

Dated:

NORTHERN VALLEY BOE

BY: Raymond M. Jalus

Dated: 3/14/07

Law Offices
Apruzzese, McDermott,
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#176-07

IN THE MATTER OF THE TENURE :

HEARING OF CARL A. HILL, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF IRVINGTON, ESSEX COUNTY. :

:

SYNOPSIS

The petitioning school district certified multiple tenure charges of unbecoming conduct and endangering the welfare of students against respondent -- a tenured physical education teacher -- for conduct which included, *inter alia*: insubordination toward his supervisors; habitual lateness and absence from work; use of disrespectful and unprofessional language and vulgar gestures towards colleagues; and use of inappropriate language toward a student.

The ALJ found that: petitioner's witnesses were straightforward and credible; the respondent engaged in various incidents of insubordination during the 2004-2005 school year; petitioner's behavior constituted conduct unbecoming a teacher and unprofessional conduct, and fostered a climate of disrespect for his colleagues. The ALJ concluded that the appropriate penalty is removal of the respondent from his tenured teaching position.

Upon careful and independent review of the record, including transcripts of five days of hearing, the Commissioner concurred with the ALJ's findings and conclusion that the charges against respondent have been proven by a preponderance of credible evidence, and that respondent's termination from tenured employment is warranted. The Initial Decision of the OAL was adopted as the final decision in this matter, and the Commissioner directed that respondent be dismissed from employment with the Irvington School District as of the date of this decision. A copy of this decision has been transmitted to the State Board of Examiners for action as that body deems appropriate.

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

May 15, 2007

OAL DKT. NO. EDU 5979-06
AGENCY DKT NO. 154-4/06

IN THE MATTER OF THE TENURE	:	
HEARING OF CARL A. HILL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein. The Board did not file reply exceptions.

Respondent's exceptions mirror his post hearing brief advanced below; it is determined that the arguments raised therein were either satisfactorily addressed or belied by the Administrative Law Judge's (ALJ) decision and, therefore, these will not be revisited here.

Upon careful and independent review of the record of this matter, which includes transcripts of the five days of hearing at the OAL,[1] the Commissioner concurs with the ALJ's findings and her conclusion that the Board has proven its charges against respondent by a preponderance of the credible evidence and that termination from his employment is warranted. In so determining, the Commissioner has given full consideration to all evidentiary proofs which comprise the record and recognition to the

[1] Hearing was held on August 14, 15, 21, 28 and 29, 2006.

particular importance of the ALJ's assessment of the credibility of the witnesses. Such being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based upon their testimony – the standard governing the Commissioner's review is clear and unequivocal:

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

The Commissioner's considered review of the entire record before her provides no basis whatsoever for alteration of the ALJ's determinations.

With respect to the appropriate penalty, the Commissioner is mindful, in adopting the conclusion of the ALJ, that the consequences for respondent are serious. "Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior reccurring." *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County,* decided by the Commissioner October 14, 1997, slip. op. at 32, *citing In re Hearing of Ostergren, Franklin School District,* 1966 *S.L.D.* 185, 187; *In re Hearing of Kittell, Little Silver School District,* 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967). In the instant matter, the Commissioner can find scant evidence on this record that would otherwise militate against the ALJ's recommended penalty of termination. The

Board's charges establish that petitioner's chronic lateness without notice, insubordinate attitude and conduct toward his supervisors, use of disrespectful language and vulgar gestures toward fellow teaching staff members, and use of inappropriate language toward a student occurred over the last two years of respondent's relatively short service with the Board.[2] Particularly unsettling here is respondent's failure to take responsibility for *any* problematic behavior on his part, let alone be repentant for it. Respondent's response to the unbecoming conduct charges ranged from complete denials of the behavior alleged by the Board and blaming the New Jersey Transit system for his habitual lateness, to rationalizations based on the bad behavior or ill-motives *of others.* Neither does the Commissioner find that the record before her provides any promise that respondent will, in the future, eliminate his chronic lateness without notice,[3] improve his interpersonal relationships with fellow teachers and students or yield to the authority of the administration without continued conflict.

The Commissioner recognizes that "teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Twp. of Cherry Hill*, 1980 *S.L.D.* 987 at 1003. As such, some actions are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as

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[2] Respondent testified that he has worked for the Irvington Board of Education for six years. (Hearing Transcript, 8/28/06, p. 38)

[3] The impact of this particular conduct on students is well recognized:

> [f]requent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling.
> (*In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County*, 1977 *S.L.D.* 403, 414)

to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid.*) Based on the total record before her, the Commissioner finds that such is the case in this matter and the ALJ's recommended penalty of removal is appropriate.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated therein. The Commissioner hereby directs that Carl A. Hill be dismissed from his tenured employment with the Irvington School District as of the date of this decision. A copy of this decision shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.[4]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/07

Date of Mailing: 5/15/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05979-06
AGENCY DKT. NO. 154-4/06

IN THE MATTER OF THE TENURE HEARING OF CARL A. HILL, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY

Ronald C. Hunt, Esq., for petitioner School District of the Township of Irvington, Essex County (Hunt, Hamlin & Ridley, attorneys)

Gregory T. Syrek, Esq., for respondent Carl A. Hill (Bucceri & Pincus, attorneys)

Record Closed: February 13, 2007 Decided: April 2, 2007

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

STATEMENT OF THE CASE

Petitioner School District of the Township of Irvington, Essex County, (Board or District), certified tenure charges of conduct unbecoming a teacher and endangering the welfare of students against respondent Carl A. Hill. The Board seeks to remove Hill from his position.

On June 5, 2006, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On June 13, 2006, a prehearing conference was held pursuant to N.J.A.C. 1:1-13.1.

Respondent denied the charges. Additionally, respondent claimed that the Board failed to comply with N.J.A.C. 6A:3-5.1(b)(1) and moved to dismiss the tenure charges. I considered the arguments of the parties and denied respondent's motion to dismiss the appeal. Hearings were held on August 14, 15, 21, 28, and 29, 2006. Upon receipt of posthearing briefs and a telephone conference with counsel regarding the status of posthearing documents, the record closed on February 16, 2007.

CHARGES

The School District of the Township of Irvington, Essex County charges Carl Hill, a physical education teacher, with conduct unbecoming a teacher and endangering the welfare of the students. The specific charges are as follows:

1. Habitual and repeated lateness and/or absence from work from September 2005 to the present; sleeping on the job; failure to attend professional workshops; and failure to complete lesson plans timely.

2. The use of disrespectful an unprofessional language toward fellow teachers in the presence of students as well as disrespectful language towards students.

3. Dereliction of duty by failing to supervise students prior to the end of the school day as assigned; failure to timely report the cafeteria duty as assigned.

4. Abandonment of students, leaving them in the school building unsupervised during a fire drill, endangering their welfare.

5. The respondent, Call Hill, has been charged with conduct supervise of discipline and morale of the school district by displaying unprofessional and behavior toward students and fellow teaching staff members.

ISSUE

The issue is whether respondent is guilty of conduct unbecoming a teacher and/or endangering the welfare of students? If so, what is the appropriate penalty?

SUMMARY OF EVIDENCE

In 2000, the Irvington Board of Education hired Carl Hill to teach physical education and health education. Hill was assigned to the University Six School and acquired tenure in school year 2003-2004.

The Board presented Ronald Bligh, supervisor of Health and Physical Education. Bligh testified to several incidents involving Hill's conduct. For example, on April 19, 2005, all physical education teachers were required to attend an in-service workshop at 1:30 p.m. When Hill arrived at 2:00 p.m., Bligh questioned him about arriving late. Hill retorted with a snap remark, calling Bligh "crazy." Bligh believed Hill's conduct was insubordinate, unprofessional and unbecoming a teacher. Consequently, Bligh attempted to serve Hill a letter of reprimand. Hill refused to accept and sign the document. The building principal, Dr. Wilma Crespo, was present on this occasion.

Hill denied arriving late to the workshop on April 19, and he maintained that he did not address Bligh in an abusive manner. When Bligh accused him of arriving to the meeting late, he responded, "Man, you must be crazy." Hill explained that on the date of the workshop he accompanied the students on the bus from University Six to the Thurgood Marshall School, the site of the workshop, arriving at 1:15 p.m. Hill acknowledged that he and Bligh did not get along. Thus, he refused to socialize or attend any pre-meeting events. Instead, he waited inside the office until the meeting

began. Hill refused to accept the letter of reprimand and did not sign the "sheet" because Bligh falsely accused him of arriving late.

Bligh testified about an incident that occurred on April 22, 2005. Bligh attempted to serve Hill another letter of reprimand. Hill refused to accept or sign the letter and called Bligh "crazy" and "liar." Bligh maintained that Hill's behavior was disrespectful and threatening. (P-5; P-6; P-7; P-8). In May 2005 Bligh recommended withholding Hill's salary increment for the 2005-2006 school year because of Hill's continued behavior. The Board adopted the recommendation to withhold his salary. Bligh further testified that on May 3, 2005, he planned to meet with Hill and another physical education teacher to review their roll books. Hill arrived at the meeting late and informed Bligh that his roll book and grade book was "no concern of [Mr. Bligh]" and refused to produce them. Hill then called Bligh a "jerkoff."

Hill denied yelling at Bligh and calling him a "jerkoff." Hill said he did not respect Bligh as a person but he acknowledged Bligh's position of authority. Nevertheless, he refused to accept letters, memos or other written communications from Bligh because he believed that they contained false accusations. Further, he refused to meet with Bligh and Crespo without a union representative. With regard to the plan book, Hill maintained that he prepared and submitted his lesson plans to Crespo on Fridays for the following week. At the end of the school year, the books were submitted to the administration and not returned to the staff. Hill further maintained that prior to receiving a letter from Bligh about his plan book, the issue was never raised by Bligh. However, Hill discussed the issue with Crespo, and Hill conceded that on occasion his plan book was not timely submitted.

Bligh recalled another incident in which he and Crespo observed Hill arguing with a female student and three male students. Crespo's attempt to calm Hill was unsuccessful. Hill told the female student to "shut up" and then stated, "Just because you have breasts that don't make you a woman." Bligh immediately verbally reprimanded Hill for his inappropriate comments to the student. Bligh testified that Hill told him to mind my own business and stomped out of the office. (P-10).

Hill's version differs from that of Bligh and he believes that Bligh has taken the incident out of context. Hill observed a female student and two male students arguing in the main office. He claimed to have counseled the girl on ladylike behavior. Hill told the female student, "Just because you have breasts, that doesn't make you a young lady, that makes you a female." Hill saw Bligh but said nothing.

Bligh also testified about Hill's deficiencies in instruction and record keeping. He claimed that Hill inadequately maintained students' attendance and grade records. An audit of Hill's roll book and grade book revealed some of the following deficiencies: no indication that Hill took class attendance prior to March 14, 2005; no records of students in homerooms 301, 303, and 310 participating in physical education; inadequate student attendance records; misspelled student names; and poor or inadequate grading strategies. (P-12). Bligh believed that Hill's roll book was "flawed and lacked validity, integrity and accountability." As a result of the audit, Bligh and Crespo issued Hill a sixty-day improvement plan. Ibid.

Bligh testified about an incident on December 13, 2005. Two students laughed and joked about Hill's late arrival to class. Hill disciplined their behavior by making the students sit in the cafeteria while he took the remainder of the class outside for physical education instruction. During the class period the school conducted a fire drill. The two students remained in the cafeteria while everyone else exited the building. (P-14). Hill maintained that he left the two students in the charge of Ms. Murtha, another teacher. (P-5).

The Board presented Dr. Wilma Crespo, principal of University Six School. Crespo testified about Hill's chronic lateness and his failure to notify the substitute service if he planned to be late or absent. On three occasions she met with Hill concerning his excessive absence, lateness, failure to provide lesson plans, and overall poor performance. (P-21a to P-21y). Crespo corroborated much of Bligh's testimony about Hill's insubordination. For example, Crespo was present during the incident involving Hill's remark about a female student's breasts. She had also reviewed the

audit of Hill's grade book, which revealed many inaccuracies and misinformation on students who were no longer enrolled in the school. Further, the audit showed inadequate student grading strategies to measure the students' progress. Crespo also issued Hill letters of reprimand. Hill, however, never responded to or rebutted the administration's concerns over his lack of interpersonal skills, absenteeism, tardiness, failure to submit instructional plans and failure to properly monitor student attendance.

Dr. Crespo also handled several complaints against Hill by other teachers. For example, the language arts teacher was obligated to remain with the students until Hill arrived to pick them up. Consequently, the language arts teacher was deprived of time from her forty-five-minute preparation period due to Hill's tardiness. (P-28). On one occasion Crespo observed Hill sleeping in the school medical office when he was assigned to cafeteria/recess duty.

The Board presented Rose Teer, a music teacher at University Middle School. Teer worked with Hill during school years 2004-2005 and 2005-2006. She said that on "many" occasions she was compelled to give up her free period to cover Hill's class because he was late or absent and failed to notify the substitute service. Teer also recalled an incident in the cafeteria when Hill told her to "shut up" and made a vulgar gesture with his middle finger. This occurred in the presence of a student.

Hill denied the remaining allegations, including making derogatory remarks about other teachers and vulgar gestures. Hill provided explanations for the alleged inappropriate conduct. For example, he refused to sign any letters of reprimand because he believed that they contained false accusations. He requested that Crespo change his schedule so that he could visit his ailing mother before he came to work. Another reason for the schedule change was to accommodate his commute to work. Hill used public transportation and every morning he left home at 6:10 a.m. to arrive to work by 8:10 a.m. He also disclosed to Crespo his personal illnesses and hospitalizations.

Hill argues that the Board's proofs have been undermined because the Board failed to produce the original roll book and instead presented copies, which contained missing sections from each marking period. Hill further maintained that the missing portions contained the "grades, quizzes and tests." Moreover, the Board's audit and amended audit of his roll book are invalid because they contain missing sections. (P-12; P-13). Additionally, he contends that he was never advised about the audit.

Hill also denied leaving students unattended in the classroom. Further, he denied leaving two students in the cafeteria unsupervised during a fire drill. On that day, he arrived at work at 9:30 a.m. and was informed that there would be a fire drill at 10:00 a.m. He went to the cafeteria to meet his class. The art teacher and another physical education class were in the cafeteria. "[Hill] agreed to let [students] play outside to do the art teacher a favor." (Petitioner's Brief at 9). Two boys began misbehaving and teasing Hill about being late. Hill maintained that his concern was about the behavior of the students "in the event guests or parents were present in school." Id. at 10. Therefore, he disciplined those two students by prohibiting them from joining their class outdoors for gym. Instead, "he asked the art teacher to supervise them while [he] took the rest of the class outside. She agreed." Ibid. Hill acknowledged that he slept in the nurse's office, but claimed that he was ill. He denied sleeping in Room 311. He further claimed that the school apparently lost his documents covering the professional improvement plan and lesson plans.

FINDINGS OF FACT

Based on a careful review of the evidence and the demeanor of the witnesses I **FIND** as **FACT**:

During school year 2004-2005 respondent engaged in various incidents of insubordination. These included:

1. Arrived late to a workshop scheduled for all physical education teachers and addressed his supervisor in a manner that was unprofessional and insubordinate.

2. Refused to accept letters from supervisors because he believed that they contained false accusations regarding his conduct.

3. Failed to timely submit his roll book and grade book.

4. Used inappropriate language toward a student.

5. Used disrespectful language and vulgar gestures toward colleagues on more than one occasion.

6. In school year 2004-2005, Hill was absent eighteen full days and fourteen half days, and late thirty-five days.

Positions of the Parties

The Board contends that Hill's actions constituted conduct unbecoming a public school teacher and insubordination, and endangered the welfare of students. The Board maintains that Hill's conduct did not improve, notwithstanding several verbal and written warnings from his supervisor and the building principal. Moreover, he failed to provide sufficient information to justify the excessive absences and late arrivals. The Board reasoned that Hill's mother's unspecified illness and the difficulty he experienced with transportation to work did not justify the "habitual unexcused absence/lateness." Instead, respondent's problems with absences and lateness continued from one school year into the next, such that respondent's conduct deprived the students of valuable education. (Petitioner's Brief at 11).

The Board further contends that through school years 2004-2005 and 2005-2006 Hill was repeatedly insubordinate and disrespectful towards his supervisor, Ronald

Bligh, and the building principal, Dr. Wilma Crespo. Hill refused to accept letters of reprimand and he used vulgar and profane language towards his supervisor. The Board argues that Hill's consistent misconduct constituted a lack of respect, trust and confidence in his immediate supervisor and building principal. The Board contends that respondent's conduct warrants dismissal from his tenured position.

Respondent argues that a negative inference should be drawn as the result of the Board's treatment of the documents. The Board presented a copy of his roll book, not the original. (P-22). Respondent contends that the copy was incomplete and lacked sections on "grades, quizzes, etc." (Respondent's Brief at 18). Additionally, respondent contends that Dr. Crespo presented inconsistent testimony regarding the date she evaluated Hill's performance. The evaluation occurred in November 2004, and reflects ratings of "effective" in all categories, with the exception of four areas[1] in which he was rated "not effective." Thus, respondent maintains the Board's actions are highly suspicious and warrant a negative inference.

Respondent further argues that the Board's allegations should be dismissed for failure to comply with N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(c). "A substantial number of these allegations have been improperly constituted by the Board . . . [and] are actually based on alleged shortcomings in performance that fall traditionally within the definition of inefficiency rather than unbecoming conduct or incompetence." (Respondent's Brief at 20). Respondent asserts, "The manner in which respondent conducted his classes and dealt with other staff and students . . . " should be claims of inefficiency, not unbecoming conduct or other wrongdoing. (Id. at 21). Accordingly, respondent would be entitled to a ninety-day period to remedy inefficient conduct. Since this did not occur, all charges should be dismissed.

Additionally, respondent argues that the Board failed to meet its burden of proof. It did not inquire into the reasons for Hill's absences. Moreover, many issues, e.g., attendance, hat wearing, and insufficient lesson plans, were documented by only Hill's

[1] (1) Weekly plans and their relationship to specific objectives/aims/overall goals; (2) Regular daily attendance, attendance at meetings and required extra activities; (3) Completion, performance of administrative tasks, assignments and duties; and (4) Communication of instructional objectives to students (written/verbal).

immediate supervisor, Bligh, and the building principal, Dr. Crespo. Respondent maintains that the allegations lack merit.

Alternatively, respondent argues that dismissal is not an appropriate penalty. Respondent contends that many of the allegations against him "arise from a clear personality conflict between Hill and Bligh." (Id. at 49). Respondent claims that the Board had the opportunity to remedy the situation through an intensive ninety-day improvement plan. Ibid. Respondent also asserts that the matter involves only a two-year period of time in Hill's lengthy career. Therefore, termination is unwarranted. Respondent suggests a penalty such as salary loss during his time of suspension.

DISCUSSION

State law provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. N.J.S.A. 18A:6-10. Thus, tenured employees are protected "in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control." In re Maratea, 1966 S.L.D. 77, 106. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing are required under the law to protect tenured teachers from arbitrary dismissal for unfounded or flimsy reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee that may help to explain the situation. In re Romanoli, 1975 S.L.D. 352.

The District has the burden of proof to establish the charges against respondent by a preponderance of the credible evidence. In re Polk, 90 N.J. 550, 560 (1982). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must be such as to lead a reasonable

cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Proof of the charges against respondent depends in part on the credibility of the witnesses. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. Middletown Township v. Murdoch, 73 N.J. Super. 511, 523 (App. Div. 1962). Moreover, the trier of fact is not bound to believe the testimony of any witness and may accept or reject, in whole or in part, the testimony. Application of Howard Sav. Bank, 143 N.J. Super. 1, 9 (App. Div. 1976). One factor to consider in determining which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I have carefully considered the testimony and demeanor of the witnesses. "[T]estimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). I have also considered respondent's claim that the Board presented inconsistent evidence. Some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. United Stations of N.J. v. Getty Oil Co., 102 N.J. Super. 459, 476 (Ch. Div. 1968). The testimony must be such that the administrative law judge can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances. Dr. Crespo's testimony was straightforward and credible.

The charges against Hill are serious and the penalty sought is severe. Based on the whole of the record, I am persuaded that Hill engaged in the conduct described by the Board.

CONCLUSION

Based on the totality of the evidence, including the arguments presented by the parties, I **CONCLUDE** that Hill's behavior constituted conduct unbecoming a teacher and unprofessional conduct and fostered a climate of disrespect for his colleagues.

Penalty

The District contends that Hill's conduct warrants dismissal. Factors to be considered in assessing an appropriate penalty include the nature and gravity of the offense, any extenuating or aggravating circumstances, and maintaining discipline and proper administration of the school system. In re Fulcomer, 93 N.J. Super. 404, 420-22 (App. Div. 1967). Except for the pending charges, Hill's record is unblemished. He received unsatisfactory scores on one performance evaluation.

Respondent's explanations do not account for chronic lateness without notice. The frustration he might have experienced from working with people whom he personally disliked does not excuse unbecoming conduct. Behavior that constitutes unbecoming conduct need not be "predicted upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Indeed, members of the teaching profession hold a sacred position in our society. They have daily contact with our students, molding habits and nurturing young minds. Thus, teachers must be held to a high standard of conduct. Parents, law enforcement

officials and the general public expect teachers to impart to students the foundations of "reading, writing and arithmetic" as well as convey social and moral values appropriate to the setting. Clearly, teachers influence the opinions of their pupils and, indeed, teachers are role models. Also, teachers encourage students to set goals and then help to steer them on a path to achieve those goals. Further, teachers are entrusted with the care and custody of school children. Thus, they play a most important role in the community. In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98-99, the Commissioner recognized:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

It is essential that teachers avoid conduct that is in violation of the public trust or that creates a justifiable impression among the public that such trust is being violated. Teachers are expected to exercise self-restraint and control.

Based on the whole of the record, I **CONCLUDE** that the mitigating factors do not support Hill's continued employment with the Irvington public schools. Consequently, I **CONCLUDE** that the appropriate penalty is removal from his tenured teaching position.

ORDER

It is **ORDERED** that respondent Carl A. Hill be removed from his teaching position with the Irvington School District and that all of his tenure rights be extinguished.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 2, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: April 2, 2007

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 3 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

Witnesses

Presented School District of the Town of Irvington:

Ronald Bligh

Alberta Sharif

Rosanne Teer

Wilma Crespo

For Respondent:

Carl Hill

Madeline Ewards

Exhibits

For Petitioner:

P-1 December 8, 2004 reprimand

P-2 February 21, 2005 letter

P-3 In-Service Sign In Sheet

P-4 April 21, 2005 document

P-5 April 24, 2005 letter

P-6 May 2, 2005 letter

P-7 May 2, 2005 document

P-8 May 3, 2005 document

P-9 May 4, 2005 document

P-10 May 5, 2005 correspondence

P-11 May 10, 2005 documentation

P-12 Original review

P-13 Revised review

P-14 December 13, 2005 letter to Hill

P-15 December 13, 2005 letter to Dr. Crespo

P-16 January 20, 2005 evaluation

P-17 January 31, 2005 Personal Improvement Plan

P-18A Receipt from post office

P-18B Receipt from post office

P-19A Signature receipt

P-19B Receipt from post office

P-20 May 10, 2005 letter

P-21 February 11, 2005 letter

P-21A Various memos, letters

P-22 2004/2005 record book

P-23A June 10, 2005 letter

P-23B Lateness memo

P24 September 7, 2005 letter

P-25 September 21, 2005

P-26 October 11, 2005 letter

P-27 October 19, 2005 letter

P-28A October 26, 2005 letter

P-28B Memo

P-29 November 1, 2005 letter

P-30 October 27, 2005 letter

P-31 November 28, 2005 incident report

P-31A November 29, 2005 letter

P-31B Rose Teer's memo

P-32 December 1, 2005 letter

P-33A November 16, 2005 letter

P-34 December 19, 2005 letter

P-34B December 16, 2005

P-35 December 19, 2005 signed document

P-36 March 3, 2005 disciplinary charges

P-37 Statement of evidence

For Respondent:

R-1 October 6, 2005 evaluation

#177-07

CARRIE L. BRIGHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teacher at a private high school in Morristown, challenged a determination by the New Jersey Department of Education, Criminal History Review Unit (Department) disqualifying her from school employment pursuant to *N.J.S.A.* 18A:6-7.1. Petitioner contended that her conviction for a violation of the Federal Food, Drug, and Cosmetic (FD&C) Act does not constitute a disqualifying offense, as the drug which she pled guilty to mislabeling – gamma hydroxybutyrate , or GHB – was not classified as a controlled substance at the time of her offense.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary decision; GHB was not classified as a controlled dangerous substance (CDS) by the federal government until March 2000; petitioner committed her offense three years prior to that date; petitioner's conduct could not have supported a prosecution for a CDS violation in 1997; and petitioner's offense of conspiring to misbrand GHB before or after it was introduced into interstate commerce cannot be construed as substantially equivalent to the possession or distribution of a CDS. The ALJ granted the petitioner's motion for summary decision, concluding that petitioner's violation in 1997 of the FD&C Act regarding GHB is not an offense involving a CDS, and does not constitute a conviction for a substantially equivalent crime or offense.

The Commissioner concurred with the ALJ, for the reasons fully set forth in the Initial Decision, that petitioner's conviction for conspiracy to violate the FD&C Act does not disqualify her from school employment pursuant to *N.J.S.A.* 18A:6-4.13 *et seq.* and 18A:6-7.1 *et seq.* In so deciding, the Commissioner stated that under the specific circumstances related to the petitioner's offense, the plain language of statute precludes a finding of disqualification. Accordingly, the Initial Decision – reversing the determination of the Department and finding petitioner qualified for school employment – is adopted as the final decision in this matter.

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

May 15, 2007

OAL DKT. NO. EDU 3779-06
AGENCY DKT. NO. 66-2/06

CARRIE L. BRIGHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions of the Department of Education (Department) and petitioner's reply thereto, duly filed pursuant to *N.J.A.C.* 1:1-18.4.[1]

On exception, the Department reiterates its arguments before the Administrative Law Judge (ALJ) as substantially set forth in the Initial Decision. (Department's Exceptions at 1-5) In reply, petitioner objects to the Department's statement that she admitted to "possessing" the drug in question, stressing that – as the Department elsewhere acknowledges – the offense to which she actually admitted was "mislabeling." Additionally, she addresses a case law precedent cited by the Department but not specifically discussed in the Initial Decision,[2] distinguishing the situation in that matter from the one herein. (Petitioner's Reply at 1-3)

Upon careful and independent review, the Commissioner is compelled – for the reasons fully set forth in the Initial Decision – to concur with the ALJ that petitioner's conviction for conspiracy to violate the Federal Food, Drug, and Cosmetic (FD&C) Act does not disqualify her

[1] Although the Department's exceptions were inadvertently addressed to the State Board of Examiners, they were timely filed and promptly redelivered to the Commissioner, as well as properly served on counsel for petitioner.

[2] *Rixford v. New Jersey State Department of Education,* 97 *N.J.A.R.*2d (EDU) 320, raised by the Department in both its reply brief before the OAL and in exceptions before the Commissioner.

from school employment pursuant to *N.J.S.A.* 18A:6-4.13 *et seq.* and 18A:6-7.1 *et seq.* In so holding, the Commissioner stresses that her determination, like that of the ALJ, is a necessary consequence of the fact that: 1) the drug involved in petitioner's conviction – gamma hydroxybutyrate (GHB)[3] – had not, at the time of her actions, been classified as a "controlled dangerous substance (CDS)" or "controlled substance" under Federal or State law, as it subsequently was; and 2) there is no disqualifying offense in *N.J.S.A.* 18A:6-7.1 that is "substantially equivalent" to petitioner's offense of conspiring to misbrand a drug other than a CDS before or after its introduction into interstate commerce. Under these circumstances, the plain language of the controlling statute precludes a finding of disqualification, notwithstanding the Department's understandable attempt to apply the law in a manner consonant with the Legislature's broader intent and the State's public policy interest in protecting school children.[4]

Accordingly, the Initial Decision of the OAL – reversing the determination of the Department and finding petitioner qualified for school employment – is adopted for the reasons expressed therein.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/07

Date of Mailing: 5/15/07

[3] According to the U.S. Food and Drug Administration, in the early 1990s, GHB was marketed as a dietary supplement for claimed purposes including inducing sleep, releasing growth hormone, enhancing sexual activity and athletic performance, and relieving depression; it also gained favor as a recreational drug, and was used for date rape because of its intoxicating effects. It is considered highly dangerous, and is – apart from its recently approved usage for strictly limited medical purposes – subject to penalties under the most restrictive schedule of the Controlled Substances Act. (http://www.fda.gov/cder/drug/infopage/xyrem/xyrem_qa.htm#1) The parties were advised of the Commissioner's intent to take official notice of the referenced web page pursuant to *N.J.A.C.* 1:1-15.2 and did not object to such notice although offered the opportunity to do so.

[4] The Commissioner here notes her concurrence with the ALJ that the holdings of *Cidoni* and *Nunez, supra,* are inapplicable in the present matter (Initial Decision at 7), as is *Rixford, supra.* (see Note 2 above).

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 3779-06

AGENCY DKT. NO. 66-2/06

CARRIE L. BRIGHAM,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Marc H. Zitomer, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Melanie Brookes, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: March 13, 2007 Decided: March 30, 2007

BEFORE **JOSEPH A. PAONE**, ALJ:

STATEMENT OF THE CASE

Petitioner Carrie L. Brigham challenges the determination by respondent New Jersey Department of Education (DOE), Criminal History Review Unit (CHRU), that she is disqualified from school employment due to her conviction for a violation of the

Federal Food, Drug, and Cosmetic (FD&C) Act, 21 U.S.C. § 301, et seq. Petitioner contends that she has been convicted of neither a disqualifying offense, nor its substantial equivalent.

PROCEDURAL HISTORY

On October 13, 2005, the CHRU notified petitioner that a fingerprint search revealed a conviction and, therefore, she was permanently disqualified from employment with any school under the supervision of the DOE. On October 24, 2005, petitioner wrote to the CHRU challenging her disqualification. On January 20, 2006, the CHRU notified petitioner that after a review of documents she submitted in support of her position, the CHRU concluded that petitioner remained disqualified. On February 9, 2006, petitioner filed a verified petition with the New Jersey Department of Education, Bureau of Controversies and Disputes (Bureau), and on March 10, 2006, the DOE filed its answer.

On March 23, 2006, the Bureau transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On February 23, 2007, Brigham filed a motion for summary decision and on February 26, 2007, the DOE filed a cross-motion for summary decision. On March 13, 2007, oral arguments were presented on behalf of both parties and the record closed.

STATEMENT OF FACTS

The following facts are stipulated by the parties:

1. Petitioner is employed as a high school English teacher at the Morristown Beard School, a private non-sectarian school located in Morristown, New Jersey.

2. Petitioner does not hold a teaching certificate from the State of New Jersey, nor is she required to hold such a certificate by the Morristown Beard School.

3. Petitioner commenced her employment at Morristown Beard in or about September 2005.

4. On or about July 26, 2000, petitioner pled guilty to conspiracy to violate the FD&C Act, 18 U.S.C. 371, which is delineated in Count One of the Information, dated September 28, 1999. (J-1; J-2).

5. By letter dated October 13, 2005, Carl H. Carabelli, manager of the CHRU, notified Brigham that a fingerprint search conducted through the New Jersey State Police and the Federal Bureau of Investigation, in accordance with N.J.S.A. 18A:6-7.1 or N.J.S.A. 18A:6-4.13, had revealed a disqualifying offense. (J-3).

6. After a period of correspondence between counsel for petitioner and the CHRU regarding the disqualification issue, the CHRU issued a letter dated January 20, 2006, concluding that petitioner would remain disqualified from public school employment, and that this decision could be appealed to the Commissioner of Education. (J-4).

CONCLUSIONS OF LAW

The facts related to this motion are not in dispute. Petitioner admits that she has been convicted in federal court of a violation of the FD&C Act, and as a nonpublic-school employment candidate is subject to the disqualification provisions of N.J.S.A. 18A:6-7.1, pursuant to N.J.S.A. 18A:6-4.13. The only issue is whether her conviction constitutes a disqualifying offense as provided by N.J.S.A. 18A:6-7.1. Pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), there are no genuine issues of material fact and, therefore, the matter is ripe for summary decision.

Petitioner was charged in an Information filed on October 1, 1999, by the United States Attorney with conspiracy to violate the FD&C Act, a misdemeanor. (J-2). Count

One alleged that from an unknown date until February 9, 1997, petitioner conspired with another to

> [introduce] or [cause] to be introduced into interstate commerce drugs, namely GHB (gamma hydroxybutyrate and gamma hydroxybutyrate acid sodium salt), that were misbranded within the meaning of Title 21, United States Code, Sections 352(b) and 352(f), in violation of Title 21, United States Code, Sections 331(a) and 333(a)(1); and [did] an act to a drug, namely GHB, after shipment of one or more of its components in interstate commerce, which act caused the drug to be misbranded while held for sale within the meaning of Title 21, United States Code, Section 353(b)(1), in violation of Title 21, United States Code, Sections 331(k) and 333(a)(1).

The prosecutor asserted as overt acts that in December 1996, petitioner and her codefendant purchased gamma butyrolactone in Roanoke, Virginia, which her codefendant used to manufacture GHB. In January 1997, petitioner asked her codefendant to send her GHB, which he shipped to her in Massachusetts between January and February 1997.

According to the Information, it was the responsibility of the United States Food and Drug Administration to ensure that drugs, including GHB, "bore labeling containing true and accurate information and adequate directions and warnings for use." Under 21 U.S.C. § 352(f), failure of a label to contain such information, or under 21 U.S.C. § 352(b), failure of a package to bear a label containing the name and place of business of the manufacturer, packer or distributor and an accurate statement of the quantity of the contents, would deem the drug misbranded. 21 U.S.C. § 331(a) makes it illegal to introduce into interstate commerce such a misbranded drug. And 21 U.S.C. § 331(k) makes it illegal to do any act with respect to a drug if such act was done while the drug was being held for sale after shipment of one or more of its components in interstate commerce and resulted in the drug being misbranded.

Petitioner pled guilty to Count One and faced a maximum penalty of one year of imprisonment and a fine of not more than $1,000. 21 U.S.C. 333(a)(1). On July 26, 2000, petitioner was sentenced in the United States District Court for the Western

District of Virginia to two years' probation and fined $500. (J-1). She was also ordered to pay an assessment of $25 and perform 100 hours of community service.

N.J.S.A. 18A:6-7.1 provides in pertinent part:

> A . . . school . . . under the supervision of the Department of Education . . . shall not employ . . . [a teacher] . . . unless the [school] has first determined . . . that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from [employment]. . . .
>
> An individual . . . shall be permanently disqualified from employment . . . if the individual's criminal history record check reveals a record of conviction for . . .
>
> . . . .
>
> b. An offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S. 2C:36-1 et seq.

The disqualification applies also to convictions for conspiracy to commit such offenses. N.J.S.A. 18A:6-7.1(c)(3).

If one has been convicted under a similar statute of the United States for a "substantially equivalent crime or other offense," that conviction would have the same disqualifying effect. N.J.S.A. 18A:6-7.1(d). As a nonpublic school, the Morristown Beard School may require "final candidates for employment . . . as a teacher . . . to demonstrate that no criminal history record information exists . . . which would disqualify that individual from employment in the public schools of this State . . . ." N.J.S.A. 18A:6-4.13.

Petitioner contends that she merely pled guilty to her involvement in mislabeling GHB, which took place at the latest on February 9, 1997. She did not plead guilty to any offense involving a controlled dangerous substance (CDS). Nor could she,

because GHB was not classified as a CDS at that time. GHB was added as a CDS in New Jersey on August 19, 1999, L. 1999, c. 186, and was made a Schedule I controlled substance by the Federal Government on March 13, 2000, 65 Fed. Reg. 13235. Petitioner committed her offense three years before GHB was scheduled by the Federal Government as a controlled drug. Petitioner further contends that her conviction for mislabeling a drug in violation of the FD&C Act is not the substantial equivalent of a conviction involving the possession or distribution of a CDS. New Jersey does not have any agency equivalent to the Food and Drug Administration or a statute similar to the FD&C Act. Had petitioner resided in New Jersey at the time she committed her offense involving GHB, she could not have been charged by the State with any offense.

The DOE concedes that at the time petitioner committed her offense, GHB was not a CDS. The DOE argues, however, that whether an offense constitutes a disqualifying CDS offense is determined at the time the CHRU conducts its criminal history record check. Since on September 2005, the date of the criminal history record check, GHB was a CDS and its possession constituted a disqualifying offense pursuant to N.J.S.A. 18A:6-7.1, the DOE argues that petitioner's offense in 1997 disqualifies her from employment. In support of its position, the DOE relies on Cidoni v. Camden Board of Education, EDU 6088-03, Initial Decision (January 11, 2006), adopted, Comm'r (February 27, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>, and Nunez v. Department of Education, EDU 3689-02, Initial Decision (January 5, 2005), rejected and remanded, Comm'r (May 26, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. The Commissioner in Cidoni reiterated the principle enunciated in Nunez that "any application for criminal history record check received by the Department must be reviewed and effectuated based upon the standards of law then in effect." Cidoni, supra, EDU 6088-03, Comm'r (February 27, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>.

Respondent's reliance on Cidoni and Nunez is misplaced. In Cidoni, no record check was performed in 1991 when Cidoni became employed by the school district. A 2003 background check revealed his 1984 conviction for carrying a firearm without a license. Cidoni asserted that the amended version of N.J.S.A. 18A:6-7.1 should not

apply to him because his conviction would not have constituted a disqualifying offense in 1991, when a prior version of the statute was in effect. He argued that he should be subject to the earlier version of the criminal record check statute. In Nunez, the petitioner had been convicted of the sale of a CDS in 1984. He was hired by a school district in March 1998. Prior to June 1998, an applicant would not be disqualified if he demonstrated his rehabilitation to the Commissioner by clear and convincing evidence. Because no criminal review records could be found in Nunez's personnel file, another criminal history check was conducted in 2001, after the provision allowing for the showing of rehabilitation had been repealed. Nunez similarly argued that he should be subject to only the earlier version of N.J.S.A. 18A:6-7.1.

Brigham is not arguing, as the school-employment applicants in Cidoni and Nunez had, that the criminal history record check provision contained in N.J.S.A. 18A:6-7.1 has changed and become more onerous, and urging a retroactive application of that statute. Instead, she contends that the law governing the conduct in 1997 for which she was convicted has since expanded. Petitioner's conduct never could have supported a prosecution for a CDS violation in 1997. Accordingly, Cidoni and Nunez are inapposite.

In the alternative, respondent urges that since petitioner's conviction was entered on July 26, 2000, after GHB was scheduled as a CDS by both the State of New Jersey and the Federal Government, she must be disqualified. The date petitioner's conviction was entered, however, cannot change the fact that petitioner's conduct did not constitute a disqualifying CDS offense in 1997.

Petitioner cannot be held accountable for a CDS offense that did not exist at the time she conspired to misbrand GHB. She could only be liable, as she was, for the FD&C Act violation. Had N.J.S.A. 18A:6-7.1 been amended and provided that the possession of GHB constitutes a disqualifying offense, respondent's argument would be more compelling. But I cannot conclude that petitioner's offense of conspiring to misbrand GHB before or after it was introduced into interstate commerce is substantially equivalent to the possession or distribution of a CDS. In order to do that, I would have to consider GHB a CDS at a time when neither the Federal Government nor

the State of New Jersey had. Accordingly, I must **CONCLUDE** that petitioner's violation in 1997 of the FD&C Act regarding GHB is not an offense involving a CDS. Nor does it constitute a conviction for a substantially equivalent crime or offense.

ORDER

I hereby **ORDER** that petitioner's motion for summary decision that her conviction for conspiracy to violate the FD&C Act is not a disqualifying offense is **GRANTED**. I further **ORDER** that respondent's motion for summary decision is **DENIED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 30, 2007
DATE

JOSEPH PAONE, ALJ

Date Received at Agency

4-4-07 / UPS

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 4 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

EXHIBITS

Joint:

J-1 Judgment of Conviction

J-2 Information filed October 1, 1999

J-3 Correspondence from the CHRU to Brigham, dated October 13, 2005

J-4 Correspondence from the CHRU to counsel, dated January 20, 2006

#178-07

178-07

OAL DKT. NO. EDU 1119-06
AGENCY DKT. NO. 323-11/05

WILLIAM CRESPO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

The record, Initial Decision and Stipulation of Dismissal with Prejudice transmitted to the Commissioner by the Office of Administrative Law have been reviewed. Because no settlement terms were brought to the record and because the document appended to the decision is a Stipulation of Dismissal with Prejudice, this matter is appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal; consequently, this matter is no longer deemed to be a contested case before her and is, accordingly, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/17/07
Date of Mailing: 5/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 1119-06

AGENCY DKT. NO.: 328-11/05

WILLIAM CRESPO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondent.

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

Joel Miklacki, Esq., for Passaic Board of Education, respondent

Record Closed: March 27, 2007 Decided: April 4, 2007

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

On January 6, 2006 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was initially scheduled for hearing on August 10 & 11, 2006 but the dates were adjourned and rescheduled to October 18 & 19, 2007 because Respondent's witnesses were not available. On September 21, 2006, respondent's

counsel notified the undersigned that he had a scheduling conflict for the October hearing dates and requested that the matter be adjourned. The undersigned subsequently rescheduled the matter for January 10 & 11, 2007. On January 9, 2007, the parties notified the undersigned that the matter had been settled in principal subject to Board approval. The Board approved the settlement on January 29, 2007 and a signed Stipulation of Dismissal was forwarded to the OAL on March 27, 2007. A copy of the Stipulation of Dismissal is attached hereto and made a part hereof.

I have reviewed the record and terms of the Stipulation of Dismissal and I **FIND**:

1. The parties have voluntarily agreed to the dismissal as evidenced by the Signatures of the parties or their representatives.

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

I **CONCLUDE** that the dismissal meets the safeguard requirements of N.J.A.C. 1:1-19.1 and that these proceedings be **CONCLUDED**.

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

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

Apr 4 07
DATE

JEFFREY A. GERSON, ALJ

4-9-07-UPS
Date Received at Agency:

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 9 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

JOEL M. MIKLACKI, ESQ.
One Howe Avenue, Suite 301
Passaic, New Jersey 07055
973-779-3300
Attorney for the Respondent
Passaic Board of Education, Passaic County

WILLIAM CRESPO Petitioner(s), vs. PASSAIC BOARD OF EDUCATION, PASSAIC COUNTY, Respondent(s),	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDU0A 01119-2006N AGENCY DOCKET NO.: 323-11/05 **STIPULATION OF DISMISSAL WITH PREJUDICE**

THE MATTER in difference in the above entitled administrative action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice, and without costs or fees to either party.

Attorney for Petitioner

SPRINGSTEAD & MAURICE

By: _____
Alfred F. Maurice, Esq.

Dated: March ____, 2007

Attorney for Respondent

JOEL M. MIKLACKI, ESQ.

By: _____
Joel M. Miklacki, Esq.

Dated: March ___, 2007

So Ordered:

_____
Jeffrey Gerson, J.S.C.

APR 4 07

#179-07

179-07

OAL DKT. NO. EDU 1842-03
AGENCY DKT. NO. 410-12/02

DEBORAH LEFF,	:	
PETITIONER.	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/17/07

Date of Mailing: 5/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01842-03
AGENCY DKT. NO. 410-12/02

DEBORAH LEFF,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett)

Karen A. Murray, Esq., for respondent
(Murray & Murray)

Record Closed: April 10, 2007 Decided: April 11, 2007

BEFORE **IMRE KARASZEGI,** ALJ:

On March 4, 2003, this matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

April 11, 2007

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 4-12-07 - UPS

Mailed to Parties:

APR 12 2007

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

The Murray Law Firm, LLC
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent, Elizabeth Board of Education

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DEBORAH LEFF, **Petitioner,** **v.** **ELIZABETH BOARD OF EDUCATION,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDUOR 01842-03N** **AGENCY DKT. NO.: 410-12/02** **SETTLEMENT AGREEMENT**

Petitioner, **DEBORAH LEFF** (D.L.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall credit Petitioner, L.R., a total of five (10) sick days for sick days utilized on September 17, 18, 19, 20, 23, 24, 25, 26, 27 and 30, 2002.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, D.L., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to Petitioner's injury that occurred on or about September 17, 2002.

4. Petitioner, D.L., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission; etc. relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for an injury that occurred in September 2002.

5. Petitioner, D.L., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to an injury that occurred in September 2002.

6. Petitioner, D.L., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, D.L., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree to accept the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Elizabeth Board of Education
Date: 3/20/07

DEBORAH LEFF

Deborah Leff, Petitioner
Date: 3/7/07

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner
Date:

C
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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Deborah Leff, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-1842-2003N and Agency Docket Number 410-12/02, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

06-206

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 15, 2007

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

The Murray Law Firm, LLC
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent, Elizabeth Board of Education

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STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 APR 10 A 7:24

DEBORAH LEFF, **Petitioner,** **v.** **ELIZABETH BOARD OF EDUCATION,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDUOR 01842-03N** **AGENCY DKT. NO.: 410-12/02** **SETTLEMENT AGREEMENT**

Petitioner, **DEBORAH LEFF** (D.L.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall credit Petitioner, L.R., a total of five (10) sick days for sick days utilized on September 17, 18, 19, 20, 23, 24, 25, 26, 27 and 30, 2002.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, D.L., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to Petitioner's injury that occurred on or about September 17, 2002.

4. Petitioner, D.L., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission; etc. relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for an injury that occurred in September 2002.

5. Petitioner, D.L., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to an injury that occurred in September 2002.

6. Petitioner, D.L., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, D.L., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree to accept the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Elizabeth Board of Education
Date: 3/20/07

DEBORAH LEFF

Deborah Leff, Petitioner
Date: 3/7/07

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner
Date:

C
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P
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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Deborah Leff, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-1842-2003N and Agency Docket Number 410-12/02, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

06-206

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 15, 2007

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

180-07

EDNA DARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that respondent Board's mandatory school uniform policy was adopted in violation of the statutory requirement for parental request, pursuant to *N.J.S.A.* 18A:11-8. Petitioner sought to postpone implementation of the policy pending the results of an updated and independently audited parent survey which would be made available to the public.

The ALJ found, *inter alia,* that: the respondent Board adopted a policy for student school uniforms pursuant to *N.J.S.A.* 18A:11-8; parents, staff, and the student body were kept informed prior to adoption of the policy; a majority of parents/guardians and staff members were in favor of uniforms; the Board met statutory terms and conditions in adopting its uniform policy; petitioner failed to carry her burden of proof, by a preponderance of the credible evidence, that the adopted policy was in violation of statutory provisions. The ALJ concluded that the action of the Board should stand, and dismissed the petition.

The Commissioner concurred with the ALJ that petitioner failed to meet her burden, and further found that there has been no showing that the respondent acted arbitrarily or unreasonably in the course of establishing its policy requiring school uniforms. Accordingly, the Commissioner dismissed the petition.

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

May 18, 2007

OAL DKT. NO. EDU 8299-06
AGENCY DKT. NO. 293-8/06

EDNA DARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were received from the parties.

For the reasons set forth in the Initial Decision, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner failed to meet her burden to prove that the respondent school board violated *N.J.S.A.* 18A:11-8. The Commissioner further finds that there has been no showing that the respondent acted arbitrarily or unreasonably in the course of considering, researching, planning, presenting, and implementing its policy requiring school uniforms.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/07

Date of Mailing: 5/18/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. EDU 8299-06
AGENCY REF. NO. 293-8/06

EDNA DARE,
Petitioner,
v.
CITY OF SALEM BOARD OF EDUCATION, SALEM COUNTY,
Respondent

Edna Dare, petitioner, pro se
Roger A. Barbour, Esq., for respondent (Barbour and Barbour, attorneys)

Record Closed: January 25, 2007 Decided: February 28, 2007

BEFORE **LILLARD E. LAW,** ALJ, T/A

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contends that the policy adopted by the Board of Education of the City of Salem (Board) mandating that all pupils in attendance in its schools wear an approved uniform was adopted in violation of the statutory requirement for parental request, pursuant to N.J.S.A. 18A:11-8. Petitioner seeks to postpone the incorporation of the Board's policy pending the results of an updated parental survey and that the survey be independently audited and made available to the public.

The Board admits it adopted a school uniform policy subsequent to its having conducted a survey of parents and staff members, in accordance with the requirement of state law, and denies that it in any way violated any law or regulation.

The Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The hearing was held on January 25, 2007, at the Atlantic City OAL, Atlantic City, New Jersey. The hearing record closed on January 25, 2007.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

This matter arises out of a petition of appeal by petitioner, Edna Dare, as a consequence of the Board having adopted a policy requiring all pupils attending its public schools to wear approved uniforms during the school day. Petitioner seeks to have the Commissioner issue a stay of the implementation of the policy pending an independent audited parent survey.

Petitioner testified on her own behalf and offered, among other things, a series of documents in support of her position. The first of which is a letter dated April 12, 2004, where the Board addressed it to all parents and guardians of students attending its public schools, which states, in part, as follows:

> A safe and disciplined learning environment is the first requirement of a good school. Every school is in essence a learning institution. That which aids learning is acceptable and that which hinders it is unacceptable. Students who are safe and secure, who learn the basics of society and the essential values of good citizenship are better students. Many public schools are turning to school uniforms. They range from formal to the informal. For the most part, it's an outfit made up of khakis and knit shirts of varying colors. The Salem City School District is considering the adoption of school uniforms. We realize parental support is critical for success. Please read below the list of pros and cons of

> school uniforms. As you read through the list will become evident that the pros far outweigh the cons (P-3).

The letter, dated April 12, 2004, contains a list of ten pro statements and six con statement (P-3). Attached is a survey, dated April 22, 2004, which asks three questions to be answered by students:

> 1. Do you feel you need to wear name-brand clothing to fit in?
>
> For Example: Fubu – Nike – Tommie Jean – Lee – Levis
>
> _____Yes ___No
>
> 2. Has anyone ever made fun of your clothes?
>
> _____Yes ___No
>
> 3. Would you be willing to wear a school uniform to avoid peer pressure, teasing, arguing with your parent on what to wear, etc?
>
> ____Yes ___No
>
> (P-3.)

Petitioner offered a letter, dated April 22, 2004, where the Board surveyed the parents/guardians, and asked them to answer a question concerning school uniforms:

> Would you be willing to have your child(ren) wear a school uniform starting next year? A uniform generally consists of khaki slacks, shorts or skirts and a knit shirt. The cost of one uniform, which includes a shirt and a pair of pants, would be approximately $15. The uniforms may be purchased from JC Penney's, Wal-Mart and Target.
>
> Directions: Please place a check on the line below that best reflects your feelings.
>
> _____Yes, I would be willing to have my child(ren) wear a school uniform starting next year. I understand that the cost of one uniform, which includes a shirt and a pair of pants would be approximately $15.

_____No, I would not be willing to have my child(ren) wear a school uniform next year.

Why?_____

The survey continued to request the family name, the child's name and grade, together with the parent's signature (P-3). There also included a survey of teachers, which asked whether or not the teacher favored school uniforms (P-3).

Petitioner's Exhibit P-3, contains the survey results of the Board's John Fenwick School with respect to the use of school uniforms, which is shown as follows:

Parent – Yes – 209

Parent – No – 51

Student – Yes – 140

Student – No – 117

Teacher – Yes – 19 For Self

Teacher – No – 35 For Self

Teacher – Yes – 51 For Students

Teacher – No – 3 For Students (P-3)

Petitioner offered the results of the survey, by way of the Interoffice Memorandum addressed to the Superintendent of Schools, dated June 4, 2004, and are shown as follows:

95 parents responded with 67% in favor of student uniforms, 21% against, and 12% undecided.

48 teachers responded with 96% in favor and 4% against student uniforms. The 48 teachers voted 67% in favor of teachers wearing uniforms, with 29% against and 4% undecided.

347 students responded with 27% willing to wear student uniforms and 73% against (P-3).

Petitioner referred to a newspaper article dated June 6, 2004, where, among other things, she observed that the Salem High School Principa Gregory Dunham is quoted as stating that he was not a proponent of uniforms for high school students and did not think the policy would be instituted next year (P-4). Petitioner cited a subsequent newspaper article, dated August 28, 2006, which, among other things, included a report of the Board meeting where the policy for school uniforms was adopted by the Board by a vote of seven in favor to four against (P-5). Attached thereto, is the e-mail, dated August 29, 2006, from petitioner addressed to Superintendent of Schools Nicolosi, with a courtesy copy addressed to Principal Dunham, wherein petitioner referred to the Board meeting at which the Board adopted the student uniform policy. In petitioner's e-mail to the Superintendent, petitioner opines, among other things, that she appreciated that everyone had the opportunity to be heard at the Board meeting, however, she perceived that the Board had already made up its mind about the student uniforms and that the meeting was a waste of time. Petitioner continued to state she had done some research concerning the Quinton school district (which had adopted a student uniform policy) and reported that the "GEPA performance in Language Arts, Math and Science Advanced Proficient was better in 1999-2000 without uniforms than it was in 2004-2005 with uniforms." (P-5) Petitioner continued to opine, among other things, that the results were definitely not "concrete evidence in favor of uniforms in schools" as stated by Dr. Agnew (P-5).

Petitioner offered a newspaper article, dated November 13, 2006 (P-6), where petitioner highlighted certain portions of the article. The highlighted sections read as follows:

> . . .According to Superintendent Margaret Nicolosi, the rules were not enforced in September and October as a way to ease students into the process of wearing a uniform to school each day.
>
> . . .Initial success was observed at the start of the school year at Salem High School, but as the weeks went by students started to revert back to their pre-uniform wardrobes.

> ...We had a lot of students in the high school wearing uniforms at the start of the school year, Nicolosi said. "But as the year went by and more students saw their peers stop wearing the uniforms, participation in the policy waned.
>
> . . .Despite the complaints, the board of education members adopted the policy by a vote of seven to four. (P-6)

Petitioner observed that the Board adopted the school uniform policy three years after it surveyed the parents, students and teachers. Petitioner contends that the delay in implementing the policy makes it invalid. Petitioner asserts there is no evidence to prove that the student uniform policy will result in improved student behavior. Petitioner contends, moreover, that the high school principal and the present parents of high school students now do not support the policy.

Superintendent of Schools Margaret J. Nicolosi testified on behalf of respondent concerning the August 2006 Board meeting where the student uniform policy was adopted. Superintendent Nicolosi asserted that fewer than ten percent of the adult school population appeared at the August meeting. She opined that supporters of Board actions generally do not appear at Board of Education meetings. Superintendent Nicolosi testified that the enrollment for the Salem City Schools was 1,400 students with 250 receiving students from other school districts.

Superintendent Nicolosi testified that the letter in petitioner's exhibit P-3 was sent to all parents, teachers and students representing each of the three schools in the district. She reiterated the tabulation of the responses to the survey as indicated above by petitioner's testimony and the exhibit at pages 5, 6, and 7 of P-3 in evidence. She asserted that the wearing of school uniforms does not take away a student's choice. Rather, she testified, there is a combination of four different color choices the student can make and comply with the school uniform policy.

Superintendent Nicolosi testified that she contacted the superintendents of the school districts of Quinton, Pennsgrove and Bridgeton where each board of education adopted student uniform policies. The Bridgeton Board of Education conducted a pilot program two years ago and now has phased in its school uniform policy. The Quinton

student uniform policy has been in operation for five or six years and it was reported to Ms. Nicolosi that student discipline decreased and the number of students on the honor roll increased. It was reported to her by the Quinton Superintendent of Schools that the parents had some initial concerns; however, the parents now have accepted the policy. The Pennsgrove school district has had its student uniform policy in operation for four years. She testified, among other things, that a committee composed of parents, staff members and students, engaged in long-range planning and favored the student uniform policy.

Superintendent Nicolosi testified that the student uniform policy was introduced at the regular Board Meeting held on July 12, 2006, where the first reading of the policy was approved by roll call vote of seven in favor with none opposed. However, there was one board member who voted "no" concerning student uniforms for high school students (R-5). On July 20, 2006, the Superintendent caused a letter to be sent to all parents/guardians of pupils in the school district, advising that the Board's "Uniform Policy" had been approved on its first reading. The letter also advised parents/guardians that a meeting was to be held on August 9, 2006, to solicit comments concerning the policy and prior to the second reading for the adoption of the school uniform policy (R-3). Enclosed with the letter (R-3), the Superintendent provided the parents/guardians with a copy of the proposed School Uniform policy, which, in six pages, detailed the rules and regulations (R-4). Subsequent to the meeting soliciting public comment, the second reading of the policy was held at the regular Board meeting held on August 9, 2006, where the recorded roll call vote of the eleven board members was seven in favor and four opposed (R-1).

In September 2006, the principal of the John Fenwick School sent all to of the parents of students attending the school, the Parent Handbook, which included the following: General Policy and Procedures; Attendance Policy, Protocol for Complaints, Clothing Concerns for Students, Arrival/Dismissal Procedures, Discipline Policies – Preschool & K-2; School Calendar; and the New Uniform Policy. Each parent/guardian was required to acknowledge receipt of the document with a signature, to be returned to the student's classroom teacher (R-7).

The Board's adopted School Uniform policy was distributed to all parents attending the "Back-to-School" night held on September 21, 2006 (R-9)

Superintendent Nicholosi testified that, although no Board funds are expended, it assists disadvantage students to acquire school uniforms through private donations and contributions. She asserted that the Board has the support of the parents and that while high school principal Dunham did not support the use of school uniforms three years ago, he now supports the policy.

Superintendent Nicholosi admitted there was some minor resistance to the school uniform policy. She asserted that when a violation of the policy occurs, the student is directed to the school principal's office where the student telephones his/her parent to ask that the parent bring the approved uniform to the school. If the change of clothes does not occur, the student is either sent home or assigned to detention. She also testified that fewer than twenty-five students did not wear the approved uniforms on "Senior Cut-Day." Here again, the parents were called to bring the approved uniforms to school.

FINDINGS OF FACT

Having considered the testimony of the witnesses and carefully reviewed the documents in evidence, and having given fair weight thereto, **I FIND** the following **FACTS:**

The hearing record demonstrates that between April 12 and April 22, 2004, the Board conducted a survey of parents, students and staff concerning the use of student uniforms in its schools (P-3). The results of the survey shows that a majority of the parents/guardians and teaching staff members were in favor of uniforms while the student body was generally opposed (P-3).

Salem City School Superintendent Margaret Nioclosi surveyed other school administrators where boards of education had adopted student school uniform policies

and was advised that the policies had met with success. The Quinton Superintendent reported that subsequent to its board of education approval of the uniform policy, student discipline had decreased and its honor roll had increased.

The Board held its first reading of the School Uniform Policy on July 12, 2006, where it was approved for the 2006-2007 school year by a vote of seven to zero, with one board member opposing uniforms for high school students. (R-5)

Superintendent Nicolosi testified that the committee composed of parents and professional staff members studied long-range plans for the school district and favored a policy for student school uniforms (P-3)

Prior to the second reading adopting the school uniform policy, the Superintendent sent a copy of the proposed policy, dated July 20, 2006, to all parents and guardians of students enrolled in the Salem public schools. In addition to the proposed policy, the Superintendent also advised the parents and guardians that a public hearing would be held on August 9, 2006, to solicit comments, prior to the Board meeting at which the second reading of the policy would occur (R-3).

The various school principals kept the parents, staff member and students advised of the policy through letters and a copy of the policy (R-3), a Parent Handbook (R-7), and letters to parents/guardians (R-8).

The second reading, adopting the Board policy, was held on August 9, 2006. The roll call vote approving the policy was seven votes in favor of the policy and four votes opposed to the policy (R-1). The school uniform policy became fully effective on November 13, 2006

DISCUSSION AND CONCLUSIONS

Pursuant to N.J.S.A. 18A:11-1, the general mandatory powers and duties, the board of education shall, among other things:

> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Pursuant thereto, the herein Board has adopted a policy for student school uniforms under the statutory provisions found at N.J.S.A. 18A:11-8, which provides, as follows:

> a. A board of education may adopt a dress code policy to require that students wear a school uniform if the policy is requested by the principal, staff and parents of an individual school and if the board determines that the policy will enhance the school learning environment. Any policy adopted which requires the wearing of a uniform shall include a provision to assist economically disadvantaged students. The board shall hold a public hearing prior to the adoption of the policy and shall not implement the policy with less than three months' notice to the parents or guardians of the students. The specific uniform selected shall be determined by the principal, staff, and parents of the individual school.
>
> b. The board of education may provide a method whereby parents may choose not to comply with an adopted school uniform policy. If the board provides such a method, a student shall not be penalized academically or otherwise discriminated against nor denied admittance to school if the student's parents choose not to comply with the school uniform policy.
>
> c. A dress code policy adopted pursuant to this section shall not preclude students who participate in a nationally recognized youth organization which is approved by the board of education from wearing organization uniforms to

> school on days that the organization has scheduled a meeting.

Pursuant to the above statutory provisions, the Board adopted its school dress code policy mandating the wearing of approved uniforms by the students attending its public schools. The record clearly demonstrates the Board kept the parents, staff and student body informed prior to the Board's adoption of its policy. The hearing record demonstrates that a majority of parent/guardians and staff members favored a dress code and the wearing of student uniforms. The record also shows that there are a variety of dress options available to the students. In addition, those financially disadvantaged students will have their uniforms provided to them, without cost to the school district.

Petitioner contends that the policy is void due the lapse of time between the survey of parents, students and staff members and the adoption of the dress code policy. The statute, however, does address the issue of a time between the consent of the school-community and the approval by a board of education to mandate a student dress code. The statute is clear where it requires the "...board shall hold a public hearing prior to the adoption of the policy and shall not implement the policy with less than three month's notice to the parents or guardians...." N.J.S.A. 18A:11-8 a. (emphasis added). Thus, the Board has met the terms and conditions of the statute and, therefore, its adoption should stand.

Having carefully considered the testimony of the witnesses and the documents in evidence, **I CONCLUDE** that the action of the Salem City Board of Education, in adopting its Student Uniform Policy, is pursuant to the statutory provisions found at N.J.S.A.18A:11-8. **I CONCLUDE** that petitioner has failed to carry her burden of proof, by a preponderance of the credible evidence that the adopted policy was in violation of the statutory provisions. **I CONCLUDE**, therefore, that the action of the Board should stand and that the herein Petition of Appeal be **DISMISSED**.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

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

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

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

February 28, 2007 — Lillard E. Law
DATE — **LILLARD E. LAW**, ALJ, T/A

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2-28-07
DATE

Mailed to Parties:

MAR - 6 2007
DATE — OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES

For Petitioner:

Edna Dare

For Respondent:

Margaret J. Nicolosi

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Petition of Appeal with newspaper article, dated August 10, 2006
P-2 E-mail from Edna Dare and its response
P-3 12 pages – Parental Survey and results
P-4 Newspaper article – weighing school uniforms
P-5 Newspaper article and e-mail correspondence
P-6 Newspaper article and e-mail correspondence

For Respondent:

R-1 Minutes of August 6, 2006 Board of Education meeting
R-2 First Reading of Board Policy – School Uniforms
R-3 Letter to Parents/Guardians – July 20, 2006
R-4 School Uniforms – 6 pages
R-5 Minutes of July 28, 2006 Board of Education meeting.
R-6 Memorandum, July 28, 2006 to Board members from Nicolosi
R-7 John Fenwick School, September 2006
R-8 Letter to Parents, August 2006
R-9 Policy – School Uniforms

181-07

#181-07

OAL DKT. NO. EDU 4185-02
AGENCY DKT. NO. 176-6/02

ADAM BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter was effectively resolved through proceedings on petitioner's application for emergent relief, and is therefore no longer a contested case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, which is hereby dismissed for the reasons set forth by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/07
Date of Mailing: 5/18/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 4185-02

AGENCY DKT. NO. 176-6/02

A. B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY

Respondent.

Scott T. Schweiger, Esq., on behalf of petitioner (Mitnick, Josselson & DePersia, attorneys)

Frank P. Cavallo, Esq., on behalf of respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: April 9, 2007 Decided: April 16, 2007

BEFORE **SOLOMON A. METZGER**, ALJ:

The above matter having been heard in May 2002 on an application for emergent relief involving graduation exercises, and a decision having been rendered, it appears this is no longer a contested case. The file has remained on my docket, but recent inquiry to counsel reveals that no further action is required.

Based on the foregoing I **CONCLUDE** that this matter is no longer a contested case and It is **DISMISSED**.

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

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

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

4/16/07
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

APR 17 2007
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/cad

182-07

OAL DKT. NOS. EDU 6733-06 **and** EDU 8330-06[1]
AGENCY DKT. NOS. 291-8/06 **and** 351-9/06

CAROL ANN MOORE,	:	
PETITIONER,	:	
V.	:	
		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF CAROL ANN MOORE, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

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

Upon such review, although the Initial Decision does not address the applicable standard for acceptance of settlements in tenure matters, the Commissioner finds that the instant settlement is, in fact, consistent with such standard. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

[1] Although there is no indication in the record that these matters were formally consolidated at the Office of Administrative Law (OAL), consolidation was suggested in the agency's transmittal instructions; the two matters appear to have proceeded at the OAL as if consolidated from the outset, and the parties' proposed settlement agreement pertains to both matters and was presented to the Commissioner through a single Initial Decision. The Commissioner, therefore, finds it appropriate to review this matter for final agency decision as a consolidated case.

In so holding, the Commissioner is fully mindful of the distressing allegations raised against respondent in the tenure matter. However, in the case of charges alleging use of racial slurs and profanity in the presence of students, the Commissioner cannot compel the Board to litigate such charges under the circumstances set forth in the settlement agreement at Paragraph 3D, which cast serious doubt on the Board's ability to prove the charges true; and in the case of respondent's distribution of inappropriate material to a 12th grade literature class, the Commissioner is satisfied that the penalty imposed by the settlement agreement – withholding of an increment and forfeiture of the 120 days of salary withheld during the tenure proceeding pursuant to N.J.S.A. 18A:6-14 – is consonant with penalties imposed for similar conduct in other tenure matters, particularly in a case such as this where the parties have stipulated that respondent's record is otherwise unblemished. *In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange Township, Essex County,* decided by the Commissioner October 19, 2006, citing *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, decided by the Commissioner October 21, 2002, affirmed by the State Board December 3, 2003, citing *In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner August 4, 1999; *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, decided by the Commissioner March 22, 2000; and *In the Matter of the Tenure Hearing of George Mamunes, Pascack Valley Regional School District,* decided by the Commissioner June 26, 2000.

Moreover, the Commissioner is mindful of respondent's decision to cease employment in the district on June 30, 2007 for reasons unrelated to the tenure charges. In this regard, the Commissioner concurs that – under the circumstances – the present matter is not appropriate for referral to the State Board of Examiners by the school district or the Commissioner for suspension or revocation of respondent's certificate pursuant to *N.J.A.C.* 6A:9-17.4 or *N.J.A.C.* 6A:9-17.6(a)1. However, the Commissioner also reminds the parties that her decision and its underlying record are public documents, and that acceptance of the parties' agreement by the Commissioner cannot circumscribe the authority of the Board of Examiners to act independent of such referral, should it so wish, nor obviate the district's responsibility to cooperate with the Board in that eventuality.

Accordingly, for the reasons – and with the proviso – set forth above, the proposed settlement is approved, and this matter is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/07

Date of Mailing: 5/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6733-06

AGENCY DKT. NO. 291-8/06

CAROL ANN MOORE,

Petitioner,

v.

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

Respondent.

OAL DKT. NO. EDU 8330-06

AGENCY DKT. NO. 351-9/06

IN THE MATTER OF THE TENURE HEARING OF CAROL ANN MOORE, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Richard A. Friedman, Esq., for petitioner (Zazzali, Flagella, Nowak, Kleinbaum & Friedman, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners & George, attorneys)

Record Closed: April 4, 2007 Decided: April 9, 2007

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

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

These matters were transmitted to the Office of Administrative Law on September 15, 2006 and October 19, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1). Upon receipt of the Trenton Board of Education Resolution on April 4, 2007, the hearing record closed.

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

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

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

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

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

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

April 9, 2007
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:

APR 12 2007
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

LIST OF EXHIBITS

Jointly submitted:

J-1 Stipulation of Settlement and Settlement Agreement

TRENTON BOARD OF EDUCATION

RESOLUTION

WHEREAS, Carol Ann Moore, Petitioner, has filed a Petition of Appeal on August 22, 2006 with the Commissioner of Education, Agency Docket No. 291-8/06, OAL Docket No. EDU 6733-2006S, against the Trenton Board of Education, Respondent, seeking to overturn the Board's decision to withhold her increment for the 2006-07 school year; and

WHEREAS, the Trenton Board of Education certified Tenure Charges against Carol Ann Moore on September 25, 2006, Agency Docket No. 351-9/06, OAL Docket No. EDU 8330-2006S; and

WHEREAS, the parties agree it is in their best interests to amicably resolve the Tenure Charges and Petition of Appeal as set forth in the settlement agreement attached hereto;

THEREFORE, BE IT RESOLVED on this 26th day of March, 2007, that the Trenton Board of Education agrees to settle the above-mentioned Tenure Charges and Petition of Appeal as set forth in the attached Stipulation of Settlement and Settlement Agreement.

Nancy R. Swirsky
Board Secretary
Trenton Board of Education

Robert M. Revelle
President
Trenton Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2007 APR -4 A 10:58

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Respondent/Petitioner
Carol Ann Moore

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2007 APR -4 A 9:59
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE CHARGES AGAINST CAROL ANN MOORE, TRENTON BOARD OF EDUCATION, MERCER COUNTY AND CAROL ANN MOORE v. TRENTON BOARD OF EDUCATION, MERCER COUNTY	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NOS. EDU 08330-2006S AND EDU 06733-2006S AGENCY DOCKET NOS. 351-9/06 AND 291-8/06 **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to these matters, the Trenton Board of Education ("Board") and Carol Ann Moore ("Ms. Moore"), having reached an agreement to resolve the within matters, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the tenure charge or the petition of appeal challenging the increment withholding shall be prejudiced and the matters shall be returned to the Office of Administrative Law for hearings in relation to the tenure charge and petition of appeal challenging the increment withholding, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the

parties from agreeing to a new, revised or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the Board shall withdraw the tenure charge and Ms. Moore shall withdraw her petition challenging the Board's withholding of her increment.

3. Rationale for Settlement

A. On or about September 15, 2006, Ms. Moore filed her petition with the Commissioner of Education against the Board. On or about October 19, 2006, the Board filed the tenure charge with the Commissioner of Education against Ms. Moore.

B. The petition alleges that the Board's withholding of Ms. Moore's employment and adjustment increments for the 2006-2007 school year was arbitrary and capricious, and thus in violation of N.J.S.A. 18A:29-14, because the Board provided no reasons, including any written reasons, to Ms. Moore to take such action; and that if any purported reasons were provided by the Board, those reasons would be arbitrary, capricious and unreasonable under the law.

C. The tenure charge alleges that during the 2004-2005 school year, Ms. Moore distributed material authored by her students to her World Literature students who were 12th grade seniors which contained inappropriate language, and that during the 2005-2006 school year, the Board received some complaints by her students and their guardians regarding Ms. Moore's conduct in the classroom, specifically the use of racial slurs, profane language, and an argumentative behavior towards her students which disrupted the learning environment in her classroom.

D. In the course of their investigation and discovery in the case, information was exchanged between the parties which demonstrates to the Board's satisfaction that the Board can

rely only on a few students, essentially from one class that Ms. Moore taught during the 2005-2006 school year, in order to present the allegations in the tenure charge that Ms. Moore used racial and profane language, or inappropriately handled a student in her classroom. The Board further understands that Ms. Moore denies that she engaged in the conduct referred to in the written statements provided by those students, and realizes that Ms. Moore will present statements and/or testimony from other students she taught during the 2005-2006 school year to dispute the statements made about her classroom behavior from those students, and from herself.

E. In the course of their investigation and discovery in the case, information was exchanged between the parties which has demonstrated to Ms. Moore's satisfaction that it is likely that the Board can prove the allegation that Ms. Moore distributed material authored by her students to her World Literature students which contained inappropriate language, but that the Board understands that Ms. Moore made an inadvertent error by not checking the materials that were collated by her students and distributed to those students.

F. Both parties acknowledge that this settlement agreement is based upon their analysis and understanding of the evidence which would be proffered at the hearing, that these conclusions appear to be probable, but cannot be stated with certainty, and that in the event that this settlement agreement is not approved and the matters proceed to a hearing, neither this agreement nor anything in this agreement shall be admissible in evidence, and that neither party will be deemed to have admitted or conceded any of the contents of or the statements in paragraph 3 (D) or (E) of this agreement, or in any other paragraph in this agreement.

G. The Board is aware of the public interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the public schools in New Jersey. However, upon review of all the circumstances, which includes evaluation of the time and

expense of pursuing tenure charges, the uncertainty of the result which might be obtained, both in terms of sustaining the charges and the penalty which might be imposed, Ms. Moore's tenured service in the district, and in all other respects favorable record, the Board believes and Ms. Moore concurs that it is in the best interests of all parties and the public to resolve these matters by this settlement agreement.

4. The parties agree that the acts or omissions engaged in by Ms. Moore as referred to in paragraph 3 above may be deemed to constitute conduct unbecoming and were sufficient to warrant the filing of the tenure charge, but not her removal, and that the appropriate penalty for Ms. Moore in these circumstances is the withholding of Ms. Moore's employment and adjustment increments for the 2005-2006 school year, and the suspension without pay for one hundred and twenty (120) days, penalties which have already been imposed on and served by Ms. Moore as a result of the tenure charge.

5. The parties further agree that the Board will reinstate Ms. Moore to an employment position and pay her salary through June 30, 2007, and with all benefits and emoluments, including, but not limited to, health insurance benefits, through June 30, 2007. In addition, upon leaving her employment, the Board will provide Ms. Moore with a positive letter of reference and incorporate such letter of reference in her personnel file.

6. By settling these matters, Ms. Moore acknowledges that she is waiving her right to hearings before the Office of Administrative Law and Commissioner of Education, in which she could seek an adjudication on the merits of the petition challenging the increment withholding and the tenure charge, and on the penalty, if any, if the tenure charge is sustained. Ms. Moore further acknowledges that she understands and agrees to the terms of this agreement and is satisfied with the legal representation that she received in this matter.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

7. The parties understand that as a result of personal circumstances unrelated to the tenure charge, Ms. Moore will not return to employment with the Board after June 30, 2007, instead choosing to seek other employment opportunities, and has so advised the Board. The parties further agree that the appropriate penalty for Ms. Moore's acts or omissions is as set forth in paragraphs four (4) and five (5) above, and that Ms. Moore's determination not to return to employment after June 30, 2007 does not constitute part of the consideration for this agreement, and is not as the result of the tenure charge.

8. As per paragraph seven (7) above, the parties expressly agree that neither the tenure charge nor the settlement thereof shall be deemed to have resulted in Ms. Moore's loss of her tenured position, that the facts do not warrant suspension or revocation of Ms. Moore's certificate, and that in these circumstances, that the tenure matter is not appropriate for transmittal or referral to the State Board of Examiners pursuant to N.J.A.C. 6:9-17.4 or under any other statute or regulation, and will not be referred to the State Board of Examiners by the Commissioner of Education, and the Commissioner accepts this agreement, and will not refer the matter to the State Board of Examiners.

9. The parties agree that in the event that the Commissioner of Education does not accept paragraph eight (8) or any paragraph of this settlement agreement, this settlement agreement shall be deemed null and void, and the matters shall be returned to the Office of Administrative Law for hearings without prejudice to either parties' position.

10. The Board has approved the terms of this settlement agreement as acknowledged by the attached resolution.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

10. The Board has approved the terms of this settlement agreement as acknowledged by the attached resolution.

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Robert Revelle, President of the Trenton Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on March 26th, 2007, Robert Revelle, President of the Trenton Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Thomas W. Sumners, Jr.
Attorney-at-Law
State of New Jersey

Rodney Lofton, Superintendent of Schools
Trenton Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on March 26th, 2007, Rodney Lofton, Superintendent of the Trenton Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Thomas W. Sumners, Jr.
Attorney at Law
State of New Jersey

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Carol Ann Moore

Carol Ann Moore

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on March 8, 2007, Carol Ann Moore, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

Carrie Jo R. Herbert

CARRIE JO R. HERBERT
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 1/7/2008

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

183-07

OAL DKT. NO. EDU 5411-03
AGENCY DKT. NO. 146-5/03

ROSALIE SCIARRINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/21/07

Date of Mailing: 5/21/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05411-03

AGENCY DKT. NO. 146-5/03

ROSALIE SCIARRINO,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: April 17, 2007 Decided: April 19, 2007

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

On May 7, 2003 the petitioner, Rosalie Sciarrino, filed a Verified Petition with the Commissioner of Education alleging that the action of the respondent, the Board of Education of the City of Elizabeth (the Board), charging petitioner with sick days for a work-related injury violated N.J.S.A. 18A:30-2.1. On May 14, 2003, the Board filed an Answer to the Verified Petition. The Department of Education transmitted the matter to the Office of Administrative Law where, on June 3, 2003, it was filed for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was

originally assigned to Thomas E. Clancy, ALJ. Subsequently, the matter was re-assigned to the undersigned on February 5, 2007. By letter dated March 21, 2007, counsel for the Board advised the undersigned that a settlement had been reached. Thereafter, under letter dated April 16, 2007, counsel for the Board submitted the attached Settlement Agreement and Resolution of the Board reflecting the Board's agreement to accept the Settlement Agreement.

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

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

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

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

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

April 9, 2007
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 4-23-07 URS

Mailed to Parties: DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 23 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

db

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent, Elizabeth Board of Education

ROSALIE SCIARRINO, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO.: EDUOR 05411-03N AGENCY DKT. NO.: 146-5/03

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SETTLEMENT AGREEMENT

Petitioner **ROSALIE SCIARRINO** (R.S.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall credit Petitioner, R.S., a total of thirty-five (35) sick days. This credit represents the reinstatement of the sick days Petitioner utilized on February 3, 4, 5, 6, 10, 11, 12, 13, 21, 24, 25, 26, 27 and 28, 2003 and March 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and 31, 2003.

2. The parties agree that this Settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, R.S., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to Petitioner's injuries that occurred on or about October 22, 2002.

4. Petitioner, R.S., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission, etc., relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for injuries that occurred in October 2002.

5. Petitioner, R.S., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred in October 2002.

6. Petitioner, R.S., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, R.S., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree to accept the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen Murray

Karen A. Murray, Esquire
Counsel for Respondent,
Elizabeth Board of Education

Date: 4/4/07

ROSALIE SCIARRINO

Rosalie Sciarrino

Rosalie Sciarrino, Petitioner
Date: 3/10/07

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner
Date:

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Rosalie Sciarrino, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-05411-2003N and Agency Docket Number 146-5/03, in lieu of a hearing, and;.

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD APRIL 3, 2007

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

06-231

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent, Elizabeth Board of Education

ROSALIE SCIARRINO, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO.: EDUOR 05411-03N AGENCY DKT. NO.: 146-5/03

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SETTLEMENT AGREEMENT

Petitioner **ROSALIE SCIARRINO** (R.S.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall credit Petitioner, R.S., a total of thirty-five (35) sick days. This credit represents the reinstatement of the sick days Petitioner utilized on February 3, 4, 5, 6, 10, 11, 12, 13, 21, 24, 25, 26, 27 and 28, 2003 and March 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and 31, 2003.

2. The parties agree that this Settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, R.S., agrees that this Settlement resolves any and all claims that she had, or may have had against Respondent relative to Petitioner's injuries that occurred on or about October 22, 2002.

4. Petitioner, R.S., agrees to waive any rights she had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission, etc., relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for injuries that occurred in October 2002.

5. Petitioner, R.S., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred in October 2002.

6. Petitioner, R.S., agrees that she has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, R.S., agrees that she has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree to accept the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Elizabeth Board of Education

Date: 4/4/07

ROSALIE SCIARRINO

Rosalie Sciarrino, Petitioner
Date: 3/10/07

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner
Date:

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Rosalie Sciarrino, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-05411-2003N and Agency Docket Number 146-5/03, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD APRIL 3, 2007

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

06-231

184-07

184-07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2780-07

AGENCY DKT. NO. 124-5/07

T.B.M, ON BEHALF OF
MINOR CHILD, M.M.,
Petitioner,

v.

MOORESTOWN BOARD OF EDUCATION,
Respondent.

Louis N. Caggiano, Esq., for petitioner

Arthur Risden, Esq., for respondent (Archer & Greiner, attorneys)

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

STATEMENT OF THE CASE

T.B.M. on behalf of minor child M.M. (petitioner) asserts that her son's punishment, including the removal from an Honors class at Moorestown High School (School) for plagiarism and possession of unauthorized downloads is arbitrary, and capricious. The Moorestown Board of Education (Board) asserts that more than twenty students were found to have been involved in plagiarism and possession of unauthorized downloads from the school internet site, and the punishments for such behavior are set forth in the student handbook and are not arbitrary and capricious.

PROCEDURAL HISTORY

On May 3, 2007, Petitioner filed an application for emergent relief with the Commissioner of Education. The application stated the Board acted in an arbitrary and capricious manner by imposing the punishment on her son, including the removal of her son from the Honors program and a two-day in school suspension.

On May 4, 2007, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief on May 9, 2007. On that date, petitioner requested a brief adjournment to obtain counsel. On May 11, 2007, the case was heard in the OAL, Trenton (Hamilton Township) and the record closed on that date.

STATEMENT OF FACTS

M.M. is a ninth grade Moorestown student who was enrolled in the Honors Computer Assisted Drafting 1 course (CAD 1) during the current academic school year.

On or about March 1, 2007, the school became aware of potentially widespread cheating in the CAD 1 class. The School began an investigation to determine the full extent of the cheating in the CAD I class, as well as what steps need to be implemented to prevent this type of situation in the future (R-1). The Moorestown Student Handbook provides that plagiarism will not be tolerated in any schoolwork, and it will result in the loss of credit for the assignment, out-of-school suspensions, and/or loss of credit for the course (R-2). The Moorestown's Acceptable Use Agreement and Policy No. 6142.10 specifically provides that users will respect the rights of others by complying with all school district policies regarding plagiarism (R-5).

The Administration presented the students in CAD I with the opportunity to come forward to admit to any violations of policies and guidelines, and indicated that students who came forward would be disciplined, but more leniently than those who did not

come forward (R-1, R-7, R-8).

On March 9, 2007, M.M. submitted a written admission that he had copied a project from another student although he was "not sure which" one (R-6). M.M. was one of twenty-one students who came forward.

The School determined that students who came forward would be treated with leniency, when compared to the traditional consequences for plagiarism. Although the students who came forward faced the same discipline, the school alleges each student was considered individually, and special accommodations were offered, when appropriate, such as for special education students and senior students. Specifically, the students were afforded safeguards regarding credit, the ability to retake the course, and counseling on how to handle questions about the incident during the college admission process, if asked (R-1, R-7, R-8).

Based on his admission, M.M. was charged with possession of a file that was determined to be the work of another student, the use of a computer file that was the work of another student, defined as plagiarism, and/or the possession of an executable gaming file that was identified as an unauthorized download.

As a result of these charges, M.M. received an administrative withdrawal from CAD I, with a final grade of W (Withdraw), suspension of his MooreNet privileges until Friday, March 16, 2007, a two-day in-school suspension, and ten social probation points. Customarily, such conduct would result in an academic withdrawal with a final grade of WF (Withdraw-Fail), which impacts the G.P.A., suspension of MooreNet privileges for the remainder of the school year, a five day out-of-school suspension, and twenty-five social probation points (R-7).

Any student who came forward, including MM., was afforded special safeguards, including the ability to maintain sufficient credits for the current year, despite the loss of five CAD I credits, the ability to retake CAD I, and discussions with parents regarding how a student should handle questions about the plagiarism suspension during the college admission process, if asked (R-1, R-7, R-8).

The preceding information has not been disputed or contradicted by the parties, and is found as fact.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

Petitioner argues that M.M. will suffer irreparable harm because he will not be able to catch-up in the CAD I class unless he is reinstated immediately; he will not be able to attend all of the classes available in the architecture/engineering field if he has to take CAD I next year; that he will not earn enough credits upon completing the ninth grade; and, that he will have a difficult time explaining to colleges and universities why he withdrew from CAD I. Although Petitioner may sincerely believe M.M. will suffer some or all of these problems if the alleged harm is not reinstated in CAD I, M.M. will have the opportunity to take CAD I next year. There was also an allegation that the withdrawal would affect his grade point average, however the testimony was clear that this would only be a withdrawal without a failure and not affect his average. Although the petitioners certainly raise important arguments as to the effect of this action on the possible effects on college admission and the ability to take future honors course, M.M.

is only a freshman. Any effect on future classes or college admission is only speculative. There is no guarantee if reinstated that M.M. would be able to complete the CAD 1 program. Therefore, I **FIND** the petitioners have been unable to meet their burden that M.M will suffer irreparable harm if this relief is not granted.

Student's choice in specific courses, curriculum materials, assignments, and teachers are matters of educational policy and not constitutional rights. J.L. and J.E.H. o/b/o T.H.I. v. Board of Education of the Hopewell Valley Regional School District, EDU 2658-99, Initial Decision (August 20, 1999, adopted, Commissioner of Education (October 18, 1999), and, adopted, State Board of Education (February 2, 2000). The determination of placement, suspension, or withdrawal from an Honors course is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm.

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294. The School has clearly established a policy that does not tolerate plagiarism and any students found to violate that policy will face loss of credit for the assignment, out-of-school suspensions and/or loss of credit for a course. As a result, I **FIND** that Respondent's actions in applying its policy to withdrawal from CAD I, with a final grade of W (Withdraw); suspend of his MooreNet privileges until Friday, March 16, 2007; suspend M.M. in-school for two days; and assess ten social probation points due to his

conduct cannot be disturbed. Consequently, I further **FIND** it unlikely that the Petitioners would have prevailed on the merits.

Petitioner cites N.J.A.C. 6A:16-7.1(b)(6) in reliance of her position that the legal right underlying the petitioner's claim is settled. N.J.A.C. 6A:16-7.1(b)(6) provides that a code of conduct shall be created:

> Establish parameters for school responses to violations of the code of student conduct that take into account, at a minimum, the severity of the offenses, the developmental ages of the student offenders and students' histories of inappropriate behavior.

Petitioner alleges that Moorestown failed to take into account these standards. The School asserts that they did, including his status as a freshman and lack of a disciplinary record. Petitioners further argues that this incident constitutes misuse of technology equipment, which is disciplined as a Level C offense (R-3). Petitioner further argues that that the first offense for a Level C offense is one Saturday suspension (R-4), and the penalties imposed on M.M. are in far excess of what is prescribed, and is arbitrary and capricious.

The School argues that this offense constitutes plagiarism, which has specific penalties outlined under that chapter of the handbook (R-2), and the penalties imposed are well within that section. The School further argues that level offense are penalties that can be imposed, and the handbook also states that they have the authority to administer a higher level of discipline or may take other appropriate action when deemed necessary.

As stated above, the actions of boards of education have a presumption of validity. A specific policy and punishment was established by the Board with respect to plagiarism and enumerated in the School Handbook. Based on these factors, I **FIND**

that the petitioner did not meet her burden of proof that there is a legal right underlying the claim.

Clearly, the respondent has a substantial interest in preventing plagiarism and cheating, as well as ensuring that its disciplinary policies are applied. If it did not enforce its disciplinary policies, the School would be sending the wrong kind of message and possibly establishing a dangerous precedent. Consequently, I **FIND** that Respondent will suffer greater harm than Petitioner if the requested relief is granted.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m)1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and all three petitioners have failed to satisfy any of the four requirements, I **CONCLUDE** that the Petitioners have failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the Petitions of M.M. for emergent relief is **DENIED** without prejudice.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 11, 2008
DATE

Donald J. Stein
DONALD J. STEIN, ALJ

/lam

LIST OF EXHIBITS

For petitioner:

P-1 Petition

P-2 Petitioner's Brief

For respondent:

R-1 Affidavit of Timothy Brennan

R-2 Moorestown Student Handbook Policy For Academic Dishonesty And Cheating

R-3 Moorestown Student Handbook Policy For Misuse Of Technology Equipment

R-4 Moorestown Student Handbook Guidelines For Student Conduct And Consequences

R-5 Moorestown's Acceptable Use Agreement and Policy

R-6 Written Statement of M.M. dated March 9, 2007

R-7 Affidavit of Andrew Seibel

R-8 Respondent's Brief

185-07

JENNIFER BOYCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, AND CAPE MAY COUNTY SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a former library media specialist in respondent's district – contends that she attained tenure in the district, and that the Board terminated her employment in violation of the law. Respondent asserts that petitioner – who holds an instructional certificate with an elementary endorsement – was employed in the position of media specialist first as a long term substitute and then under an emergency certificate; petitioner taught Character Education, a subject for which no certificate is required, in addition to her media specialist responsibilities; and petitioner was never eligible for tenure status. Respondent claims that petitioner was terminated due to her failure to complete the requirements for standard certification for the position of library/media specialist.

The ALJ found, *inter alia*, that: petitioner was originally employed as library/media specialist to replace a staff member who was on a leave of absence, and her time spent as a replacement cannot be counted toward tenure; petitioner's time in the Character Education program does not contribute toward tenure because the function did not require an instructional certificate; petitioner failed to present sufficient evidence that she was the teacher of record for the PACE program, and her service in that program was performed under her emergency library/media specialist certificate. The ALJ concluded that petitioner was not improperly dismissed, but the Board violated the 60 day contractual notice clause and is responsible to award petitioner any salary due under the contract. In all other respects, he recommended that the petition be dismissed.

Upon a full and independent review, the Commissioner concurs with the ALJ that petitioner did not attain tenure in respondent's district. However, the matter is remanded to the OAL for findings and conclusions regarding 1) whether the pleadings included a claim that respondent violated the 60-day notice clause, and/or a demand that petitioner be paid for the sixty days; and 2) if such a claim and demand were made in the pleadings, the amount of pay petitioner received after respondent's notice to her of termination.

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

OAL DKT. NO. EDU 727-06
AGENCY DKT. NO. 392-12/05

JENNIFER BOYCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, AND CAPE MAY COUNTY SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] Neither party filed exceptions.

The Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner did not meet her burden to show by a preponderance of the evidence that she had achieved tenure in respondent's district prior to her dismissal in September 2005; this matter, however, is remanded to the OAL for clarification regarding whether the issue of violation of the contractual 60 day notice requirement was addressed in amended pleadings at the OAL hearing, and if it was, whether petitioner received compensation for the sixty day period.

Initially, it is undisputed that between the onset of her employment by respondent in 2001 and her dismissal in 2005, petitioner failed to complete the academic requirements for certification as a media specialist. Thus, tenure in that position was not available to her. Furthermore, there are multiple flaws in petitioner's position that she achieved tenure by teaching two classes per day of character education for about 2.8 school years and assisting other

[1] The parties did not provide the Commissioner with a transcript of the OAL hearing.

teachers with the PACE program for about a year. For instance, tenure accrues to "teaching staff members." *N.J.S.A.* 18A:28-5. The term "teaching staff member" is defined in *N.J.S.A.* 18A:1-1, to mean an employee whose job requires him or her to "hold a valid and effective, standard, provisional or emergency certificate appropriate to his office." It is undisputed – and the ALJ found – that petitioner's service as a character education instructor did not require certification. Thus, petitioner was not, by virtue of her instruction in character education, a teaching staff member and consequently could not accrue time toward tenure for that instruction. *See, also, Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63 (1982).

Moreover, although he did not include it in his formal findings of fact, the ALJ clearly accepted (Initial Decision, p.32) that petitioner began her employment in respondent's district as a long term substitute, temporarily replacing an employee who had requested a leave of absence. Thus, the period of time prior to the date upon which the on-leave employee resigned could not be counted in calculating tenure eligibility. *See, e.g. Lustberg v. Board of Education of the Borough of Tenafly, Bergen County,* EDU 7080-03 (February 27, 2004), adopted by the Commissioner April 12, 2004. Accordingly, even if petitioner's service as a character education instructor could be considered tenure-track service, the first year of it could not be counted.

Additionally, although the ALJ did not include the following in his formal findings of fact, he did accept that:

> To the extent that petitioner participated with the school's PACE program, it appears petitioner acted more as a reference point in her capacity as the library/media specialist, rather than having complete control of the socials [sic] studies classes. It is not disputed petitioner participated with the PACE program, however, there is no evidence that she was the sole teaching staff member in charge. (Initial Decision, p.32, emphasis added)

Thus, the ALJ determined that the assistance petitioner provided to PACE students was consistent with her responsibilities as a media specialist, and was designed to help students accomplish assignments designed by other teachers. Respondent's exhibit R-3 supports this determination. Accordingly, the ALJ concluded that petitioner did not perform independent service as an elementary classroom teacher during the year or so of her involvement in the PACE program, and could not use that aspect of her employment as a basis for tenure accrual. The Commissioner cannot disagree.

In sum, petitioner neither achieved tenure as a media specialist nor as an elementary teacher in respondent's district. Thus, respondent's termination of her employment was not a tenure violation. Accordingly, the petition is dismissed as to petitioner's allegations that her tenure rights were violated, and as to any relief requested in connection therewith.

The remaining issue in the case is the ALJ's conclusion that respondent violated the sixty-day notice clause in the employment contract between the parties, and his determination that respondent is required to pay petitioner wages for any balance due for the period between the September 22, 2005 notice of termination and November 21, 2005. The Commissioner notes that, as a general matter, she does not have jurisdiction over contract disputes. In the present controversy, however, the application of the 60-day notice clause in the parties' contract can be regarded as ancillary to the main issues in the case. Having decided the primary issues, the Commissioner would be loathe to send the parties to another forum for a determination concerning a maximum of sixty days of pay.

However, the Commissioner must remand this matter to the OAL for the following reasons. First, neither the petition nor the pre-hearing order includes an allegation that respondent violated the 60-day notice clause and/or a demand that petitioner be paid for the sixty

days. Because the Commissioner was not provided with a transcript of the hearing she was unable to determine whether the pre-hearing order was modified during the hearing to include that issue. Relief may not be granted if it was not requested in the pleadings or articulated in the pre-hearing order unless the pleadings were amended at hearing.

In addition, it is unclear from the record whether petitioner's remuneration was, in fact, paid through November 15, 2005, as found by the ALJ (Initial Decision, p.17), whether her pay was stopped on September 29, 2005, the effective date of her termination, as set forth in petitioner's exhibit P-4, or whether some other date was used as the terminus for her salary.

Accordingly, this matter is remanded to the OAL for findings and conclusions regarding 1) the existence *vel non* in the pleadings of a claim that respondent violated the 60-day notice period in the contract of employment between the parties, and a demand for relief for such violation, and 2) if such a claim and demand were made in the pleadings, the amount of pay petitioner received after respondent's notice to her of termination.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/21/07

Date of Mailing: 5/21/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.*18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

187-07

OAL DKT. NO. EDU 1041-07
AGENCY DKT. NO. 436-11/06

NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY, INC., d/b/a MICHAEL'S ENERGY FACTOR AND d/b/a BARNEY'S EDUCATIONAL CENTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.[1]

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ – for the reasons extensively set forth in her oral decision from the bench – that petitioner has failed to satisfy *any* of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner, however, finds it unnecessary to reach to the ALJ's grant, pursuant to *N.J.A.C.* 1:1-6.2, of petitioner's Motion to Amend the Petition as this is not appropriately before her in resolution of this emergent matter.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits a contemplated by the ALJ and the parties.

IT IS SO ORDERED.[2]

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/23/07

Date of Mailing: 5/23/07

[1] It is noted that although the hearing in this matter – at which the ALJ's decision, and her reasons underlying such decision, were rendered orally – was held on Wednesday, May 2, 2007, the record of this matter and the hearing tape were not received by the Commissioner until Friday, May 11.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 01041-07

AGENCY DKT. NO. 436-11/06

NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY, INC., d/b/a MICHAEL'S ENERGY FACTORY and d/b/a BARNEY'S EDUCATIONAL CENTER,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Roy J. Evans, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

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

On or about November 27, 2006, North Jersey Community Coordinated Child Care Agency, Inc. d/b/a Michael's Energy Factory and d/b/a Barney's Educational Center (NJCCCC) filed a Verified Petition of Appeal against the respondent, the State Operated School District of the City of Paterson (the District), challenging the recoupment of monies from NJCCCC's monthly payments based on the review of financial reports of NJCCCC's programs. The Department of Education (the Department) transmitted the matter to the Office of Administrative Law (OAL) where, on January 3, 2007, it was filed

for hearing as a contested case. On March 9, 2007, NJCCCC filed with the Commissioner of Education a Motion for Emergent Relief and Leave to Amend its Petition. More particularly, NJCCCC moved for an Order granting emergent relief enjoining the District from implementing the repayment/reduction schedule delineated in its January 17, 2007 notifications pending disposition of the underlying dispute. In support of the motion, NJCCCC filed a brief and a Certification of Mary Ann Mirko, the Director and Chief Executive Officer of NJCCCC. The Department transmitted the emergent relief application and motion to amend to the OAL where it was filed on or about March 15, 2007. The District submitted a brief in opposition to the emergent relief motion dated March 19, 2007, along with a Certification of Anna DeMolli, Ed. D., the District's Director of the Department of Early Childhood Education, and a Certification of Counsel. NJCCCC submitted a reply brief and Certification of Antonio DiNizo, the Chief Financial Officer of NJCCCC, in further support of the motion. The motion was held in abeyance due to a pending motion before Administrative Law Judge Richard McGill seeking reconsideration of his Order denying consolidation of this matter with an earlier matter pending before Judge McGill, captioned as Holistic Ministries International d/b/a Loving Care Early Learning Center v. State Operated School District of Paterson, OAL Docket No. EDU 11391-06. Subsequently, on April 18, 2007, the matter assigned to Judge McGill was reassigned to the undersigned. The undersigned denied NJCCCC's reconsideration motion by Order dated April 30, 2007. On May 2, 2007, the undersigned heard oral argument on NJCCCC's Motion for Emergent Relief and Leave to Amend.

Having considered the documentation, including the certifications, exhibits and briefs, submitted on behalf of the parties; and having heard the arguments of counsel (Christina N. Campanella, Esq. appearing for petitioner and Roy J. Evans, Esq. appearing for respondent); and for good cause shown, I **CONCLUDE** that, for the reasons more particularly set forth in the undersigned's oral decision rendered on May 2, 2007, NJCCCC has failed to meet the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6(b) and Crowe v. DeGioia, 90 N.J. 126 (1982). Specifically, I

CONCLUDE that, for the reasons set forth in the undersigned's oral decision on May 2, 2007, NJCCCC has failed to demonstrate that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

I **ORDER** that petitioner's Motion for Emergent Relief be and hereby is **DENIED**.

I further **ORDER** that petitioner's Motion to Amend the Petition, which respondent did not oppose, be and hereby is **GRANTED.**

I further **ORDER** that, within ten (10) days of receipt of this Order, petitioner shall file an Amended Verified Petition substantially similar to the Amended Verified Petition attached to the Notice of Motion, after which respondent shall file an Answer to the Amended Verified Petition within the time required by the regulations.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Margaret M Monaco

May 3, 2007
DATE

MARGARET M. MONACO, ALJ

db

188-07E

188-07

OAL DKT. NO. EDU 11391-06
AGENCY DKT. NO. 374-10/06

HOLISTIC MINISTRIES INTERNATIONAL d/b/a LOVING CARE EARLY LEARNING CENTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.[1]

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ – for the reasons extensively set forth in her oral decision from the bench – that petitioner has failed to satisfy *any* of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner, however, finds it unnecessary to reach to the ALJ's grant, pursuant to *N.J.A.C.* 1:1-6.2, of petitioner's Motion to Amend the Petition as this is not appropriately before her in resolution of this emergent matter.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits as contemplated by the ALJ and the parties.

IT IS SO ORDERED.[2]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/23/07

Date of Mailing: 5/23/07

[1] It is noted that although the hearing in this matter – at which the ALJ's decision, and her reasons underlying such decision, were rendered orally – was held on Wednesday, May 2, 2007, the record of this matter and the hearing tape were not received by the Commissioner until Friday, May 11.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 11391-06

AGENCY DKT. NO. 374-10/06

HOLISTIC MINISTRIES INTERNATIONAL d/b/a LOVING CARE EARLY LEARNING CENTER,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Roy J. Evans, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

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

On or about October 18, 2006, Holistic Ministries International d/b/a Loving Care Early Learning Center (HMI) filed a Verified Petition of Appeal against the respondent, the State Operated School District of the City of Paterson (the District), challenging the recoupment of monies from HMI's monthly payments based on the review of financial reports of HMI's program. The Department of Education (the Department) transmitted the matter to the Office of Administrative Law (OAL) where, on November 27, 2006, it

was filed for hearing as a contested case. On or about March 12, 2007, HMI filed with the Commissioner of Education a Motion for Emergent Relief and Leave to Amend its Petition. More particularly, HMI moved for an Order granting emergent relief enjoining the District from implementing the repayment/reduction schedule delineated in its January 18, 2007 notification pending disposition of the underlying dispute. In support of the motion, HMI filed a brief and a Certification of Georgia D. Scott, the Director of Loving Care. The Department transmitted the emergent relief application and motion to amend to the OAL for disposition. The District submitted a brief in opposition to the emergent relief motion dated April 2, 2007, along with a Certification of Toni Scholing, the District's Fiscal Monitor, and a Certification of Counsel. HMI submitted a reply brief in further support of the motion. This matter was originally assigned to Administrative Law Judge Richard McGill and was reassigned to the undersigned on April 18, 2007. By Order dated April 30, 2007, the undersigned denied HMI's motion for reconsideration of Judge McGill's order denying consolidation. On May 2, 2007, the undersigned heard oral argument on HMI's Motion for Emergent Relief and Leave to Amend.

Having considered the documentation, including the certifications, exhibits and briefs, submitted on behalf of the parties; and having heard the arguments of counsel (Christina N. Campanella, Esq. appearing for petitioner and Roy J. Evans, Esq. appearing for respondent); and for good cause shown, I **CONCLUDE** that, for the reasons more particularly set forth in the undersigned's oral decision rendered on May 2, 2007, HMI has failed to meet the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6(b) and Crowe v. DeGioia, 90 N.J. 126 (1982). Specifically, I **CONCLUDE** that, for the reasons set forth in the undersigned's oral decision on May 2, 2007, HMI has failed to demonstrate that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

I **ORDER** that petitioner's Motion for Emergent Relief be and hereby is **DENIED**.

I further **ORDER** that petitioner's Motion to Amend the Petition, which respondent did not oppose, be and hereby is **GRANTED.**

I further **ORDER** that, within ten (10) days of receipt of this Order petitioner shall file an Amended Verified Petition substantially similar to the Amended Verified Petition attached to the Notice of Motion, after which respondent shall file an Answer to the Amended Verified Petition within the time required by the regulations.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 3, 2007
DATE

MARGARET M. MONACO, ALJ

db

187-07

OAL DKT. NO. EDU 7632-03
AGENCY DKT. NO. 166-5/03

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

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

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

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/23/07

Date of Mailing: 5/23/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7632-03
AGENCY DKT. NO.: 166-5/03

ANNEMARIE TORRE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,
Respondent.

Nancy Oxfeld, Esq.., for petitioner (Oxfeld, Cohen, attorneys)

Lester Taylor, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: April 26, 2007 Decided: April 30, 2007

BEFORE **IRENE JONES**, ALJ:

On May 20, 2003, petitioner, AnneMarie Torre filed a petition with the Commissioner of Education contesting the respondent's action that charged her sick time for a work related injury in violation of N.J.S.A. 18A:30-2.1. On August 15, 2003 the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The

matter was scheduled for hearing but was placed on the inactive list for good cause. On March 6, 2007, the parties agreed to settle the matter and filed a Stipulation of Settlement which is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

4/30/07
DATE

Irene Jones
IRENE JONES, ALJ

Date Received at Agency: 5-8-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, NJ 07102-5504
(973-642-0161
Attorney(s) for Petitioner

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STATE OF N.J.
2007 APR 26 A 10:54

ANNEMARIE TORRE,	
Petitioner,	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
vs.	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,	**OAL DKT. NO.: EDUOA 07632-2003N**
Respondent.	**AGENCY REF. NO.: 166-5/03**
	SETTLEMENT AGREEMENT

Annemarie Torre, Petitioner, and the Board of Education of the Township of Irvington, Respondent, hereby agree to resolve this matter upon the following terms:

1. The Respondent agrees to pay the Petitioner $440.00, representing pay for unused sick days pursuant to the collective bargaining agreement between the Respondent and the Irvington Education Association;

2. The Petitioner agrees to withdraw with prejudice her petition in this matter;

3. Both parties agree that the entire agreement between the parties is set forth herein. Both parties waive any claims which were brought or could have been brought relating to this matter, including any grievance Petitioner could have filed pursuant to the collective bargaining agreement between the Respondent and the Irvington Education Association, other than the relief specifically set forth in this agreement;

4. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting to any liability with regard to the allegations set forth in this or any other proceeding.

OXFELD COHEN, PC
Attorney(s) for Petitioner

DATED: 3/30/07

By: _____
NANCY I. OXFELD, ESQ.

Hunt, Hamlin & Ridley
Attorney(s) for Respondent

By: _____
Lester Taylor, Esq.

DATED:

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, NJ 07102-5504
(973-642-0161
Attorney(s) for Petitioner

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STATE OF N.J.
OFFICE OF ADMIN. LAW

2007 APR 26 A 10:56

ANNEMARIE TORRE,	)
Petitioner,	) **BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
vs.	)
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,	) **OAL DKT. NO.: EDUCA 07632-2003N**
Respondent.	) **AGENCY REF. NO.: 166-5/03**
	)
	) **SETTLEMENT AGREEMENT**
	)

Annemarie Torre, Petitioner, and the Board of Education of the Township of Irvington, Respondent, hereby agree to resolve this matter upon the following terms:

1. The Respondent agrees to pay the Petitioner $440.00, representing pay for unused sick days pursuant to the collective bargaining agreement between the Respondent and the Irvington Education Association;

2. The Petitioner agrees to withdraw with prejudice her petition in this matter;

3. Both parties agree that the entire agreement between the parties is set forth herein. Both parties waive any claims which were brought or could have been brought relating to this matter, including any grievance Petitioner could have filed pursuant to the collective bargaining agreement between the Respondent and the Irvington Education Association, other than the relief specifically set forth in this agreement;

4. This agreement may not be utilized by either party in any other proceeding as support or proof of any contention raised by that party in this proceeding and neither party is admitting to any liability with regard to the allegations set forth in this or any other proceeding.

OXFELD COHEN, PC
Attorney(s) for Petitioner

DATED: 3/30/07

By: _____
NANCY I. OXFELD, ESQ.

Hunt, Hamlin & Ridley
Attorney(s) for Respondent

By: _____
Lester Taylor, Esq.

DATED:

189-07

T.B. and M.B. on behalf of minor child S.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, and DR. PATRICIA JOHNSON,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

T.B. and M.B. filed a petition in April 2007 seeking reimbursement of the $400 cost of S.B.'s 2006 summer school chemistry class which – according to petitioners – was necessitated by a chemistry teacher's unfair and discriminatory treatment of their daughter during the 2005-2006 school year, and respondent board and superintendent's failure to take corrective action. Respondent board made a motion to dismiss for violation of the 90-day requirement provided in *N.J.A.C.* 6A:3-1.3(i).

The Commissioner found, *inter alia*, that: respondents' action – or lack thereof – which allegedly caused petitioners harm took place in May 2006 and therefore the 90-day limitations period ended in August 2006; there is no indication in the pleadings that petitioners ever brought a formal appeal of S.B.'s grade or the teacher's alleged misconduct before the respondent board; and the Commissioner has no jurisdiction to grant petitioners the relief they seek. Accordingly, the petition was dismissed.

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

May 23, 2007

189-07

AGENCY DKT. NO. 95-4/07

T.B. and M.B. on behalf of minor child S.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, and DR. PATRICIA JOHNSON,	:	DECISION
RESPONDENT.	:	

According to the petition in this matter, petitioners' minor child, S.B., had been doing poorly in chemistry during the 2005-2006 school year, and petitioners had requested an audience with the teacher and a guidance counselor in May 2006. Petitioners did not accept the teacher's representation – made at the conference – that he had given S.B. extra help. To the contrary, they accepted S.B.'s assertions that the teacher had been treating her unfairly. In the petition they further alleged that the guidance counselor had promised – at the above referenced meeting – to provide S.B. with tutoring, but never followed through on the promise.

Petitioners also contended in the petition that the principal of S.B.'s school and the respondent superintendent of schools had improperly failed to investigate "the unequal and discriminatory treatment of [S.B.] by Mr. Deutsch" and take "corrective action." The allegation of discriminatory treatment rested upon S.B.'s assertion that the teacher did not like her and ridiculed her when she gave wrong answers.

S.B. failed chemistry, and petitioners consequently enrolled her in a summer chemistry course, which necessitated rescheduling of the family's 2006 summer vacation. Petitioners alleged in the petition that they had made telephone calls to the school beginning in May 2006 but that the "school gave no attention to our complaint and seemed to dismiss it

outright." They contend further that they had "tried to get the attention of the Board of Education; however, they [sic] just gave us a run around and asked us to write another letter to the Superintendent to no avail."

The relief demanded in the petition, which was filed on April 2, 2007, was the reimbursement of the $400 cost for S.B.'s summer class which, according to petitioners, had been necessitated by the chemistry teacher's behavior and "the appalling response by the Park Ridge School."

Respondent answered on May 1, 2007, by way of a brief motion to dismiss the petition for untimeliness. On May 2, 2007 the Bureau of Controversies and Disputes (the Bureau) wrote to petitioners asking them to address respondent's motion, and also to identify the legal basis for their request for consequential damages.

Petitioners' response was received by the Bureau on May 10, 2007. As to the issue of timeliness, they contended that their petition had been filed within the 90-day period required by *N.J.A.C.* 6A:3-1.3(i) because it had been filed 73 days after "the final ruling of the board of education." The "final ruling" to which petitioners referred is a letter dated January 19, 2007, from respondent Superintendent Patricia Johnson. In the letter Johnson stated, in pertinent part:

> After our last conversation I apprised the Board of Education at the January 8th meeting of your concerns and displeasure concerning your daughter's experience in chemistry during the last school year and your assertion that the teacher, the school and the district did not meet their responsibilities. I further indicated to the Board your belief that you should be compensated $400 due to the expenses incurred in placing your daughter in summer school (summer 2006), along with the inconvenience revolving around her attendance during the summer months.
>
> The Board of Education requested that I respond for them. It is not the practice of the Board to compensate parents for summer school expenses. In doing so they would be creating a precedent that is questionable at best.

Respondents pointed out in their motion papers that the action the petitioners challenge is actually the district's decision – in May 2006 – not to investigate or correct the alleged mistreatment of S.B. by her chemistry teacher.[1] Accordingly, counting from the end of May 2006, petitioners ran out of time for filing an appeal at the end of August 2006. Nonetheless they did not file an appeal to the Commissioner until April 2007, at least ten months after the alleged offending action. Thus, respondents ask that the petition be dismissed with prejudice for untimeliness.

The Commissioner agrees. The district action, or lack thereof, which allegedly caused petitioners harm took place in May 2006, and the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i) consequently ended in August. Even if the date upon which the district issued S.B. a failing grade were used as the beginning of the period of limitations, the petitioner's time to file an appeal would have expired long before April 2, 2007, the date of their petition.

Furthermore, there is no indication in the pleadings that petitioners had ever brought a formal appeal of S.B.'s grade, or the teacher's alleged misconduct, before the respondent board of education. Thus, the letter dated January 19, 2007 – conveying the board's informal response to petitioners' concerns, which petitioners had expressed verbally to respondent Johnson at some point before January 8, 2007, and Johnson had conveyed to the board on January 8, 2007 – does not constitute an intervening "final ruling of the board of education."[2]

---

[1] According to petitioners, such an investigation and, perhaps, corrective action, would have prevented S.B.'s failing grade in chemistry and, in turn, the need for petitioners to pay $400 for summer school.

[2] The Commissioner rejects petitioners' request that respondents' answer be dismissed. The first acknowledgment letter sent out by the Bureau of Controversies and Disputes on April 2, 2007, was inadvertently not sent to all parties. An amended acknowledgment letter was distributed on April 30, 2007, and respondents' motion to dismiss was filed one day later, on May 1, 2007.

point before January 8, 2007, and Johnson had conveyed to the board on January 8, 2007, does not constitute an intervening "final ruling of the board of education."[2]

In response to the Bureau's request for the identification of a legal basis for their demand for consequential damages, petitioners simply reiterated their factual allegations and assumptions. No legal basis was provided to show that the Commissioner has the authority to award such damages and, indeed, the Commissioner has previously found to the contrary. *See, e.g., John Scott and Charles Yarnell v. Board of Education of the City of Trenton, Mercer County, and Board of Education of the Mercer County Vocational and Technical School District, Mercer County, and James Pupalaikis, Augustine Spagnola and Edward Schmidt v. Board of Education of the City of Trenton, Mercer County and Board of Education of the Mercer County Vocational Technical School District, Mercer County,* OAL DKT. NOS. EDU 10333-96 and EDU 6748-97 (Consolidated), decided by the Commissioner on September 30, 2002, pp. 3-4. Therefore, even absent a timeliness problem, the Commissioner would have no jurisdiction to grant petitioners the relief they seek.

For the reasons set forth above, the petition is dismissed.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/23/07

Date of Mailing: 5/23/07

[2] The Commissioner rejects petitioners' request that respondents' answer be dismissed. The first acknowledgment letter sent out by the Bureau of Controversies and Disputes on April 2, 2007, was not sent to all parties. An amended acknowledgment letter was distributed on April 30, 2007, and respondents' motion to dismiss was filed one day later, on May 1, 2007.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

190-07

OAL DKT. NO. EDU 5109-06
AGENCY DKT. NO. 90-2/06

RENE CRAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with one qualification. Paragraph 9 of the Settlement Agreement recites that it shall not serve as precedent for "similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members." Mr. Cras has no authority to bind the Elizabeth Education Association or its members. Consequently, paragraph 9 of the Settlement Agreement is null and void.

The matter is hereby dismissed, subject to compliance with the terms of the settlement, excepting paragraph 9.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/23/07

Date of Mailing: 5/23/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05109-06

AGENCY DOCKET NO. 90-2/06

RENE CRAS,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq. for petitioner (Bergman & Barrett)

Karen Murray, Esq., for respondent (The Murray Law Firm, LLC)

Record Closed: April 12, 2007 Decided: April 16, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 18, 2006, for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. This matter was initially assigned to Thomas E. Clancy, ALJ whom placed it on the inactive list because of a companion Workers' Compensation petition. The matter was then reassigned to the undersigned on April 3, 2007. A telephone conference was conducted on April 10, 2007 at which time the parties advised that the matter was settled. On April 12, 2007 the undersigned received the fully executed settlement and Board of Education Resolution, and the record closed that day.

Having reviewed the contents of the attached Stipulation of Settlement, and Board of Education Resolution, I **FIND**:

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

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

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

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

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

April 16, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 4-18-07 - UPS

Mailed to Parties:

APR 18 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent Elizabeth Board of Education

RENE CRAS, **Petitioner,** **v.** **ELIZABETH BOARD OF EDUCATION,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDUOR 5109-2006N** **AGENCY DKT. NO.: 90-2/06** **SETTLEMENT AGREEMENT**

2007 APR 12 9:05
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

Petitioner **RENE CRAS** (R.C.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall credit Petitioner, R.C., a total of five (5) sick days for sick days utilized on November 29 and 30, 2005 and December 1, 2 and 5, 2005.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, R.C., agrees that this Settlement resolves any and all claims that he had, or may have had against Respondent relative to any issue raised in or related to this matter.

4. Petitioner, R.C., agrees to waive any rights he had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission, etc. relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for the injuries that occurred in November 2005.

5. Petitioner, R.C., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred in November 2005.

6. Petitioner, R.C., agrees that he has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, R.C., agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree to accept the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Board of Education

Date: 3/23/07

RENE CRAS

Rene Cras, Petitioner
Date: 02/25/07

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner
Date: 2-27-07

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Rene Cras, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-5019-2006N and Agency Docket Number 90-2/06, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the Settlement Agreement on file with the Board Secretary.

Elizabeth, New Jersey

06-207

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 15, 2007

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

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent Elizabeth Board of Education

RENE CRAS, **Petitioner,** **v.** **ELIZABETH BOARD OF EDUCATION,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDUOR 5109-2006N** **AGENCY DKT. NO.: 90-2/06** **SETTLEMENT AGREEMENT**

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2007 APR 12 9:05
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT

Petitioner **RENE CRAS** (R.C.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall credit Petitioner, R.C., a total of five (5) sick days for sick days utilized on November 29 and 30, 2005 and December 1, 2 and 5, 2005.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, R.C., agrees that this Settlement resolves any and all claims that he had, or may have had against Respondent relative to any issue raised in or related to this matter.

4. Petitioner, R.C., agrees to waive any rights he had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission, etc. relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for the injuries that occurred in November 2005.

5. Petitioner, R.C., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred in November 2005.

6. Petitioner, R.C., agrees that he has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, R.C., agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree to accept the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Board of Education

Date: 3/23/07

RENE CRAS

Rene Cras, Petitioner
Date: 02/25/07

BERGMAN & BARRETT

Michael T. Barrett, Esquire
Counsel for Petitioner
Date: 2-27-07

C
O
P
Y

10v

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Petitioner, Rene Cras, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-5019-2006N and Agency Docket Number 90-2/06, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the Settlement Agreement on file with the Board Secretary.

Elizabeth, New Jersey

06-207

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 15, 2007

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

195-07

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The West Orange Board of Education challenged the decision of the Interim Essex County Superintendent that petitioner must provide free public education to five homeless children following a determination that the last known residence of the children's mother was in petitioner's district. Respondent Department filed a motion to dismiss, citing petitioner's failure to exhaust its administrative remedies pursuant to *N.J.A.C.* 6A:17-2.8(b) and *N.J.A.C.* 6A:23-5.2(d-f).

The Commissioner finds that *N.J.A.C.* 6A:17-2.8(b) and *N.J.A.C.* 6A:23-5.2(d-f) require the petitioner to first bring an appeal of the county superintendent's determination to the Division of Finance in the Department of Education; as petitioner has not done so, the Commissioner lacks jurisdiction in this matter. Accordingly, the petition is dismissed and the matter referred to the Division of Finance for decision pursuant to the regulations.

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

May 31, 2007

AGENCY DKT. NO. 91-3/07

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

This matter was initiated as a challenge by the petitioning West Orange Board of Education to the decision by the Interim Essex County Superintendent of Schools that petitioner should provide free public education for five children who are currently housed in a shelter in Newark. The decision was based upon the Superintendent's determination that the last known residence of the children's mother, S.M., before she became homeless was in petitioner's district.

The respondent, New Jersey State Department of Education, answered by way of a motion to dismiss the petition, alleging that petitioner failed to exhaust its administrative remedies. Respondent referred to *N.J.A.C.* 6A:17-2.8(b), which is the regulation that allows a school district which has been designated by a county superintendent as a homeless child's district of origin to appeal to the Department of Education. *N.J.A.C.* 6A:17-2.8(b) expressly directs that a district wishing to make such an appeal follow the instructions set forth in *N.J.A.C.* 6A:23-5.2(d-f).

The first of those provisions directs the appealing district to "submit a written notification of a dispute to the Division of Finance [of the Department of Education], within 30 days of the receipt of a final notice that a child was determined to be a resident of the district for purposes of state funding." *N.J.A.C.* 6A:23-5.2(d). The second provision instructs the Division of Finance to "attempt to resolve the dispute administratively and [ ] notify the district board of education whether a redetermination of district of residence shall be made ...." *N.J.A.C.* 6A:23-5.2(e). The third provision allows a district board of education to "initiate a formal proceeding before the Commissioner to resolve such a dispute if the Division of Finance is unable to resolve a dispute within the 90-day time limit . . . ." *N.J.A.C.* 6A:23-5.2(f).

Thus, respondent is correct that the regulations require that petitioner first bring its appeal of the county superintendent's determination to the Division of Finance in the Department of Education. As petitioner has not done so, the Commissioner does not yet have jurisdiction.

In its reply to respondent's motion to dismiss the petition, petitioner argued against the dismissal of its appeal, citing as support of its position a sentence in the letter from Interim Essex County Superintendent of schools to petitioner, memorializing his determination that petitioner is responsible for the education of S.M.'s children. That sentence stated that petitioner had "the right to appeal this decision to the Department of Education/Bureau of Controversies and Disputes pursuant to *N.J.A.C.* 6A:23-5.2(d), (e) and (f)."

While petitioner does have the right to appeal to the Commissioner of Education through the Bureau of Controversies and Disputes, it must follow the procedures set forth in the regulation which the Interim Essex County Superintendent cited. As discussed above, that

regulation requires petitioner to first give notice to the Division of Finance which, in turn, must attempt to resolve the dispute administratively.

Accordingly, the petition before the Commissioner is dismissed and this matter is hereby referred to the Division of Finance for decision pursuant to *N.J.A.C.* 6A:17-2.8(b) and *N.J.A.C.* 6A:23-5.2 (d-f).

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/31/07

Date of Mailing: 5/31/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

191-07

191-07

T.B. and M.B. on behalf of minor child S.B., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, and DR. PATRICIA JOHNSON, : DECISION

RESPONDENT. :

SYNOPSIS

T.B. and M.B. filed a petition in April 2007 seeking reimbursement of the $400 cost of S.B.'s 2006 summer school chemistry class which – according to petitioners – was necessitated by a chemistry teacher's unfair and discriminatory treatment of their daughter during the 2005-2006 school year, and respondent board and superintendent's failure to take corrective action. Respondent board made a motion to dismiss for violation of the 90-day requirement provided in *N.J.A.C.* 6A:3-1.3(i).

The Commissioner found, *inter alia*, that: respondents' action – or lack thereof – which allegedly caused petitioners harm took place in May 2006 and therefore the 90-day limitations period ended in August 2006; there is no indication in the pleadings that petitioners ever brought a formal appeal of S.B.'s grade or the teacher's alleged misconduct before the respondent board; and the Commissioner has no jurisdiction to grant petitioners the relief they seek. Accordingly, the petition was dismissed.

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

May 24, 2007

AGENCY DKT. NO. 95-4/07

T.B. and M.B. on behalf of minor child S.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, and DR. PATRICIA JOHNSON,	:	DECISION
RESPONDENT.	:	

According to the petition in this matter, petitioners' minor child, S.B., had been doing poorly in chemistry during the 2005-2006 school year, and petitioners had requested an audience with the teacher and a guidance counselor in May 2006. Petitioners did not accept the teacher's representation – made at the conference – that he had given S.B. extra help. To the contrary, they accepted S.B.'s assertions that the teacher had been treating her unfairly. In the petition they further alleged that the guidance counselor had promised – at the above referenced meeting – to provide S.B. with tutoring, but never followed through on the promise.

Petitioners also contended in the petition that the principal of S.B.'s school and the respondent superintendent of schools had improperly failed to investigate "the unequal and discriminatory treatment of [S.B.] by Mr. Deutsch" and take "corrective action." The allegation of discriminatory treatment rested upon S.B.'s assertion that the teacher did not like her and ridiculed her when she gave wrong answers.

S.B. failed chemistry, and petitioners consequently enrolled her in a summer chemistry course, which necessitated rescheduling of the family's 2006 summer vacation. Petitioners alleged in the petition that they had made telephone calls to the school beginning in May 2006 but that the "school gave no attention to our complaint and seemed to dismiss it

outright." They contend further that they had "tried to get the attention of the Board of Education; however, they [sic] just gave us a run around and asked us to write another letter to the Superintendent to no avail."

The relief demanded in the petition, which was filed on April 2, 2007, was the reimbursement of the $400 cost for S.B.'s summer class which, according to petitioners, had been necessitated by the chemistry teacher's behavior and "the appalling response by the Park Ridge School."

Respondent answered on May 1, 2007, by way of a brief motion to dismiss the petition for untimeliness. On May 2, 2007 the Bureau of Controversies and Disputes (the Bureau) wrote to petitioners asking them to address respondent's motion, and also to identify the legal basis for their request for consequential damages.

Petitioners' response was received by the Bureau on May 10, 2007. As to the issue of timeliness, they contended that their petition had been filed within the 90-day period required by *N.J.A.C.* 6A:3-1.3(i) because it had been filed 73 days after "the final ruling of the board of education." The "final ruling" to which petitioners referred is a letter dated January 19, 2007, from respondent Superintendent Patricia Johnson. In the letter Johnson stated, in pertinent part:

> After our last conversation I apprised the Board of Education at the January 8th meeting of your concerns and displeasure concerning your daughter's experience in chemistry during the last school year and your assertion that the teacher, the school and the district did not meet their responsibilities. I further indicated to the Board your belief that you should be compensated $400 due to the expenses incurred in placing your daughter in summer school (summer 2006), along with the inconvenience revolving around her attendance during the summer months.
>
> The Board of Education requested that I respond for them. It is not the practice of the Board to compensate parents for summer school expenses. In doing so they would be creating a precedent that is questionable at best.

Respondents pointed out in their motion papers that the action the petitioners challenge is actually the district's decision – in May 2006 – not to investigate or correct the alleged mistreatment of S.B. by her chemistry teacher.[1] Accordingly, counting from the end of May 2006, petitioners ran out of time for filing an appeal at the end of August 2006. Nonetheless they did not file an appeal to the Commissioner until April 2007, at least ten months after the alleged offending action. Thus, respondents ask that the petition be dismissed with prejudice for untimeliness.

The Commissioner agrees. The district action, or lack thereof, which allegedly caused petitioners harm took place in May 2006, and the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i) consequently ended in August. Even if the date upon which the district issued S.B. a failing grade were used as the beginning of the period of limitations, the petitioner's time to file an appeal would have expired long before April 2, 2007, the date of their petition.

Furthermore, there is no indication in the pleadings that petitioners had ever brought a formal appeal of S.B.'s grade, or the teacher's alleged misconduct, before the respondent board of education. Thus, the letter dated January 19, 2007 – conveying the board's informal response to petitioners' concerns, which petitioners had expressed verbally to respondent Johnson at some point before January 8, 2007, and Johnson had conveyed to the board on January 8, 2007 – does not constitute an intervening "final ruling of the board of education."[2]

---

[1] According to petitioners, such an investigation and, perhaps, corrective action, would have prevented S.B.'s failing grade in chemistry and, in turn, the need for petitioners to pay $400 for summer school.

[2] The Commissioner rejects petitioners' request that respondents' answer be dismissed. The first acknowledgment letter sent out by the Bureau of Controversies and Disputes on April 2, 2007, was inadvertently not sent to all parties. An amended acknowledgment letter was distributed on April 30, 2007, and respondents' motion to dismiss was filed one day later, on May 1, 2007.

In response to the Bureau's request for the identification of a legal basis for their demand for consequential damages, petitioners simply reiterated their factual allegations and assumptions. No legal basis was provided to show that the Commissioner has the authority to award such damages and, indeed, the Commissioner has previously found to the contrary. *See, e.g., John Scott and Charles Yarnell v. Board of Education of the City of Trenton, Mercer County, and Board of Education of the Mercer County Vocational and Technical School District, Mercer County, and James Pupalaikis, Augustine Spagnola and Edward Schmidt v. Board of Education of the City of Trenton, Mercer County and Board of Education of the Mercer County Vocational Technical School District, Mercer County,* OAL DKT. NOS. EDU 10333-96 and EDU 6748-97 (Consolidated), decided by the Commissioner on September 30, 2002, p. 3-4, modified on other grounds by the State Board of Education, June 2, 2004. Therefore, even absent a timeliness problem, the Commissioner would have no jurisdiction to grant petitioners the relief they seek.

For the reasons set forth above, the petition is dismissed.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/24/07

Date of Mailing: 5/24/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

196-07

MARGARET CREWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a teacher in the Hackensack School District – challenged the respondent's denial of her request for reimbursement of legal fees incurred in connection with her defense against a criminal complaint for disorderly conduct in April 2004. Petitioner claimed indemnification for her legal fees pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1.

The ALJ found, *inter alia,* that petitioner's arrest occurred off of school property, at a time when she had abandoned her place of employment, and was neither in the course of educating children nor in the course of attempting to fulfill her accompanied medical test obligation under the substance abuse program by which she was bound; petitioner's disorderly conduct charge neither arose out of nor arose in the course of the performance of her duties as a teacher; and petitioner has not satisfied the statutory requirement for reimbursement of her legal fees. Accordingly, the ALJ concluded that petitioner is not entitled to reimbursement, and ordered the petition dismissed.

Upon a thorough and independent review, the Commissioner fully concurs with the ALJ's conclusion, and adopts the Initial Decision of the OAL as the final decision in this matter.

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

May 31, 2007

OAL DKT. NO. EDU 7629-06
AGENCY DKT. NO. 193-5/06

MARGARET CREWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions – dated and mailed on May 16, 2007, and filed with the Agency on May 21, 2007 – were untimely pursuant to *N.J.A.C.* 1:1-18.4[1] and, consequently, these and the Board's reply exceptions were not considered herein.

Upon her full and independent review, the Commissioner is in full accord with the Administrative Law Judge's conclusion – for the reasons clearly detailed in his decision – that petitioner is not entitled to indemnification for legal fees and expenses, pursuant to *N.J.S.A* 18A:16-6 and *N.J.S.A.* 18A:16-6.1, incurred in the defense of a criminal charge of disorderly conduct as such charge neither arose out of nor in the course of the performance of her duties as a teacher.

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

IT IS SO ORDERED.[2]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/31/07
Date of Mailing: 5/31/07

[1] *N.J.S.A.* 1:1-18.4(a) specifies: "Within 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head.***" OAL papers indicate that the instant Initial Decision was mailed to the parties on May 3, 2007. As such, any exceptions to this decision were required to be *filed with,* not mailed to, the Agency on May 16, 2007.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07629-06
AGENCY DKT. NO. 193-5/06

MARGARET CREWS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

Respondent.

Jennifer Borgia, Esq., for petitioner (Timothy R. Smith and Associates, L.L.C, attorneys)

Richard R. Salkin, Esq., for respondent

Record Closed: April 25, 2007 Decided: May 2, 2007

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

STATEMENT OF THE CASE

Petitioner Margaret Crews ("Crews"), a teacher for respondent Hackensack Board of Education ("Board"), had a criminal complaint for disorderly conduct filed against her for activity occurring outside the Hackensack Middle School on April 22, 2004. The charge against her was dismissed when she was acquitted after a bench trial. Under N.J.S.A. 18A:16-6 and 6.1, if a criminal action is dismissed against a teacher for any act arising out of and in the course of performing her teaching duties,

the Board shall reimburse her for reasonable counsel fees. Crews appeals from the Board's denial of this reimbursement. At issue is whether the criminal complaint arose out of and was in the course of her teaching duties thereby requiring a counsel fee indemnification by the Board.

PROCEDURAL HISTORY

After receipt of Crews' May 26, 2006 Appeal from the Board's failure to reimburse her for counsel fees and the Board's June 6, 2006 Answer, the Commissioner of Education ("Commissioner") transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The OAL filed it for hearing and determination as a contested case on July 17, 2006. At the April 9, 2007 hearing, the parties stipulated to all of the facts. The record closed on April 25, 2007 upon the receipt of briefs.

FINDINGS OF FACT

The parties stipulated to the following facts in this matter and included, as part of the stipulation, the transcript of proceedings involving Crews before the Hackensack Municipal Court, the Board's substance abuse policy (3218), and a sketch of Union Street in Hackensack along the Middle School site. I accordingly **FIND** the following **FACTS** based on the stipulation, the substance abuse policy and unrebutted testimony from the stipulated transcript of the municipal court proceeding:

Crews, an employee and teacher of the Board on April 22, 2004, was, at all relevant times, aware of District Policy 3218.

As a result of an allegation made by a student and observations independently made by Hackensack Middle School Principal Ann Small, Small had reasonable cause to direct Crews to obtain testing to determine if she was under the influence of a controlled dangerous substance or alcohol pursuant to the relevant provisions of District Policy 3218. Under this substance abuse policy, when an employee is suspected of being under the influence of a substance during working hours, the principal shall

arrange for the immediate examination of the employee by the school doctor or a doctor selected by the employee, or if such doctor is not immediately available, then arrange transportation to the local hospital. The employee shall be accompanied to the doctor or emergency room by a member of the school staff designated by the principal.

In an effort to comply with this policy, Principal Small directed Dean of Students Christopher Moran on April 22 to accompany Crews to a doctor upon Crews leaving the Principal's office. Moran followed Crews through the school and informed her several times that he was there to offer her a ride to a doctor. She told him that she did not want a ride and that he should "get away." She then exited the school and the school grounds with Dean Moran following her at a time when school was still in session.

When Hackensack police officers Thomas Aletta and Kenneth Martin arrived in the area of Hackensack Middle School on April 22, 2004, they were not there as a result of being summoned by Hackensack School District personnel. When the police arrived, Crews was in the passenger seat in a car owned and operated by Rhonda Bembry, which was parked on Union Street in front of the property of the Middle School campus. Upon seeing the police, Dean Moran, while on Middle School property and during school hours, motioned to the police officers and directed their attention to Crews, in a manner which they interpreted as a request to stop the vehicle. The police officers proceeded to park their car at an angle in front of Bembry's vehicle.

When Aletta told Bembry to stop her vehicle, she replied that she had to go. When she turned her wheel and accelerated the vehicle, its bumper and tire struck Aletta on his hip and thigh. She stopped when Martin stepped in front of the vehicle. Moran told Martin that Crews had been drinking while teaching class. Aletta asked Crews what was wrong, and she replied that she was having a heart attack and needed to go to a hospital. He detected the odor of alcohol coming from Crews. Crews exited the car and became excited and agitated for a few minutes and said that she did not want to be there and that the police had no right to bother her. Aletta summoned an ambulance. When it arrived Crews became more agitated and loud, was flailing her arms, was cursing and said that she did not want to go with the ambulance. She yelled to get the f--- off her and to keep his f---ing hands off her. He told her she would be

arrested for disorderly conduct if she did not calm down and did arrest her when she persisted and tried to push away from the officers.

All activities and communications by and between Crews and the Hackensack police on the scene took place in either Bembry's car or on the sidewalk in front of the Middle School on Union Street in Hackensack. The sidewalk and street on the Union Street side of the Middle School are not the property of the Hackensack School District.

As a result of this incident on April 22, 2004, Crews was charged with disorderly conduct by the Hackensack police. On March 22, 2006 the charge against her was dismissed when she was acquitted after a Bench Trial.

The reasonable legal fees and costs related to defending the disorderly conduct charge was $19,704.48.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 18A:16-6 and 6.1 are complementary provisions which must be read together in order to determine the circumstances under which a teacher may be reimbursed for defending herself in a criminal proceeding. See, Bowers v. Board of Education of City of East Orange, 149 N.J. 416, 423 (1997). Section 6 provides that, whenever any legal proceeding has been brought against a person holding any office or employment under the jurisdiction of any board of education, for any act or omission arising out of and in the course of the performance of the duties of such position or employment, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses. Subsection 6.1 further provides that, should any criminal action be instituted against any such person for any such act or omission, and, should such proceeding result in a final disposition in favor of such person, the board of education shall reimburse her for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

These statutes set a two-part standard for determining when indemnification is appropriate: (1) when any act or omission, on which criminal charges are based, arises out of and is in the course of the performance of the duties of such employment; and (2) when the charges result in a final disposition in favor of the employee. Here, the second prong has been satisfied with Crews' acquittal of the disorderly person charge. I **CONCLUDE** however that the disorderly person charge neither arose out of nor arose in the course of the performance of her duties as a teacher.

Bowers involved a situation where an indictment on charges of sexual abuse of three pupils during school time and on school premises was twice dismissed without trial. The dilemma the Supreme Court encountered was that, without any proceeding, no evidence existed concerning whether any predicate acts or omissions had occurred that could serve as the basis for establishing the second prong of the statutory test for indemnification. Id. at 419. It noted that, in most cases, the predicate conduct is sufficiently well-defined so as to simplify the inquiry. Id. at 424. The conduct of Crews is indeed sufficiently well-defined here by the stipulation of the parties and the record established in the municipal court proceeding.

Powers v. Union City Board of Education, 124 N.J. Super. 590 (Law Div. 1973), aff'd. o.b. 127 N.J. Super. 249 (App. Div.), cert. denied, 65 N.J. 575 (1974), involved a suit for indemnification of a board of education member for the successful defense of a charge of demanding kickbacks from service providers. The Court looked to identical language in the Workers' Compensation Act where an accident *arising out of* employment signifies that it results from a risk reasonably incidental thereto, and arising *in the course of* employment connotes that it occurs within its period at a place where the employee may properly be and while he is fulfilling the duties of his employment or doing something incidental to it. Id. at 595-596. The party seeking the indemnification under N.J.S.A. 18A:16-6 and 6.1 must satisfy both requirements. The proper inquiry is whether the "...the gravaman of the litigation took place when and where the individual performed his duties and while he was fulfilling the duties of [his position]." Id. at 597.

In Scirrotto, 272 N.J. Super. 391 (App. Div. 1994), a former teacher sought indemnification for the successful defense of criminal bribery charges, where he

allegedly made statements to school administrators threatening to go public with regard to immoral or illegal activities of other teachers, if the administration did not reverse its decision to deny him tenure. The Appellate Division had reversed his bribery conviction because of a lack of evidence that a "benefit" had been offered to school officials. Approving of Powers and earlier cases, the Court held that,

> ...for the acts complained of to arise out of and in the course of the duties of employment, 'the officer must have been acting in a matter which the corporation has an interest, he must have been acting in the discharge of a duty imposed or authorized by law and he must have acted in good faith' [citations omitted]. Id at 397.

Although the Court conceded that Scirrotto's statement to a superior at a meeting, while he was a teacher, arguably was *in the course of* the duties of employment, "...the conduct did not *arise out of* performance of the duties of his employment as a high school history teacher, any more than if he had indisputedly punched [the school principal] during such a meeting, but was thereafter acquitted of criminal assault charges." Id. at 398.

It is evident that, but for Dean Moran bringing Crews to the attention of Officers Aletta and Martin, the subsequent chain of events leading to her arrest would not have occurred. Yet, at the time Crews had her encounter with the police officers, her duty was to be inside the school. She was not there. As it is conceded that Crews was aware of the substance abuse policy and that Principal Small had reasonable cause to direct Crews to obtain testing to determine if she was under the influence of a controlled dangerous substance on the afternoon of April 22, 2004, Crews' duty at that time was to cooperate with arrangements for her immediate examination by a school doctor or a doctor selected by the employee, while being accompanied by a school staff member. Instead, she thwarted and ignored Moran's efforts to escort her for testing purposes. Simply put, when Crews, of her own volition, left the school grounds in derogation of her duties under the substance abuse policy and certainly not to further any pedagogical purpose, her subsequent conduct neither arose out of nor was in the course of her performance of her duties as a teacher or duties to comply with the substance abuse policy. By her conduct preceding the police encounter, she forfeited any claim that she

was fulfilling her duties of employment by time, place and/or subject matter that proximately led to her disorderly person arrest. See, Powers, supra at 597. Her arrest occurred at a time when she had abandoned her place of employment; at a place on a public street off of school property; and due to a confrontation with police officers that was neither in the course of educating children nor in the course of attempting to fulfill her accompanied medical test obligation under the substance abuse program by which she was bound. Her conduct certainly lacked a good faith attempt to discharge her imposed duties. See, Scirrotto, supra at 397.

As Crews has not satisfied the statutory requirement for reimbursement of her counsel fees and costs in defending the criminal proceeding against her, I **CONCLUDE** that she is not entitled to such reimbursement.

ORDER

It is hereby **ORDERED** that the petition of Margaret Crews is **DISMISSED.**

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

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

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

May 2, 2007
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 5/2/07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 3 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

None

Exhibits

Joint

Stipulation of Parties

J-A Transcript of Proceedings, State v. Crews, January 11, 2006 and March 22, 2006

J-B Hackensack Board of Education Substance Abuse Policy 3218, adopted 9/13/04 and revised 9/19/95

J-C Map, Union Street, Hackensack, New Jersey

#197-07

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.A. AND B.Z.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In September 2004, petitioning Board determined that A.A., N.A. and J.A. – children of J.W.A. and C.A. – were not domiciled within the school district, and therefore not entitled to a free public education in Hamilton Township Schools. J.W.A. appealed this determination to the Commissioner, who adopted the OAL's decision upholding removal of the children from the district's schools and requiring J.W.A. to reimburse the Board for tuition. While J.W.A.'s appeal was pending, the Board filed a petition against C.A. and B.Z. – the children's mother and grandmother – seeking tuition reimbursement. Respondents failed to appear at hearing, and the Acting Commissioner adopted the OAL Initial Decision directing C.A. and B.Z. to pay tuition. Subsequently, respondents appealed to the State Board of Education, requesting to re-open the record to permit them to supplement it by presentation of testimony and documents. The matter was then remanded to the OAL for a hearing, at which C.A. did not appear.

The ALJ found that B.Z. was not a credible witness, and no other evidence – testimonial or documentary – was produced at the hearing to show that respondents had complied with the terms and conditions of *N.J.S.A.* 18A:38-1(b)(1). The ALJ concluded that there is no basis in law or fact to alter or amend the order directing respondents to reimburse the Board for the period of ineligible attendance of C.A.'s children.

The Commissioner adopted the OAL's Initial Decision as the final decision in this matter, and directed respondents to pay petitioner tuition in the amount of $7,499.80 for each of C.A.'s three children, totaling $22,499.40.

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

May 31, 2007

OAL DKT. NO. EDU 4400-06
(EDU 436-05 ON REMAND)
AGENCY DKT. NO. 406-11/04

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.A. AND B.Z.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No transcript was provided to the Commissioner and the parties submitted no exceptions. The Commissioner adopts the Initial Decision – supplemented by the following comments – as the final decision, for the reasons articulated by the administrative law judge (ALJ).

Respondent C.A. failed to appear at the remand hearing ordered by the State Board of Education. Thus, she provided no basis for the Commissioner to modify the December 5, 2005 decision directing her to pay tuition fees in the amount of $7,499.80 per child for her children's attendance in petitioner's schools.

Respondent, B.Z., who did appear at the remand hearing, failed to show that the children legally resided with her in Hamilton Township. While she appeared to make an argument under *N.J.S.A.* 18A:38-1(b)(1) that she had taken in C.A.'s children, supported them *gratis*, and sent them to petitioner's schools because C.A. was unfit and neglected them, she did

not provide competent evidence to substantiate those allegations or to show that she and C.A. had complied with the terms and conditions of *N.J.S.A.* 18A:38-(b)(1).

Further, the ALJ found that "B.Z. totally lacked credibility," both by misrepresenting that she was the children's grandmother and by presenting inconsistent and implausible testimony. Her testimony was, according to the ALJ, also contradicted by, *inter alia,* surveillance reports submitted by petitioner and by the testimony of her own witness, the children's father. Orders giving custody to the children's maternal grandmother further undermined B.Z.'s account of the children's domicile, legal status and living conditions. In matters of credibility, the Commissioner generally defers to the ALJ. *D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 N.J. Super. 269, 273 (App. Div. 2004).

In sum, respondents' supplemental documents and testimony at the OAL remand hearing were not sufficient to disturb the Commissioner's December 5, 2005 decision ordering respondents to pay petitioner $7,499.80 in tuition for each of C.A.'s three children, totaling $22,499.40. Notwithstanding the fact that B.Z. may possibly have acted out of concern for the children, it appears nonetheless that the children were not entitled to a free public education in petitioner's school district, and petitioner is entitled to reimbursement.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/31/07

Date of Mailing: 6/01/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4400-06
(ON REMAND EDU 436-05)
AGENCY DKT. NO. 406-11/04

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Petitioner,

v.

C. A. AND B. Z.,

Respondents.

Dennis M. DeSantis, Esq., for petitioner (Destribats, Campbell, DeSantis, Magee & Staub, attorneys)

B. Z., respondent, pro se

C. A., respondent, No appearance by or on behalf of

Record Closed: February 9, 2007 Decided: April 20, 2007

BEFORE **JAMES W. FAISON, III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

September 22, 2004, petitioner, Board of Education of the Township of Hamilton, Mercer County (BOE) determined that A.A., N.A. and J.A., children of J.W.A. and C.A., were not domiciled within the school district and, therefore, not entitled to a free public education. J.W.A. appealed to the Commissioner of Education, who adopted the Office of Administrative Law (OAL) Initial Decision upholding removal of the children and requiring J.W.A. to reimburse BOE.

While J.W.A.'s appeal was pending resolution, BOE filed a petition against C.A. and B.Z. (grandmother) seeking tuition and counsel fees. C.A. and B.Z. failed to appear at the scheduled hearing. The Acting Commissioner adopted that OAL Initial Decision which directed C.A. and B.Z. to reimburse BOE, denied assessment of counsel fees.

December 19, 2005, C.A. and B.Z. appealed the Acting Commissioner's decision to the State Board of Education (SBE) requesting to re-open the record and permit them to supplement it by presentation of testimony and documents.

C.A. and B.Z.'s motion to supplement the record was granted and the SBE remanded the case to the Acting Commissioner. The Acting Commissioner remanded the case to the OAL for a hearing consistent with the decision of SBE.

The OAL hearing of the remand was held January 18, 2007, at the OAL in Hamilton Township, New Jersey. Witnesses and exhibits are listed in the Appendix.

FACTUAL PRESENTATION AND DISCUSSION

C.A. did not appear for the hearing.

B.Z. referred to herself as the grandmother of the children in question. She stated that the children lived with her during the week, but would go to Trenton to stay with their mother on the weekends. The children would return to B.Z.'s home Sunday nights. She also said the children would stay with C.A. when they were sick. C.A. had a fourth child August 19, 2000, S.A. who was never enrolled in BOE's district.

B.Z. testified that the residence in Trenton occupied by C.A. also housed some unsavory characters. She was not comfortable with the children residing there full time. However, she could not say when C.A. moved into or out of that residence.

B.Z. testified that N.A. lives with her currently, but is not enrolled in school. A court order from August 1998 placed all the children in the custody of C.A.'s mother, Ms. Lizer. B.Z. said she is unaware whether that order was ever set aside. B.Z. was permitted to place into evidence a purportedly notarized letter from C.A. dated March 26, 1999, giving B.Z. temporary custody of the children. (Exhibit R-1).

On cross examination B.Z. admitted that she is not the grandmother of the children. At one time she had a relationship with J.W.A.'s father, but they never married. B.Z. acknowledged that she "lied" when she listed herself as "grandmother" on the various school documents, including the petition challenging the removal of the children from the school district. She also admitted "numerous times" claiming the children as dependents on her tax filings. (Exhibit P-1).

J.W.A. testified that he claimed the children for tax purposes 2004 to 2006. He stated that children were with him 2004 to 2005. A new custody order in 2006 again placed the custody of the children with the maternal grandmother. He stated that he has not had legal custody of the children since the 1998 custody order.

J.W.A. contradicted B.Z.'s testimony, testifying that the children stayed with C.A. many times at night, not just weekends.

DISCUSSION AND ANALYSIS

B.Z. totally lacked credibility. Her explanations as to why the agents of BOE observed the children entering and leaving the Trenton residence were not believable. The time frames that she claimed the children would stay in Trenton were contradicted by the surveillance of BOE. When confronted with the contradiction, B.Z. would adjust her testimony in an attempt to explain. Had she any credibility left, it would have been totally destroyed by her admissions that she misrepresented herself as the children's grandmother not only to BOE, but also to IRS. Further, J.W.A. contradicted her testimony as to the regularity that the children would stay at the Trenton address. Add to that, two court orders placing custody of the children with the maternal grandmother and it is clear that B.Z.'s performance at the hearing was a sham.

No credible evidence, testimonial or documentary, was produced at the hearing to alter the previous conclusions and rulings.

CONCLUSIONS OF LAW

C.A. and B.Z. were afforded the opportunity to supplement the record of the hearing which gave rise to the order requiring them to pay tuition to BOE. C.A. failed to appear at the supplementation hearing. The testimony and exhibit presented by B.Z. lacked credibility. There is no basis in law or fact to alter or

amend the order for them to reimburse BOE for the unlawful attendance of A.A., N.A. and J.A. in BOE's school district.

ORDER

ORDERED, that the **Order of Restitution** signed September 23, 2005, in Agency Dkt. No. 406-11/04 and OAL Dkt. No. EDU 436-05 adopted by the Acting Commissioner December 5, 2005, remains in effect as originally entered.

IT IS FURTHER ORDERED, that the appealed filed by C.A. is dismissed for lack of prosecution.

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

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

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

April 24, 2007
DATE

JAMES W. FAISON, III, ALJ

Date Received at Agency:

4-20-07 lom
Mailed to Parties:

APR 24 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

mh

APPENDIX

EXHIBITS:

For Petitioner

P-1 2002 Tax Return

For Respondent:

R-1 Notarized letter

Court:

C-1 Order of restitution

WITNESSES:

For Petitioner

None

For Respondent:

B.Z.

J.W.A.

198-07

#198-07E

OAL DKT. NO. EDU 5369-07
AGENCY DKT. NO. 130-5/07

ASHLEY DREW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on May 23, 2007, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief, concurring with the ALJ's determination that petitioner has not satisfied her burden of establishing the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); most notably, the Commissioner concludes that petitioner has not demonstrated a likelihood of prevailing on the underlying merits of the matter, or that a balancing of the equities and interests of the parties inures to her favor.

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for such further action as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/01/07

Date of Mailing: 6/04/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING APPLICATION FOR
EMERGENCY RELIEF
OAL DKT. NO. EDU 5369-07
AGENCY DKT. NO. 130-5/07

A.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

A.D., pro se

Frank Pomaco, Esq., for Respondent (Gaccione, Pomaco & Malanga, attorneys)

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

On May 11, 2007, Petitioner, A.D., filed an application for emergent relief through the attorney then representing her. The application for emergent relief was filed with the Department of Education which transmitted the matter to the Office of Administrative Law (OAL) on May 16, 2007, as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

Petitioner seeks an Order directing the District to permit her to attend the high school senior prom on June 8, 2007. An in-person hearing on the application was held by the undersigned on May 23, 2007. The District was represented by counsel. Petitioner proceeded pro se with her parents in attendance.[1]

FINDINGS

The incident giving rise to this application occurred on January 16, 2007, at Bloomfield High School. The allegations by A.D.'s teacher were that she had repeatedly come to class late and, when the teacher sought an explanation as to where A.D. had been and asked for a pass, A.D. became belligerent and used foul language. In addition, A.D. refused to step out of the classroom when the teacher asked her to do so and she told the teacher to get security because she was not leaving. A.D. had to be escorted from the classroom by another teacher. A.D.'s teacher filed a Student Referral Form and, as a result of this incident, a three-day out of school suspension was imposed on A.D. commencing on January 18, 2007.

According to the testimony of the District personnel, the assistant principal, Michael Schilari, who is familiar with A.D., received the referral form from the teacher involved and as a result of the report, had a conversation first with the teacher and then with A.D. A.D. denied the allegation that she used foul language. The assistant principal noted that he then spoke with others, although he did not specify who those others were, and he spoke with Petitioner's mother. He testified that the teacher described specifically that A.D. used foul language to her and specifically recited the language (See R-1). Petitioner denied having used foul language; however, she admitted during testimony that she did in fact yell and scream at the teacher at that time. It is a logical inference to be drawn that since tempers were flaring, Petitioner more likely than not did use the language.

Petitioner raises the issue of failure to provide her with an opportunity to be heard by the District and presented, at the time of hearing, a printout purportedly of a

[1] There is a fax dated May 18, 2007, from the attorney noting that he was no longer handling the matter and the clients wished to proceed pro se.

publication by the New Jersey State Bar Foundation Student Rights Handbook in which suspensions of ten days or fewer are discussed. She has noted that a give and take session should take place before the suspension and the student should also be given an opportunity to present his or her side of the story. Although it is clear from the record there was not a formal or informal sit down, face-to-face between the teacher and A.D., Mr. Schilari testified that he did speak first with the teacher and then with A.D. explaining the evidence he had, i.e., the teacher's referral, and asking whether she engaged in using foul language, A.D. denied doing so. He then proceeded to talk with others including, most importantly, Petitioner's mother. Thus, clearly, Petitioner has been afforded the less extensive protections described in her own document.

LEGAL DISCUSSION

In order to prevail on an application for emergent relief in a matter such as this, the applicant must prove by a preponderance of credible evidence:

- the moving party, A.D., will suffer irreparable harm if the requested relief is not granted;
- the legal right underlying the moving party's claim is well settled;
- the moving party has a likelihood of prevailing on the underlying claim; and,
- when the equities and interests of the parties are balanced, the moving party will suffer greater harm than the Respondent if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b).

Turning now to the record, Petitioner has established that it means a great deal to her to participate in the prom; however, I **CONCLUDE** that she has not established that she will suffer irreparable harm. A conclusory statement about the lasting effect of her inability to attend the prom is not enough to stand as evidence of irreparable harm.

I further **CONCLUDE** that A.D. has not established that the legal right underlying her claim is well settled. She has not demonstrated that a student who has not complied with the District's disciplinary policy clearly has the right to participate in a graduation ceremony, which is a privilege, not a right. From the evidence at the

hearing, it is clear the District personnel have met several times throughout the year to stress the need for compliance with the student code of conduct in which the specific examples of appropriate and inappropriate behaviors are set forth. The student code of conduct specifically prohibits the use of profanity or obscenity. In addition, it prohibits openly defiant and disrespectful behavior as well as willful and continuous disobedience. There was testimony during the hearing that she has engaged in these inappropriate behaviors within this school year, which further supports the inference drawn above that it is more likely than not she did engage in using foul language.

I further **CONCLUDE** that the moving party has not proved that she has any likelihood of prevailing on the merits of the underlying claim and finally I **CONCLUDE** that A.D. has not met her burden of proving she will suffer greater harm than the District will suffer will the equities and interest of the parties are balanced. Specifically, A.D. has not demonstrated that her interest in going to the prom outweighs the District's interest in maintaining order in its school.

ORDER

I hereby **ORDER** that Petitioner's application for emergent relief be and hereby is **DENIED**; I further **ORDER** the matter be and hereby is **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 25, 2007
DATE

Maria M La Fiandra
MARIA M. LA FIANDRA, ALJ

jb

APPENDIX

Witnesses:

Michael Schilari

Christopher Jennings

A.D.

S.W. (A.D.'s mother)

Exhibits

P-1 New Jersey State Bar Foundation - Student Rights Handbook (printout one page)

R-1 Student Referral Form for A.D., January 16, 2007

R-2 Suspension Notice, January 18, 2007

R-3 A.D.'s Student Suspension Record

R-4 Student Code of Conduct

R-5 General Information and Requirements for Student Participation in Extracurricular Activities

R-6 Memo - To Mr. Jennings, April 20, 2007[2]

[2] Although the record reflects that R-6 was admitted as an exhibit during the hearing, after the hearing counsel for Respondent requested that the document be returned and not be included in the record since it contains the name of several other students who were subjected to the same discipline as A.D. The document has been returned and is only referenced for purposes of identification in this decision.

199-07

#199-07E

OAL DKT. NO. EDU 2780-07
AGENCY DKT. NO. 124-5/07

T.B.-M., on behalf of minor child, M.M.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	DECISION ON
RESPONDENT.	APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on May 11, 2007, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner concurs with the ALJ's determination - for the reasons clearly detailed in his Order - that petitioner has failed to satisfy any of the requirements necessary for the granting of extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and adopts the recommended Order denying emergent relief .

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/01/07

Date of Mailing: 6/04/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2782-07

AGENCY DKT. NO. 120-4/07

R.Y. and E.Y., ON BEHALF OF
MINOR CHILD, T.Y.,
Petitioners,
v.
MOORESTOWN BOARD OF EDUCATION,
Respondent.

R.Y. and E.Y., petitioners, appearing pro se

Arthur Risden, Esq., for respondent (Archer & Greiner, attorneys)

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

STATEMENT OF THE CASE

R.Y. and E.Y., on behalf of minor child T.Y. (petitioners), assert that the punishment imposed on their son, including the removal from an Honors class at Moorestown High School (School) for plagiarism and possession of unauthorized downloads is arbitrary, and capricious. The Moorestown Board of Education (Board) asserts that more than twenty students were found to have been involved in plagiarism and possession of unauthorized downloads from the school internet site, and the punishments for such behavior are set forth in the student handbook and are not arbitrary and capricious.

PROCEDURAL HISTORY

On April 30, 2007, Petitioners filed an application for emergent relief with the Commissioner of Education. The application stated the Board acted in an arbitrary and capricious manner by imposing the punishment on their son, including the removal of their son from the Honors program and a two-day in school suspension.

On May 4, 2007, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief on May 16, 2007. On that date, the case was heard in the OAL, Trenton (Hamilton Township) and the record closed.

STATEMENT OF FACTS

T.Y. is a ninth grade Moorestown student who was enrolled in the Honors Computer Assisted Drafting 1 course (CAD 1) during the current academic school year.

On or about March 1, 2007, the school became aware of potentially widespread cheating in the CAD 1 class. The School began an investigation to determine the full extent of the cheating in the CAD I class, as well as what steps need to be implemented to prevent this type of situation in the future (R-2). The Moorestown Student Handbook provides that plagiarism will not be tolerated in any schoolwork, and it will result in the loss of credit for the assignment, out-of-school suspensions, and/or loss of credit for the course (R-10). The Moorestown's Acceptable Use Agreement and Policy No. 6142.10 specifically provides that users will respect the rights of others by complying with all school district policies regarding plagiarism (R-13).

The Administration presented the students in CAD I with the opportunity to come forward to admit to any violations of policies and guidelines, and indicated that students who came forward would be disciplined, but more leniently than those who did not come forward (R-2, R-15, R-16).

On March 9, 2007, T.Y. submitted a written admission that he had copied two drawings from another student (R-6). He was one of twenty-one students who came forward.

The School determined that students who came forward would be treated with leniency, when compared to the traditional consequences for plagiarism. Although the students who came forward faced the same discipline, the school alleges each student was considered individually, and special accommodations were offered, when appropriate, such as for special education students and senior students. Specifically, the students were afforded safeguards regarding credit, the ability to retake the course, and counseling on how to handle questions about the incident during the college admission process, if asked (R-2, R-15, R-16). Students who would not be able to graduate or be promoted were given the opportunity to earn enough credits to graduate or be promoted.

Based on his admission, T.Y. was charged with possession of a file that was determined to be the work of another student, and the use of a computer file that was the work of another student, defined as plagiarism.

As a result of these charges, T.Y. received an administrative withdrawal from CAD I, with a final grade of W (Withdraw), suspension of his MooreNet privileges until Friday, March 16, 2007, a two-day in-school suspension, and ten social probation points. Customarily, such conduct would result in an academic withdrawal with a final grade of WF (Withdraw-Fail), which impacts the G.P.A., suspension of MooreNet privileges for the remainder of the school year, a five-day out-of-school suspension, and twenty-five social probation points (R-15).

Any student who came forward, including T.Y., was afforded special safeguards, including the ability to maintain sufficient credits for the current year, despite the loss of five CAD I credits, the ability to retake CAD I, and discussions with parents regarding how a student should handle questions about the plagiarism suspension during the college admission process, if asked (R-2, R-15, R-16).

The petitioners assert that T.Y. copied two drawings, which were not projects. He had completed approximately one hundred drawings, and only two were the subject of this action.

The preceding information has not been disputed or contradicted by the parties, and is found as fact.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

The petitioners argue that T.Y. will suffer irreparable harm because he will not be able to catch-up in the CAD I class unless he is reinstated immediately; he will not be able to attend all of the classes available in the architecture/engineering field if he has to take CAD I next year, and that he will have a difficult time explaining to colleges and universities why he withdrew from CAD I. Petitioners allege that if T.Y. is asked to explain his two day suspension for copying two drawings out of the one hundred he completed on his own, this explanation will not be believed by an admissions officer.

Although Petitioners may sincerely believe T.Y. will suffer some or all of these problems if he is not reinstated in CAD I, T.Y. will have the opportunity to take CAD I next year. He has enough credits to be promoted to tenth grade. Although the petitioners certainly raise important arguments as to the effect of this action on college admission and the ability to take future honors course, T.Y. is only a freshman. Any effect on future classes or college admission is only speculative. Therefore, I **FIND** the petitioners have been unable to meet their burden that T.Y. will suffer irreparable harm if this relief is not granted.

Student's choice in specific courses, curriculum materials, assignments, and teachers are matters of educational policy and not constitutional rights. J.L. and J.E.H. o/b/o T.H.I. v. Board of Education of the Hopewell Valley Regional School District, EDU 2658-99, Initial Decision (August 20, 1999, adopted, Commissioner of Education (October 18, 1999), and, adopted, State Board of Education (February 2, 2000). The determination of placement, suspension, or withdrawal from an Honors course is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm.

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294. The School has clearly established a policy that does not tolerate plagiarism and any students found to violate that policy will face loss of credit for the assignment, out-of-

school suspensions and/or loss of credit for a course. As a result, I **FIND** that Respondent's actions in applying its policy to withdraw T.Y. from CAD I with a final grade of W (Withdraw); suspend of his MooreNet privileges until Friday, March 16, 2007; suspend T.Y. in-school for two days; and assess ten social probation points due to his conduct cannot be disturbed.

Petitioners allege that the penalty given to their son was arbitrary and capricious, because some students may have had the opportunity to make up some credits to graduate or be promoted, but their son was not given the opportunity to do so because he had enough credits to be promoted. I do not agree. These safeguards were put into place to ensure that all students would be able to graduate or be promoted, similar to T.Y. If these safeguards were not put in place, some students would face a much harsher punishment; the inability to graduate or be promoted.

Petitioners further argue that this offense does not constitute plagiarism, because the copied materials are drawings, and not class projects. Petitioners refer to the Moorestown Student Handbook, which states that "students who found to have plagiarized on school exams, term papers, research assignments or class projects" will face punishment referred to herein (R-10). I do not find that the definition of plagiarism is to be that limited or strictly construed. The Handbook also states that "all assessments/assignments must be **independently** completed. This includes homework" (R-10). Therefore, I further **FIND** it unlikely that the Petitioners would have prevailed on the merits.

Petitioners cite N.J.A.C. 6A:16-7.1(b)(6) in reliance of their position that the legal right underlying the petitioner's claim is settled. N.J.A.C. 6A:16-7.1(b)(6) provides that a code of conduct shall be created:

> Establish parameters for school responses to violations of the code of student conduct that take into account, at a minimum, the severity of the offenses, the developmental ages of the student offenders and students' histories of inappropriate behavior.

Petitioners allege that Moorestown failed to take into account these standards.

The Board asserts that they did, including his status as a freshman and lack of a disciplinary record. Petitioners further argue that this incident constitutes misuse of technology equipment, which is disciplined as a Level C offense (R-3). Petitioners further argue that that the first offense for a Level C offense is one Saturday suspension (R-4), and the penalties imposed on T.Y. are in far excess of what is prescribed, and is arbitrary and capricious.

The Board argues that this offense constitutes plagiarism, which has specific penalties outlined under that chapter of the handbook (R-2), and the penalties imposed are well within that section. The Board further argues that level offense are penalties that can be imposed, and the handbook also states that they have the authority to administer a higher level of discipline or may take other appropriate action when deemed necessary.

As stated above, the actions of boards of education have a presumption of validity. A specific policy and punishment was established by the Board with respect to plagiarism and enumerated in the School Handbook. Based on these factors, I **FIND** that the petitioners did not meet their burden of proof that there is a legal right underlying the claim.

Clearly, the respondent has a substantial interest in preventing plagiarism and cheating, as well as ensuring that its disciplinary policies are applied. If it did not enforce its disciplinary policies, the Board would be sending the wrong kind of message and possibly establishing a dangerous precedent. Consequently, I **FIND** that Respondent will suffer greater harm than Petitioners if the requested relief is granted.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m) 1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and the petitioners have failed to satisfy any of the four requirements, I **CONCLUDE** that the Petitioners have failed to establish grounds for the granting of

emergency relief. Accordingly, it is **ORDERED** that the Petition of T.Y. for emergent relief is **DENIED** without prejudice.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 16, 2007
DATE

DONALD J. STEIN, ALJ

/bdt

LIST OF EXHIBITS

For petitioner:

P-1 Petition

P-2 Amended Petition

P-3 Rebuttal Statement

P-4 Affidavit of T.Y.

P-5 Dictionary definition of project

For respondent:

R-1 Respondent's Brief

R-2 Affidavit of Timothy Brennan

R-3 Grievance Letter II dated April 16, 2007

R-4 Parents letter dated July 15, 2007

R-5 Parents letter dated March 26, 2007

R-6 Parents letter dated April 7, 2007

R-7 Written Statement of T.Y. dated March 9, 2007

R-8 Memorandum dated March 8, 2007

R-9 Letter to parents dated March 13, 2007

R-10 Moorestown Student Handbook Policy For Academic Dishonesty And Cheating

R-11 Moorestown Student Handbook Policy For Misuse Of Technology Equipment

R-12 Moorestown Student Handbook Guidelines For Student Conduct And Consequences

R-13 Moorestown's Acceptable Use Policy

R-14 Moorestown's Acceptable Use Agreement

R-15 Affidavit of Andrew Seibel

R-16 Affidavit of Pamela Fisk

R-17 Supplemental Affidavit of Pamela Fisk

204-07

#204-07

ROBERT LAGRUTTA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner claims that respondent Board violated his tenure rights by failing to appoint him to a part-time position of Apprentice Coordinator for the 2005-2006 school year. The petitioner holds an Educational Services certificate with endorsement as a Coordinator of Industrial Education (C.I.E.), and had been employed by respondent as a part-time Apprentice Coordinator for its Adult Education Program between 1995 and 2004. Petitioner does not hold an endorsement as Apprentice Coordinator. Respondent Board contends that petitioner is not tenured because he does not hold the proper certification pursuant to *N.J.A.C.* 6A:9-13.21.

The ALJ found, *inter alia*, that: the regulations clearly differentiate the County Apprenticeship Coordinator endorsement from the C.I.E. endorsement; petitioner does not possess the proper endorsement for the Apprenticeship Coordinator position; petitioner's prior employment as Apprenticeship Coordinator was based on waivers granted by the New Jersey Department of Education to the district, and cannot be construed as service under an appropriate certificate; petitioner did not take steps towards securing the appropriate endorsement, contending that it was impossible to attain, nor did he apply for an emergency County Apprenticeship Coordinator certificate. The ALJ concluded that petitioner had not gained tenure in the position of Apprenticeship Coordinator because he did not possess the required endorsement, and therefore cannot assert a seniority right to the part-time Apprentice Coordinator position reinstated for the 2005-2006 school year. The ALJ dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that petitioner has no tenure rights and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner noted that the referenced waivers permitted the district to employ a less-than-fully certified person, but did not operate to confer upon petitioner the certification necessary to meet the requirements of *N.J.S.A.* 18A:28-5. The Commissioner also noted that petitioner's contentions regarding the requirements for the Apprentice Coordinator certificate should have been directed to the State Board of Examiners in the context of an application for certification.

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

June 7, 2007

OAL DKT. NO. EDU 3291-06
AGENCY DKT. NO. 379-12/05

ROBERT LAGRUTTA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board of Education's reply was untimely filed[1] and consequently has not been considered.

On exception, petitioner reasserts his claim to both tenured status and the position of part-time Apprentice Coordinator, substantially reiterating the arguments of his post-hearing brief as summarized in the Initial Decision. (Petitioner's Exceptions at 1-7) He urges rejection of the OAL's decision because the Administrative Law Judge (ALJ) failed to take sufficient account of the "specific, somewhat unique facts of this case," ignoring that: 1) the Department of Education made it impossible, by including a course that was "simply was not taught in the state," to meet the academic requirements for certification as an Apprentice Programs Coordinator; and 2) the Board was issued a

[1] Pursuant to *N.J.A.C.* 1:1-18.4(d), any reply to exceptions is due within five business days of receipt thereof. Petitioner's exceptions were served on the Board by regular mail on May 9, 2007; the Board's reply – dated May 22, 2007 – was filed with the Commissioner on May 30, 2007 with neither an explanation for its late date nor an extension having previously been requested pursuant to *N.J.A.C.* 1:1-18.8.

waiver allowing petitioner to work as Apprentice Coordinator under his C.I.E. Coordinator certificate, so that he did, in fact, possess an "appropriate certificate" for purposes of acquiring tenure in the position. The narrow reading of the law espoused by the ALJ, petitioner opines, results in "another example of an employee who plays by the rules [but] is denied tenure protections because of the actions, or inactions of other entities, whether the respondent or the Department of Education." (*Id.* at 3)

Upon review, the Commissioner finds that the ALJ did, in fact, consider the circumstances stressed by petitioner, but concluded nonetheless – correctly – that petitioner did not hold the requisite certificate to obtain tenure as an Apprentice Coordinator, nor did he take steps to acquire it while employed with the district. (Initial Decision at 12-13.) The Commissioner notes in this regard that the waivers in question were granted to the *district* to permit it to employ a less-than-fully certified person in the position of Apprentice Coordinator, and such action does not – indeed, *cannot*, in view of the process for issuance of certificates by the State Board of Examiners – concomitantly confer upon petitioner as an *individual* the certification necessary to fulfill the requirements of *N.J.S.A.* 18A:28-5. Moreover, petitioner's contention that the correct certificate was "impossible" to obtain because one required course was not easily available could and should have been raised before the State Board of Examiners in the context of an application for certification, the Examiners' decision on which could then have been appealed to the Commissioner if petitioner believed it to be arbitrary or unlawful. Thus lacking the requisite certificate, as found by the ALJ, petitioner has no entitlement to tenure status, nor to the ancillary relief sought in the Petition. (Initial Decision at 14-15)

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/07

Date of Mailing: 6/07/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03291-06

AGENCY DKT. NO. 379-12/05

ROBERT LAGRUTTA,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

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

John M. Mills, III, Esq., for respondent (Mills & Mills, attorneys)

Record Closed: February 12, 2007 Decided: April 27, 2007

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

STATEMENT OF THE CASE

Petitioner, Robert LaGrutta, claims that the respondent, the Board of Education of the Morris County Vocational School District (the Board), violated his tenure rights by failing to appoint him to a part-time position of Apprentice Coordinator. The Board controverts petitioner's tenure claim and entitlement to the position.

PROCEDURAL HISTORY

On December 19, 2005, petitioner filed a Verified Petition with the Commissioner of Education asserting that the Board's failure to employ him as a part-time Apprentice Coordinator for the 2005-2006 school year violated petitioner's tenure rights. Petitioner seeks an order directing the Board to employ him as its part-time Apprentice Coordinator and granting back pay together with any other benefits or emoluments of employment and interest. On January 19, 2006, the Board filed an Answer and Separate Defenses. The Department of Education transmitted the matter to the Office of Administrative Law where, on March 13, 2006, it was filed for hearing as a contested case. A hearing was held on November 28, 2006, after which the record remained open for the receipt of post-hearing briefs. The parties submitted briefs in support of their respective positions and the record closed on February 12, 2007.[1]

FINDINGS OF FACT

The majority of the facts surrounding this matter are not in dispute. At the commencement of the hearing, the parties submitted a Stipulation of Facts memorializing the parties' agreement with regard to certain facts and the admission of various documents in evidence. Based upon a review of the testimony and the documentary evidence presented, including the Stipulation of Facts (Stip.), and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following **FACTS**:

1. Petitioner, Robert LaGrutta, was employed by the Board as an Apprentice Coordinator for its Adult Education Program for the following school years: 1995-96; 1996-97; 1997-98; 1998-99; 1999-2000; 2000-01; 2001-02; 2002-03 and 2003-04. (Stip. at ¶1; J-1 to J-9).

[1] An order was entered extending the time within which to file this Initial Decision.

2. While employed by the Board, petitioner worked four days per week, part-time, arriving at approximately 2:45 p.m. and working until 7:30 p.m. (Stip. at ¶2).

3. Petitioner's employment with the Board commenced after his full-time employment with the Wayne Township Board of Education. Petitioner has been employed by the Wayne Township Board of Education as a full-time Cooperative Industrial Education (C.I.E.) Coordinator for approximately thirty-three years.

4. During the summer, petitioner worked up to five days per week for approximately six to eight hours Monday through Thursday and less than six hours on Friday.

5. During the course of the performance of his duties as Apprentice Coordinator, petitioner was evaluated. (Stip. at ¶4). The following evaluations were annexed to the Stipulation of Facts: May 13, 2002 (J-11); December 14, 2001 (J-12); June 28, 2001 (J-13); January 31, 2001 (J-14); June 12, 2000 (J-15); November 29, 1999 (J-16); June 3, 1999 (J-17); December 7, 1998 (J-18); June 9, 1998 (J-19); January 6, 1998 (J-20); June 16, 1997 (J-21); December 10, 1996 (J-22) and July 29, 1996 (J-23).

6. The Job Descriptions in effect during petitioner's employment as a part-time Apprentice Coordinator list, as qualifications for the position, that the individual "[s]hall hold appropriate certificates as required by the Department of Education" as well as meet the qualifications as established by the Board of Education. (J-29, J-30, J-31).

7. Petitioner holds an Educational Services certificate authorizing him to serve as a C.I.E. Coordinator. (Stip. at ¶3; J-10).

8. Petitioner does not hold an Apprenticeship Coordinator endorsement.

9. James Rodgers has served as the district's Superintendent of Schools since July 2002.

10. Kenneth Williams has been employed by the Board as its Director of Adult Education since August 2002.

11. Petitioner acknowledged that the issue regarding petitioner not holding a certificate for the Apprentice Coordinator position arose after Mr. Rodgers and Mr. Williams commenced employment with the district and petitioner had discussions with them in or around 2002 concerning obtaining the necessary certificate.

12. On an excerpt from the New Jersey Department of Education website setting forth requirements for licensure for the position of Apprentice Coordinator, Mr. Williams wrote a note to petitioner, dated June 23, 2003, indicating petitioner's "need to pursue this." (R-1).

13. Petitioner did not undertake to obtain an Apprenticeship Coordinator endorsement during his employment with the Board.

14. On January 12, 1999, the Board approved an "Equivalency/Waiver Renewal Application" to waive the course requirement of "Industrial and Labor Relations" for Apprenticeship Coordinator certification "as no such course is offered at surrounding colleges/universities." (R-1). The Board also completed a "New Jersey State Department of Education Regulatory Equivalency/Waiver Renewal Form," dated January 14, 1999, requesting a waiver of the above course requirement since it "is not offered at any of the surrounding universities." (R-1).

15. On or about June 10, 2004, the Board posted an opening for the position of Apprenticeship Coordinator. (Stip. at ¶5; J-24).

16. This position was available for the 2004-2005 school year as an eleven month, full-time position (i.e. 8:00 a.m. – 3:00 p.m. plus one late evening per week). (Stip. at ¶5, J-24).

17. The Board was planning to create this full-time position in early Spring, 2004. (Stip. at ¶5).

18. On June 8, 2004, the Board adopted a Job Description for the eleven month Apprentice Coordinator position. (J-32).

19. On June 17, 2004, Superintendent of Schools James Rogers called petitioner into his office to inform petitioner that the new position was now full-time and that petitioner was welcome to apply.

20. Although petitioner described being interviewed by Mr. Rogers during this meeting, applying for the full-time position and thereafter never hearing back from the district, the undersigned finds this testimony to be overborne by the testimony of Mr. Rodgers and Mr. Williams, both of whom credibly testified that petitioner did not apply in writing or by verbal communication for the posted full-time Apprentice Coordinator position for the 2004-2005 school year.

21. Petitioner has not worked in respondent's school district since June, 2004.

22. The Board received no applications in response to the posted position from an applicant holding an Apprenticeship Coordinator endorsement.

23. The Board appointed Joseph Rooney, who was already employed as C.I.E. Coordinator, to the additional position of Apprenticeship Coordinator for the 2004-2005 school year. Mr. Rooney was certified as a C.I.E. Coordinator when he filled the position. (Stip. at ¶6).

24. On or about July 6, 2005, the Board posted an opening for the position of Coordinator of Industrial Education

(C.I.E.)/Apprenticeship Coordinator. (Stip. at ¶7; J-25). This was to be a twelve month, full-time position. (J-25).

25. The Board did not notify petitioner of the creation of this position. (Stip. at ¶7).

26. Mr. Rooney fulfilled the duties of C.I.E. Coordinator and Apprenticeship Coordinator for the 2004-2005 school year. (Stip. at ¶8).

27. In the opinion of the Board, the combined responsibilities did not work out so the Board continued Mr. Rooney's employment solely as full-time C.I.E. Coordinator. (Stip. at ¶8).

28. As a result, after the initial posting for the full-time combined Coordinator of Industrial Education (C.I.E.)/Apprenticeship Coordinator position, the Board determined to separate the full-time C.I.E. Coordinator position from the Apprentice Coordinator position.

29. On or about July 25, 2005, the Board posted an opening for the position of Apprentice Coordinator – Part Time. (Stip. at ¶9; J-26). The qualifications for the position listed in the posted notice state: "New Jersey Certified as Apprentice Coordinator." (J-26).

30. The Board did not notify petitioner of the creation of this position. (Stip. at ¶9).

31. The Board received no applications in response to the posted Apprentice Coordinator-Part Time position.

32. The Board did not fill the Apprentice Coordinator–Part Time position. (Stip. at ¶10).

33. On or about September 13, 2005, the Board adopted a resolution appointing "Ken Williams, Director of Adult Education as acting apprentice coordinator until such time as a permanent replacement is found." (Stip. at ¶11; J-27).

34. Mr. Williams is not certified as a C.I.E. Coordinator or Apprentice Coordinator. (Stip. at ¶12).

35. On or about June 27, 2006, the Board adopted a resolution reappointing "Ken Williams as County Apprentice Coordinator for the period from July 1, 2006 through June 30, 2007." (Stip. at ¶13; J-28).

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The tenure laws, N.J.S.A. 18A: 28-1 to -18, define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. den., 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." Zimmerman, supra., 38 N.J. at 71. They are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister. v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

"The right to tenure is created and governed entirely by statute." Breitwieser v. State-Operated School District of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996). To acquire the security of tenure, the precise requirements set forth in the statute must be met. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 400 (1996); Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 278 (1993); Spiewak, supra., 90 N.J. at 72; Zimmerman, supra, 38 N.J. at 72; Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (E & A 1941). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. Canfield v. Pine Hills Bd.

of Educ., 51 N.J. 400 (1968), rev'd. on dissent, 97 N.J. Super. 483, 493 (App. Div. 1967).

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

> The services of all teaching staff members employed in the positions of teacher, principal..., assistant principal, vice-principal, assistant superintendent, and all school nurses..., school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect..., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause...after employment in such district or by such board for:
>
> (a) Three consecutive calendar years...; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years. (emphasis added).

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

Tenure is achieved in a specific position. Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991); Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1337, adopted, Comm'r., 1982 S.L.D. 1356, aff'd., State Bd. of Educ., 1983 S.L.D. 1554. Tenure is achieved in either one of the positions specifically designated in N.J.S.A. 18A:28-5, which are separately tenurable, or in position which requires the teaching staff member to hold an appropriate certificate. Ellicott, supra, 251 N.J. Super. at 347; Duva v. State-Operated School District of the City of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <http://lawlibrary.rutgers.edu/oal/search.html.>.

Pursuant to N.J.S.A. 18A:28-5, a teaching staff member must serve the required probationary period before tenure will accrue. Tenure "arises only by passage of the time fixed by the statute...." Canfield, supra, 97 N.J. Super. at 490. In the within matter, the parties do not contest that part-time employment may be tenure eligible. See Lichtman v. Ridgewood Bd. of Educ., 93 N.J. 362 (1983); Spiewak, supra. Similarly, no debate exists that teaching staff members assigned to positions in adult education programs may gain tenure if the conditions of N.J.S.A. 18A:28-5 are met. See Trenton Education Assoc. v. Trenton Bd. of Educ., 93 N.J.A.R. 2d (EDU) 777, adopted in part and remanded in part, Comm'r, 93 N.J.A.R. 2d (EDU) 780, decision on remand, 93 N.J.A.R. 2d (EDU) 781, modified, Comm'r, 93 N.J.A.R. 2d (EDU) 783, aff'd, State Bd. of Educ., 94 N.J.A.R. 2d (EDU) 328; Rabolli v. Bergen County Vocational-Technical Schools Bd. of Educ., 1983 S.L.D. 196, adopted, Comm'r, 1983 S.L.D. 210, aff'd, State Bd. of Educ., 1983 S.L.D. 217. Equally undisputed is that petitioner was employed by the Board, on a part-time basis, as the Apprentice Coordinator for its Adult Education Program for nine consecutive school years, which is plainly sufficient to meet the service time requirements set forth in N.J.S.A. 18A:28-5. However, the parties' paths diverge concerning whether petitioner served the requisite period of time under an appropriate certificate.

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

The State Board has implemented the certification requirement by authorizing the issuance of three categories of educational certificates: Instructional, Administrative and Educational Services. N.J.A.C. 6A:9-5.2(a). The State Board has designated endorsements under each type of certificate, which identify the specific area in which a certificate holder is authorized to serve. The regulations set forth various endorsements that may be issued under an Educational Services certificate. See N.J.A.C. 6A:9-13.1 et seq. Pertinent to the within matter, the endorsements include a cooperative education coordinator endorsement, N.J.A.C. 6A:9-13.20, and a County apprenticeship coordinator endorsement, N.J.A.C. 6A:9-13.21.

In general, a cooperative education coordinator (CEC) endorsement is required for an individual to serve in the capacity as a coordinator supervising vocational students who are participating in cooperative education experiences in non-hazardous occupations and this endorsement also permits the individual to supervise students participating in any other non-hazardous structured learning experience in any career cluster. N.J.A.C. 6A:9-13.20(a). An individual holding a cooperative industrial education (C.I.E.) endorsement "may serve in a position requiring the CEC endorsement in any career cluster." N.J.A.C. 6A:9-13-20(c).

A separate endorsement is required for the position of County Apprentice Coordinator. N.J.A.C. 6A:9-13.21, which establishes the certification process and requirements for this position, provides in pertinent part:

> The county apprenticeship coordinator endorsement is required for the position of county apprentice coordinator in any county vocational school district conducting an apprenticeship program. The endorsement authorizes the holder to approve and coordinate apprenticeship training programs in accordance with N.J.A.C. 6A:8 and 6A:19.
>
> [N.J.A.C. 6A:9-13.21(a)] [2]

[2] The "certificate" requirement for the position of Apprentice Coordinator was previously codified in N.J.A.C. 6:11-11.4 and included the "Industrial and labor relations" course requirement referred to in the Regulatory Equivalency/Waiver Renewal Form dated January 14, 1999. The new rules adopted as N.J.A.C. 6A:9, effective January 20, 2004, eliminated this course requirement and codified the requirement for a "county apprenticeship coordinator endorsement" in N.J.A.C. 6A:9-13.22. See 36 N.J.R. 469 (January 20, 2004).

In Breitwieser, supra, the Appellate Division addressed whether service under an emergency certificate as a teacher of the handicapped could be tacked on to the petitioner's service under permanent certification as an elementary teacher for purposes of acquiring tenure. The petitioner was appointed as a full-time teacher of the handicapped with the district effective September 1, 1989. When appointed, the petitioner held an emergency certificate for Teacher of the Handicapped and a permanent certificate as an Elementary School Teacher. The petitioner did not obtain or become eligible for a standard certificate as Teacher of the Handicapped during her employment with the district. In March 1990, the petitioner requested a transfer from her position as teacher of the handicapped to a position as an elementary school teacher, which was granted. The petitioner was transferred on March 9, 1990 and, thereafter, was hired as an elementary school teacher for the 1990-1991, 1991-1992 and 1992-1993 school years. By letter dated December 14, 1992, the district advised the petitioner that she was terminated effective February 12, 1993. The pivotal issue concerned whether petitioner's prior service under an emergency certificate as teacher of the handicapped could be counted towards the service period needed for tenure since her service under the elementary school standard certificate fell several weeks short of the period required for tenure.

The Appellate Division observed that "[e]mergency certificates are issued only on the application of a public-school district when the district is unable to locate a suitable standard-certified teacher due to unforeseen shortages or other extenuating circumstances." Breitwieser, supra, 286 N.J. Super. at 639. The court explained that:

> [a] teacher may not acquire tenure solely upon service under an emergency certificate. No matter how long a teacher serves under an emergency certificate, tenure is unavailable.... This is because holders of emergency certificates 'have not fully satisfied the educational prerequisites for standard certification, nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process'.... The requirement that teachers hold a non-emergency certificate to obtain tenure is appropriate because emergency-certified teachers are by definition unqualified to hold their position. They hold their positions temporarily, subject to termination or non-renewal as

> soon as the district locates a provisionally or permanently certified teacher.
>
> [Id. at 640-41]

While recognizing that "emergency-certificate service is not always excluded from calculation of a teacher's period of service for purposes of the tenure statute," the Appellate Division held that "service under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field as the emergency certificate." Id. at 643, 644. Accordingly, since the petitioner never received a standard certificate as teacher of the handicapped, the court concluded her emergency service could not be counted towards tenure and such emergency service was not under an "appropriate certificate" for purposes of the tenure statute. Id. at 645-46.

It is against this backdrop that the parties' positions are considered.

Petitioner asserts that he gained tenure in the part-time position of Apprentice Coordinator and that his "tenure rights were violated when he was not reinstated for the 2005-2006 school year and thereafter." At the hearing, petitioner testified that, during his employment, the district applied for and was granted waivers from the Department of Education, which petitioner understood was a waiver on behalf of the district that authorized his employment. Petitioner indicated that, although the Apprentice Coordinator endorsement existed during his employment, it could not be obtained because a required course was not offered in any State college, acknowledging, however, that petitioner was unaware whether the course was offered out of state. Petitioner argues in his post-hearing submission that "under the circumstances of this case," petitioner "held certification sufficient for employment in the position in question" and held "an appropriate certificate." Specifically, petitioner maintains that he "was certified as a C.I.E. Coordinator," "[b]ased upon the express waiver granted to the District (R-1), this certificate was all that was required for employment as Apprentice Coordinator" and, "[b]ecause a required course was not offered in New Jersey, obtaining an additional certificate, such as Coordinator: Apprentice Programs, was

impossible." In short, the Board contends that since petitioner "does not hold a Certificate for Apprenticeship Coordinator" he "could not accrue tenure status in that part-time position."

The regulations make clear that a County Apprenticeship Coordinator endorsement is a separate and distinct endorsement from a C.I.E. endorsement, and that a County Apprenticeship Coordinator endorsement is required for the position of County Apprentice Coordinator. N.J.A.C. 6A:9-13.21(a). It is undisputed that petitioner does not possess an Apprenticeship Coordinator endorsement. Accordingly, since petitioner did not hold an "appropriate" certificate for the position in issue, he did not accrue tenure status in that part-time position pursuant to N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5. The record reveals that petitioner served as the Apprentice Coordinator for several years, which appears to have been based on waivers granted by the Department of Education to the district.[3] However, while such a waiver may have permitted the district to employ petitioner, similar to an emergency certificate, this service is not under an "appropriate certificate" for purposes of the tenure statute. Indeed, petitioner acknowledged that he did not take steps towards securing the appropriate endorsement during his employment with the Board and no evidence suggests that petitioner applied for an emergency County Apprenticeship Coordinator certificate pursuant to N.J.A.C. 6A:9-13.21(c).

In sum, tenure protection in a position is limited to teaching staff members who hold an appropriate certificate for that position issued by the State Board of Examiners. N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5. This certificate requirement is mandated by

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[3] The Equivalency/Waiver Renewal Application Form submitted at the hearing references N.J.A.C. 6:3A. The cited regulations addressed Regulatory Equivalency and Waiver and were recodified as N.J.A.C. 6A:5-1.1, et. seq. In general, the purpose of the regulations is to provide regulatory flexibility for school districts to meet the requirements of the rules contained in Title 6 and Title 6A of the New Jersey Administrative Code and the regulations permit the Commissioner to approve a waiver to a specific rule based upon application submitted by a school district. See N.J.A.C. 6A:5-1.2; N.J.A.C. 6A:5-1.5.

the tenure statutes and is a necessary prerequisite to achieve tenure. Accordingly, I **CONCLUDE** that, since petitioner did not possess the endorsement required for the position in issue, he did not gain tenure in that position.

Seniority refers to an employee's bumping rights upon a reduction in force (RIF). Howley, supra, 1982 S.L.D. at 1339. It is a concept that applies to certain rights of tenured personnel and only has meaning when a RIF is necessary. Id. at 1340. The concept of seniority becomes relevant only after tenure has been achieved. "[S]eniority provides a mechanism for ranking all tenured teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies." Capodilupo v. West Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Dismissals resulting from a RIF must be made on the basis of seniority according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10. See N.J.A.C. 6A:32:5.1. A tenured member dismissed as a result of a RIF must be maintained on a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person is qualified and must be reemployed if and when such vacancy occurs. N.J.S.A. 18A:28-12. As explained in Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 531 (App. Div. 1999), "[w]hen a school board deems it necessary to eliminate a position, 'seniority' is a right afforded to tenured employees entitling the employee to either continue in an existing job opening based upon their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available." Simply put, I **CONCLUDE** that, inasmuch as petitioner did not acquire tenure, he cannot assert a seniority right to the part-time Apprentice Coordinator position reinstated for the 2005-2006 school year.

In view of the foregoing, it is unnecessary to address petitioner's argument that his tenure rights were violated because "the evidence establishes that there was no actual reduction in force or elimination of the Apprentice Coordinator position" but, rather, "the duties and responsibilities of the position were simply transferred, in full, to another employee"; first to Mr. Rooney for the 2004-2005 school year and then to Mr. Williams for

the subsequent years. Notwithstanding, it is observed that the statutory provisions afford boards of education wide latitude in the organization of its staff to meet the district's needs. A board may effectuate a reduction in force for reasons of economy, because of a change in the administrative or supervisory organization or for other good cause. N.J.S.A. 18A:28-9. The courts have consistently recognized that a RIF "whether of tenured or nontenured teachers, if done for reasons of economy, is entirely within the authority of the board." Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979), certif. denied, 81 N.J. 292 (1979). See Jamison v. Morris School Dist. Bd. of Educ., 198 N.J. Super. 411, 414-15 (App. Div. 1985); Klinger v. Cranbury Twp. Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983). Further recognized is that "[t]he determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions." Impey v. Shrewsbury Bd. of Educ., 273 N.J. Super. 429 (App. Div. 1994), aff'd, 142 N.J. 388, 399 (1995). See Klinger, supra, 190 N.J. Super. at 357.

At the hearing, the Board's witnesses described the rationale underlying the Board's determinations to make the Apprentice Coordinator a full-time position for the 2004-2005 school year and to reinstate the part-time position for the subsequent school years. Further, as observed by the Board in its post-hearing submission, by placing the Apprentice Coordinator position under the umbrella of the Director of Adult Education in 2005 and 2006, the Board has essentially effectuated a reduction in force. Suffice it to say, the Board acted within the scope of its authority and the Board's actions cannot be viewed as arbitrary, capricious or unreasonable. Indeed, to the extent that petitioner's arguments can be construed as a challenge to the Board's action in June 2004 to make the position a full-time position, any such claim would appear to be barred under the ninety-day rule. N.J.A.C. 6A:3-1.3.

ORDER

I **ORDER** that petitioner's Verified Petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

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

Apr 27, 2007 — Margaret M. Monaco
DATE — **MARGARET M. MONACO**, ALJ

Date Received at Agency: April 27, 2007

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 30 2007
DATE — OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX

List of Witnesses

For Petitioner:

Robert LaGrutta

For Respondent:

Kenneth Williams

James Rodgers

List of Exhibits In Evidence

Joint Exhibits:

JA-1 Stipulation of Facts (pp.5) with the below joint exhibits attached.

J-1 Agreement-Employee Appointment (Part-Time/Temporary) dated October 10, 1995

J-2 Agreement-Employee Appointment (Part-Time/Temporary) dated July 23, 1996

J-3 Agreement-Employee Appointment (Part-Time/Temporary) dated August 5, 1997

J-4 Agreement-Employee Appointment (Part-Time/Temporary) dated August 11, 1998

J-5 Agreement-Employee Appointment (Part-Time/Temporary) dated August 10, 1999

J-6 Agreement-Employee Appointment (Part-Time/Temporary) dated August 8, 2000

J-7 Agreement-Employee Appointment (Part-Time/Temporary) dated August 14, 2001

J-8 Agreement-Employee Appointment (Part-Time/Temporary) dated August 15, 2002,

J-9 Agreement-Employee Appointment (Part-Time/Temporary) dated July 8, 2003

J-10 Certificate Issued by State Board of Examiners, Coordinator, Cooperative Industrial Education

J-11 Evaluation of Administrative Performance dated May 13, 2002 (4 pp)

J-12 Evaluation of Administrative Performance dated December 14, 2001 (4 pp)

J-13 Evaluation of Administrative Performance dated June 28, 2001 (4 pp)

J-14 Evaluation of Administrative Performance dated January 31, 2001 and memorandum dated February 1, 2001 (6 pp)

J-15 Evaluation of Administrative Performance dated June 12, 2000 (3 pp)

J-16 Evaluation of Administrative Performance dated November 29, 1999 (4 pp)

J-17 Evaluation of Administrative Performance dated June 3, 1999 (3 pp)

J-18 Evaluation of Administrative Performance dated December 7, 1998 (4 pp)

J-19 Evaluation of Administrative Performance dated June 9, 1998 (4 pp)

J-20 Evaluation of Administrative Performance dated January 6, 1998 (4 pp)

J-21 Evaluation of Administrative Performance dated June 16, 1997 (4 pp)

J-22 Evaluation of Administrative Performance dated December 10, 1996 (4 pp)

J-23 Evaluation of Administrative Performance dated July 29, 1996 (3 pp)

J-24 Posted Position Available, Apprenticeship Coordinator, with posting date of June 10, 2004

J-25 Posted Position Available, Coordinator of Industrial Education (C.I.E.)/Apprenticeship Coordinator, with posting date of July 6, 2005.

J-26 Posted Position Available, Apprentice Coordinator-Part-Time, with posting date of July 25, 2005

J-27 Excerpt of minutes of Board meeting on September 13, 2005

J-28 Excerpt of minutes of Board meeting on June 27, 2006

J-29 Job Description, Part-Time Apprentice Coordinator, revised/adopted on January 23, 1996 (2 pp)

J-30 Job Description, Part-Time Apprentice Coordinator, revised/adopted on January 23, 1996 (2 pp)

J-31 Job Description, Coordinator of Apprentice and Customized Trade Program, revised/adopted on February 13, 1990 (2 pp)

J-32 Job Description, Apprentice Coordinator, adopted June 8, 2004 (2 pp)

J-33 Apprentice Coordinator Program, Statewide Goals and Objectives and Anticipated Outcomes (2 pp)

J-34 Apprentice Coordinator Program Plan dated April 14, 2000.

For Petitioner:

None.

For Respondent:

R-1 Excerpt from Department of Education website, Requirements for Licensure as Coordinator: Apprentice Programs with handwritten notes; Regulatory Equivalency/Waiver Renewal Form dated January 14, 1999; and abstract from minutes of the meeting of the Board on January 12, 1999 (4 pp)

205-07

#205-07

OAL DKT. NO. EDU 10427-06
AGENCY DKT. NO. 231-6/06

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J.R.-C. and J.G.,	:	DECISION
RESPONDENTS.	:	
	:	

The record, Stipulation in Lieu of Judgment, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/07

Date of Mailing: 6/07/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10427-06

AGENCY REF.NO.231-6/06

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Petitioner,

v.

J.R.-C AND J.G.,

Respondent.

Anthony V. D'Elia, Esq., for petitioner (Chasen Leyner & Lamparello, attorneys)

J.R.-C. and J.G., respondents pro se

Record Closed: April 30, 2007 Decided: May 7, 2007

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

The matter was transmitted to the Office of Administrative Law (OAL) on October 11, 2006 for determination as a contested case. A hearing was scheduled for March 27, 2007, which was adjourned due to a possible settlement.

On April 3, 2007, the parties were able to resolve the matter. On April 30, 2007, the undersigned received the original copy of the Stipulation in Lieu of Judgment and the Stipulation of Dismissal. See attached copy.

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

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

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

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

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

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

5/4/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 5-10-07

Mailed to Parties:

MAY 10 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

2007 APR 30 A 7:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, Petitioner, vs. J.R.-C. and J.G., Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO.: EDU10427-06 AGENCY DOCKET NO.: 231-6/06 Civil Action STIPULATION IN LIEU OF JUDGMENT

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon;

IT IS on this _____ day of _____, 2007,

STIPULATED by and between the parties, as follows:

1) Respondent agrees to pay the sum of $3,500.00, which sum Petitioner agrees to accept in full settlement of its claim herein, inclusive of interest, counsel fees and court costs.

2) The sum aforesaid shall be paid by Respondent, Jasmine Rendon-Contello, to Karen Perkins, Business Administrator at 745 Clifton Avenue, Clifton, New Jersey, in the following manner:

(a) $1,500.00 on or before July 1, 1996;

(b) $200.00 per month on or before the 5th day of the months of June, 2007 through May, 2008 (inclusive);

3) In the event Respondent fails to pay in accordance with the terms set forth in this Stipulation then, and in that event, Petitioner shall be entitled to obtain the entry of Judgment against Respondent, Jasmine Rendon-Contello, ex parte, in the sum of $4,500.00, giving Respondent credit for any sums actually paid pursuant to the terms of this Stipulation.

4) In the event of default as aforesaid, Petitioner shall be entitled to obtain the entry of Judgment upon ex parte application, with supporting Certification and with notice to the Respondent only in the form of a copy of the application, addressed to Jasmine Rendon-Contello, at 90 Martha Avenue, Apt. F8, Clifton, New Jersey 07011, by first class mail, postage pre-paid.

We hereby consent to the form and entry of the within Stipulation.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmine Rendon-Contello, Respondent

Dated: 4/12/07

STATE OF NEW JERSEY,

COUNTY OF Passaic S.S.:

I CERTIFY that on 04/12, 2007, Jasmine Rendon-Contello personally came before me and this person acknowledged under oath, to my satisfaction, that:

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

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

Bertha S. Flaz

Notary Public

BERTHA S. FLAZ
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES JANUARY 31, 2012

2007 APR 30 A 7:36
OFFICE OF ADMIN LAW

CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, **Petitioner,** **vs.** **J.R.-C. and J.G.,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **DOCKET NO.: EDU10427-06** **AGENCY DOCKET NO.: 231-6/06** **Civil Action** **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner and Respondent, both agree to dismiss the petition and any cross-claims which may be filed in this matter.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, Petitioner, vs. J.R.-C. and J.G., Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO.: EDU10427-06 AGENCY DOCKET NO.: 231-6/06 Civil Action STIPULATION IN LIEU OF JUDGMENT

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon;

IT IS on this _____ day of _____, 2007,

STIPULATED by and between the parties, as follows:

1) Respondent agrees to pay the sum of $3,500.00, which sum Petitioner agrees to accept in full settlement of its claim herein, inclusive of interest, counsel fees and court costs.

2) The sum aforesaid shall be paid by Respondent, Jasmine Rendon-Contello, to Karen Perkins, Business Administrator at 745 Clifton Avenue, Clifton, New Jersey, in the following manner:

(a) $1,500.00 on or before July 1, 1996;

(b) $200.00 per month on or before the 5th day of the months of June, 2007 through May, 2008 (inclusive);

3) In the event Respondent fails to pay in accordance with the terms set forth in this Stipulation then, and in that event, Petitioner shall be entitled to obtain the entry of Judgment against Respondent, Jasmine Rendon-Contello, ex parte, in the sum of $4,500.00, giving Respondent credit for any sums actually paid pursuant to the terms of this Stipulation.

4) In the event of default as aforesaid, Petitioner shall be entitled to obtain the entry of Judgment upon ex parte application, with supporting Certification and with notice to the Respondent only in the form of a copy of the application, addressed to Jasmine Rendon-Contello, at 90 Martha Avenue, Apt. F8, Clifton, New Jersey 07011, by first class mail, postage pre-paid.

We hereby consent to the form and entry of the within Stipulation.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmine Rendon-Contello
Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

STATE OF NEW JERSEY,

COUNTY OF Passaic S.S.:

I CERTIFY that on 04/12/, 2007, Jasmine Rendon-Contello personally came before me and this person acknowledged under oath, to my satisfaction, that:

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

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

Bertha S. Flaz
Notary Public

BERTHA S. FLAZ
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES JANUARY 31, 2012

RECEIVED
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STATE OF NEW JERSEY
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CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, Petitioner, vs. J.R.-C. and J.G., Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO.: EDU10427-06 AGENCY DOCKET NO.: 231-6/06 Civil Action STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner and Respondent, both agree to dismiss the petition and any cross-claims which may be filed in this matter.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

203-07

#203-07E

OAL DKT. NO. EDU 2782-07
AGENCY DKT. NO. 120-4/07

R.Y. and E.Y., on behalf of minor child, T.Y.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on May 16, 2007, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ's determination – for the reasons detailed in his Order – that petitioners have failed to satisfy any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/07

Date of Mailing: 6/07/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2782-07
AGENCY DKT. NO. 120-4/07

R.Y. and E.Y., ON BEHALF OF
MINOR CHILD, T.Y.,
Petitioners,

v.

MOORESTOWN BOARD OF EDUCATION,
Respondent.

R.Y. and E.Y., petitioners, appearing pro se
Arthur Risden, Esq., for respondent (Archer & Greiner, attorneys)

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

STATEMENT OF THE CASE

R.Y. and E.Y., on behalf of minor child T.Y. (petitioners), assert that the punishment imposed on their son, including the removal from an Honors class at Moorestown High School (School) for plagiarism and possession of unauthorized downloads is arbitrary, and capricious. The Moorestown Board of Education (Board) asserts that more than twenty students were found to have been involved in plagiarism and possession of unauthorized downloads from the school internet site, and the punishments for such behavior are set forth in the student handbook and are not arbitrary and capricious.

PROCEDURAL HISTORY

On April 30, 2007, Petitioners filed an application for emergent relief with the Commissioner of Education. The application stated the Board acted in an arbitrary and capricious manner by imposing the punishment on their son, including the removal of their son from the Honors program and a two-day in school suspension.

On May 4, 2007, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief on May 16, 2007. On that date, the case was heard in the OAL, Trenton (Hamilton Township) and the record closed.

STATEMENT OF FACTS

T.Y. is a ninth grade Moorestown student who was enrolled in the Honors Computer Assisted Drafting 1 course (CAD 1) during the current academic school year.

On or about March 1, 2007, the school became aware of potentially widespread cheating in the CAD 1 class. The School began an investigation to determine the full extent of the cheating in the CAD I class, as well as what steps need to be implemented to prevent this type of situation in the future (R-2). The Moorestown Student Handbook provides that plagiarism will not be tolerated in any schoolwork, and it will result in the loss of credit for the assignment, out-of-school suspensions, and/or loss of credit for the course (R-10). The Moorestown's Acceptable Use Agreement and Policy No. 6142.10 specifically provides that users will respect the rights of others by complying with all school district policies regarding plagiarism (R-13).

The Administration presented the students in CAD I with the opportunity to come forward to admit to any violations of policies and guidelines, and indicated that students who came forward would be disciplined, but more leniently than those who did not come forward (R-2, R-15, R-16).

On March 9, 2007, T.Y. submitted a written admission that he had copied two drawings from another student (R-6). He was one of twenty-one students who came forward.

The School determined that students who came forward would be treated with leniency, when compared to the traditional consequences for plagiarism. Although the students who came forward faced the same discipline, the school alleges each student was considered individually, and special accommodations were offered, when appropriate, such as for special education students and senior students. Specifically, the students were afforded safeguards regarding credit, the ability to retake the course, and counseling on how to handle questions about the incident during the college admission process, if asked (R-2, R-15, R-16). Students who would not be able to graduate or be promoted were given the opportunity to earn enough credits to graduate or be promoted.

Based on his admission, T.Y. was charged with possession of a file that was determined to be the work of another student, and the use of a computer file that was the work of another student, defined as plagiarism.

As a result of these charges, T.Y. received an administrative withdrawal from CAD I, with a final grade of W (Withdraw), suspension of his MooreNet privileges until Friday, March 16, 2007, a two-day in-school suspension, and ten social probation points. Customarily, such conduct would result in an academic withdrawal with a final grade of WF (Withdraw-Fail), which impacts the G.P.A., suspension of MooreNet privileges for the remainder of the school year, a five-day out-of-school suspension, and twenty-five social probation points (R-15).

Any student who came forward, including T.Y., was afforded special safeguards, including the ability to maintain sufficient credits for the current year, despite the loss of five CAD I credits, the ability to retake CAD I, and discussions with parents regarding how a student should handle questions about the plagiarism suspension during the college admission process, if asked (R-2, R-15, R-16).

The petitioners assert that T.Y. copied two drawings, which were not projects. He had completed approximately one hundred drawings, and only two were the subject of this action.

The preceding information has not been disputed or contradicted by the parties, and is found as fact.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

The petitioners argue that T.Y. will suffer irreparable harm because he will not be able to catch-up in the CAD I class unless he is reinstated immediately; he will not be able to attend all of the classes available in the architecture/engineering field if he has to take CAD I next year, and that he will have a difficult time explaining to colleges and universities why he withdrew from CAD I. Petitioners allege that if T.Y. is asked to explain his two day suspension for copying two drawings out of the one hundred he completed on his own, this explanation will not be believed by an admissions officer.

Although Petitioners may sincerely believe T.Y. will suffer some or all of these problems if he is not reinstated in CAD I, T.Y. will have the opportunity to take CAD I next year. He has enough credits to be promoted to tenth grade. Although the petitioners certainly raise important arguments as to the effect of this action on college admission and the ability to take future honors course, T.Y. is only a freshman. Any effect on future classes or college admission is only speculative. Therefore, I **FIND** the petitioners have been unable to meet their burden that T.Y. will suffer irreparable harm if this relief is not granted.

Student's choice in specific courses, curriculum materials, assignments, and teachers are matters of educational policy and not constitutional rights. J.L. and J.E.H. o/b/o T.H.I. v. Board of Education of the Hopewell Valley Regional School District, EDU 2658-99, Initial Decision (August 20, 1999, adopted, Commissioner of Education (October 18, 1999), and, adopted, State Board of Education (February 2, 2000). The determination of placement, suspension, or withdrawal from an Honors course is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm.

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294. The School has clearly established a policy that does not tolerate plagiarism and any students found to violate that policy will face loss of credit for the assignment, out-of-

school suspensions and/or loss of credit for a course. As a result, I **FIND** that Respondent's actions in applying its policy to withdraw T.Y. from CAD I with a final grade of W (Withdraw); suspend of his MooreNet privileges until Friday, March 16, 2007; suspend T.Y. in-school for two days; and assess ten social probation points due to his conduct cannot be disturbed.

Petitioners allege that the penalty given to their son was arbitrary and capricious, because some students may have had the opportunity to make up some credits to graduate or be promoted, but their son was not given the opportunity to do so because he had enough credits to be promoted. I do not agree. These safeguards were put into place to ensure that all students would be able to graduate or be promoted, similar to T.Y. If these safeguards were not put in place, some students would face a much harsher punishment; the inability to graduate or be promoted.

Petitioners further argue that this offense does not constitute plagiarism, because the copied materials are drawings, and not class projects. Petitioners refer to the Moorestown Student Handbook, which states that "students who found to have plagiarized on school exams, term papers, research assignments or class projects" will face punishment referred to herein (R-10). I do not find that the definition of plagiarism is to be that limited or strictly construed. The Handbook also states that "all assessments/assignments must be **independently** completed. This includes homework" (R-10). Therefore, I further **FIND** it unlikely that the Petitioners would have prevailed on the merits.

Petitioners cite N.J.A.C. 6A:16-7.1(b)(6) in reliance of their position that the legal right underlying the petitioner's claim is settled. N.J.A.C. 6A:16-7.1(b)(6) provides that a code of conduct shall be created:

> Establish parameters for school responses to violations of the code of student conduct that take into account, at a minimum, the severity of the offenses, the developmental ages of the student offenders and students' histories of inappropriate behavior.

Petitioners allege that Moorestown failed to take into account these standards.

The Board asserts that they did, including his status as a freshman and lack of a disciplinary record. Petitioners further argue that this incident constitutes misuse of technology equipment, which is disciplined as a Level C offense (R-3). Petitioners further argue that that the first offense for a Level C offense is one Saturday suspension (R-4), and the penalties imposed on T.Y. are in far excess of what is prescribed, and is arbitrary and capricious.

The Board argues that this offense constitutes plagiarism, which has specific penalties outlined under that chapter of the handbook (R-2), and the penalties imposed are well within that section. The Board further argues that level offense are penalties that can be imposed, and the handbook also states that they have the authority to administer a higher level of discipline or may take other appropriate action when deemed necessary.

As stated above, the actions of boards of education have a presumption of validity. A specific policy and punishment was established by the Board with respect to plagiarism and enumerated in the School Handbook. Based on these factors, I **FIND** that the petitioners did not meet their burden of proof that there is a legal right underlying the claim.

Clearly, the respondent has a substantial interest in preventing plagiarism and cheating, as well as ensuring that its disciplinary policies are applied. If it did not enforce its disciplinary policies, the Board would be sending the wrong kind of message and possibly establishing a dangerous precedent. Consequently, I **FIND** that Respondent will suffer greater harm than Petitioners if the requested relief is granted.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m) 1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and the petitioners have failed to satisfy any of the four requirements, I **CONCLUDE** that the Petitioners have failed to establish grounds for the granting of

emergency relief. Accordingly, it is **ORDERED** that the Petition of T.Y. for emergent relief is **DENIED** without prejudice.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 16, 2007
DATE

DONALD J. STEIN, ALJ

/bdt

LIST OF EXHIBITS

For petitioner:

P-1 Petition

P-2 Amended Petition

P-3 Rebuttal Statement

P-4 Affidavit of T.Y.

P-5 Dictionary definition of project

For respondent:

R-1 Respondent's Brief

R-2 Affidavit of Timothy Brennan

R-3 Grievance Letter II dated April 16, 2007

R-4 Parents letter dated July 15, 2007

R-5 Parents letter dated March 26, 2007

R-6 Parents letter dated April 7, 2007

R-7 Written Statement of T.Y. dated March 9, 2007

R-8 Memorandum dated March 8, 2007

R-9 Letter to parents dated March 13, 2007

R-10 Moorestown Student Handbook Policy For Academic Dishonesty And Cheating

R-11 Moorestown Student Handbook Policy For Misuse Of Technology Equipment

R-12 Moorestown Student Handbook Guidelines For Student Conduct And Consequences

R-13 Moorestown's Acceptable Use Policy

R-14 Moorestown's Acceptable Use Agreement

R-15 Affidavit of Andrew Seibel

R-16 Affidavit of Pamela Fisk

R-17 Supplemental Affidavit of Pamela Fisk

#204-07

ROBERT LAGRUTTA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner claims that respondent Board violated his tenure rights by failing to appoint him to a part-time position of Apprentice Coordinator for the 2005-2006 school year. The petitioner holds an Educational Services certificate with endorsement as a Coordinator of Industrial Education (C.I.E.), and had been employed by respondent as a part-time Apprentice Coordinator for its Adult Education Program between 1995 and 2004. Petitioner does not hold an endorsement as Apprentice Coordinator. Respondent Board contends that petitioner is not tenured because he does not hold the proper certification pursuant to *N.J.A.C.* 6A:9-13.21.

The ALJ found, *inter alia*, that: the regulations clearly differentiate the County Apprenticeship Coordinator endorsement from the C.I.E. endorsement; petitioner does not possess the proper endorsement for the Apprenticeship Coordinator position; petitioner's prior employment as Apprenticeship Coordinator was based on waivers granted by the New Jersey Department of Education to the district, and cannot be construed as service under an appropriate certificate; petitioner did not take steps towards securing the appropriate endorsement, contending that it was impossible to attain, nor did he apply for an emergency County Apprenticeship Coordinator certificate. The ALJ concluded that petitioner had not gained tenure in the position of Apprenticeship Coordinator because he did not possess the required endorsement, and therefore cannot assert a seniority right to the part-time Apprentice Coordinator position reinstated for the 2005-2006 school year. The ALJ dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that petitioner has no tenure rights and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner noted that the referenced waivers permitted the district to employ a less-than-fully certified person, but did not operate to confer upon petitioner the certification necessary to meet the requirements of *N.J.S.A.* 18A:28-5. The Commissioner also noted that petitioner's contentions regarding the requirements for the Apprentice Coordinator certificate should have been directed to the State Board of Examiners in the context of an application for certification.

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

June 7, 2007

OAL DKT. NO. EDU 3291-06
AGENCY DKT. NO. 379-12/05

ROBERT LAGRUTTA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board of Education's reply was untimely filed[1] and consequently has not been considered.

On exception, petitioner reasserts his claim to both tenured status and the position of part-time Apprentice Coordinator, substantially reiterating the arguments of his post-hearing brief as summarized in the Initial Decision. (Petitioner's Exceptions at 1-7) He urges rejection of the OAL's decision because the Administrative Law Judge (ALJ) failed to take sufficient account of the "specific, somewhat unique facts of this case," ignoring that: 1) the Department of Education made it impossible, by including a course that was "simply was not taught in the state," to meet the academic requirements for certification as an Apprentice Programs Coordinator; and 2) the Board was issued a

[1] Pursuant to *N.J.A.C.* 1:1-18.4(d), any reply to exceptions is due within five business days of receipt thereof. Petitioner's exceptions were served on the Board by regular mail on May 9, 2007; the Board's reply – dated May 22, 2007 – was filed with the Commissioner on May 30, 2007 with neither an explanation for its late date nor an extension having previously been requested pursuant to *N.J.A.C.* 1:1-18.8.

waiver allowing petitioner to work as Apprentice Coordinator under his C.I.E. Coordinator certificate, so that he did, in fact, possess an "appropriate certificate" for purposes of acquiring tenure in the position. The narrow reading of the law espoused by the ALJ, petitioner opines, results in "another example of an employee who plays by the rules [but] is denied tenure protections because of the actions, or inactions of other entities, whether the respondent or the Department of Education." (*Id.* at 3)

Upon review, the Commissioner finds that the ALJ did, in fact, consider the circumstances stressed by petitioner, but concluded nonetheless – correctly – that petitioner did not hold the requisite certificate to obtain tenure as an Apprentice Coordinator, nor did he take steps to acquire it while employed with the district. (Initial Decision at 12-13.) The Commissioner notes in this regard that the waivers in question were granted to the *district* to permit it to employ a less-than-fully certified person in the position of Apprentice Coordinator, and such action does not – indeed, *cannot*, in view of the process for issuance of certificates by the State Board of Examiners – concomitantly confer upon petitioner as an *individual* the certification necessary to fulfill the requirements of *N.J.S.A.* 18A:28-5. Moreover, petitioner's contention that the correct certificate was "impossible" to obtain because one required course was not easily available could and should have been raised before the State Board of Examiners in the context of an application for certification, the Examiners' decision on which could then have been appealed to the Commissioner if petitioner believed it to be arbitrary or unlawful. Thus lacking the requisite certificate, as found by the ALJ, petitioner has no entitlement to tenure status, nor to the ancillary relief sought in the Petition. (Initial Decision at 14-15)

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/07

Date of Mailing: 6/07/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03291-06

AGENCY DKT. NO. 379-12/05

ROBERT LAGRUTTA,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

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

John M. Mills, III, Esq., for respondent (Mills & Mills, attorneys)

Record Closed: February 12, 2007 Decided: April 27, 2007

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

STATEMENT OF THE CASE

Petitioner, Robert LaGrutta, claims that the respondent, the Board of Education of the Morris County Vocational School District (the Board), violated his tenure rights by failing to appoint him to a part-time position of Apprentice Coordinator. The Board controverts petitioner's tenure claim and entitlement to the position.

PROCEDURAL HISTORY

On December 19, 2005, petitioner filed a Verified Petition with the Commissioner of Education asserting that the Board's failure to employ him as a part-time Apprentice Coordinator for the 2005-2006 school year violated petitioner's tenure rights. Petitioner seeks an order directing the Board to employ him as its part-time Apprentice Coordinator and granting back pay together with any other benefits or emoluments of employment and interest. On January 19, 2006, the Board filed an Answer and Separate Defenses. The Department of Education transmitted the matter to the Office of Administrative Law where, on March 13, 2006, it was filed for hearing as a contested case. A hearing was held on November 28, 2006, after which the record remained open for the receipt of post-hearing briefs. The parties submitted briefs in support of their respective positions and the record closed on February 12, 2007.[1]

FINDINGS OF FACT

The majority of the facts surrounding this matter are not in dispute. At the commencement of the hearing, the parties submitted a Stipulation of Facts memorializing the parties' agreement with regard to certain facts and the admission of various documents in evidence. Based upon a review of the testimony and the documentary evidence presented, including the Stipulation of Facts (Stip.), and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** the following **FACTS**:

1. Petitioner, Robert LaGrutta, was employed by the Board as an Apprentice Coordinator for its Adult Education Program for the following school years: 1995-96; 1996-97; 1997-98; 1998-99; 1999-2000; 2000-01; 2001-02; 2002-03 and 2003-04. (Stip. at ¶1; J-1 to J-9).

[1] An order was entered extending the time within which to file this Initial Decision.

2. While employed by the Board, petitioner worked four days per week, part-time, arriving at approximately 2:45 p.m. and working until 7:30 p.m. (Stip. at ¶2).

3. Petitioner's employment with the Board commenced after his full-time employment with the Wayne Township Board of Education. Petitioner has been employed by the Wayne Township Board of Education as a full-time Cooperative Industrial Education (C.I.E.) Coordinator for approximately thirty-three years.

4. During the summer, petitioner worked up to five days per week for approximately six to eight hours Monday through Thursday and less than six hours on Friday.

5. During the course of the performance of his duties as Apprentice Coordinator, petitioner was evaluated. (Stip. at ¶4). The following evaluations were annexed to the Stipulation of Facts: May 13, 2002 (J-11); December 14, 2001 (J-12); June 28, 2001 (J-13); January 31, 2001 (J-14); June 12, 2000 (J-15); November 29, 1999 (J-16); June 3, 1999 (J-17); December 7, 1998 (J-18); June 9, 1998 (J-19); January 6, 1998 (J-20); June 16, 1997 (J-21); December 10, 1996 (J-22) and July 29, 1996 (J-23).

6. The Job Descriptions in effect during petitioner's employment as a part-time Apprentice Coordinator list, as qualifications for the position, that the individual "[s]hall hold appropriate certificates as required by the Department of Education" as well as meet the qualifications as established by the Board of Education. (J-29, J-30, J-31).

7. Petitioner holds an Educational Services certificate authorizing him to serve as a C.I.E. Coordinator. (Stip. at ¶3; J-10).

8. Petitioner does not hold an Apprenticeship Coordinator endorsement.

9. James Rodgers has served as the district's Superintendent of Schools since July 2002.

10. Kenneth Williams has been employed by the Board as its Director of Adult Education since August 2002.

11. Petitioner acknowledged that the issue regarding petitioner not holding a certificate for the Apprentice Coordinator position arose after Mr. Rodgers and Mr. Williams commenced employment with the district and petitioner had discussions with them in or around 2002 concerning obtaining the necessary certificate.

12. On an excerpt from the New Jersey Department of Education website setting forth requirements for licensure for the position of Apprentice Coordinator, Mr. Williams wrote a note to petitioner, dated June 23, 2003, indicating petitioner's "need to pursue this." (R-1).

13. Petitioner did not undertake to obtain an Apprenticeship Coordinator endorsement during his employment with the Board.

14. On January 12, 1999, the Board approved an "Equivalency/Waiver Renewal Application" to waive the course requirement of "Industrial and Labor Relations" for Apprenticeship Coordinator certification "as no such course is offered at surrounding colleges/universities." (R-1). The Board also completed a "New Jersey State Department of Education Regulatory Equivalency/Waiver Renewal Form," dated January 14, 1999, requesting a waiver of the above course requirement since it "is not offered at any of the surrounding universities." (R-1).

15. On or about June 10, 2004, the Board posted an opening for the position of Apprenticeship Coordinator. (Stip. at ¶5; J-24).

16. This position was available for the 2004-2005 school year as an eleven month, full-time position (i.e. 8:00 a.m. – 3:00 p.m. plus one late evening per week). (Stip. at ¶5, J-24).

17. The Board was planning to create this full-time position in early Spring, 2004. (Stip. at ¶5).

18. On June 8, 2004, the Board adopted a Job Description for the eleven month Apprentice Coordinator position. (J-32).

19. On June 17, 2004, Superintendent of Schools James Rogers called petitioner into his office to inform petitioner that the new position was now full-time and that petitioner was welcome to apply.

20. Although petitioner described being interviewed by Mr. Rogers during this meeting, applying for the full-time position and thereafter never hearing back from the district, the undersigned finds this testimony to be overborne by the testimony of Mr. Rodgers and Mr. Williams, both of whom credibly testified that petitioner did not apply in writing or by verbal communication for the posted full-time Apprentice Coordinator position for the 2004-2005 school year.

21. Petitioner has not worked in respondent's school district since June, 2004.

22. The Board received no applications in response to the posted position from an applicant holding an Apprenticeship Coordinator endorsement.

23. The Board appointed Joseph Rooney, who was already employed as C.I.E. Coordinator, to the additional position of Apprenticeship Coordinator for the 2004-2005 school year. Mr. Rooney was certified as a C.I.E. Coordinator when he filled the position. (Stip. at ¶6).

24. On or about July 6, 2005, the Board posted an opening for the position of Coordinator of Industrial Education

(C.I.E.)/Apprenticeship Coordinator. (Stip. at ¶7; J-25). This was to be a twelve month, full-time position. (J-25).

25. The Board did not notify petitioner of the creation of this position. (Stip. at ¶7).

26. Mr. Rooney fulfilled the duties of C.I.E. Coordinator and Apprenticeship Coordinator for the 2004-2005 school year. (Stip. at ¶8).

27. In the opinion of the Board, the combined responsibilities did not work out so the Board continued Mr. Rooney's employment solely as full-time C.I.E. Coordinator. (Stip. at ¶8).

28. As a result, after the initial posting for the full-time combined Coordinator of Industrial Education (C.I.E.)/Apprenticeship Coordinator position, the Board determined to separate the full-time C.I.E. Coordinator position from the Apprentice Coordinator position.

29. On or about July 25, 2005, the Board posted an opening for the position of Apprentice Coordinator – Part Time. (Stip. at ¶9; J-26). The qualifications for the position listed in the posted notice state: "New Jersey Certified as Apprentice Coordinator." (J-26).

30. The Board did not notify petitioner of the creation of this position. (Stip. at ¶9).

31. The Board received no applications in response to the posted Apprentice Coordinator-Part Time position.

32. The Board did not fill the Apprentice Coordinator–Part Time position. (Stip. at ¶10).

33. On or about September 13, 2005, the Board adopted a resolution appointing "Ken Williams, Director of Adult Education as acting apprentice coordinator until such time as a permanent replacement is found." (Stip. at ¶11; J-27).

34. Mr. Williams is not certified as a C.I.E. Coordinator or Apprentice Coordinator. (Stip. at ¶12).

35. On or about June 27, 2006, the Board adopted a resolution reappointing "Ken Williams as County Apprentice Coordinator for the period from July 1, 2006 through June 30, 2007." (Stip. at ¶13; J-28).

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The tenure laws, N.J.S.A. 18A: 28-1 to -18, define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. den., 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." Zimmerman, supra., 38 N.J. at 71. They are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister. v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

"The right to tenure is created and governed entirely by statute." Breitwieser v. State-Operated School District of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996). To acquire the security of tenure, the precise requirements set forth in the statute must be met. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 400 (1996); Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 278 (1993); Spiewak, supra., 90 N.J. at 72; Zimmerman, supra, 38 N.J. at 72; Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (E & A 1941). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. Canfield v. Pine Hills Bd.

of Educ., 51 N.J. 400 (1968), rev'd. on dissent, 97 N.J. Super. 483, 493 (App. Div. 1967).

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

> The services of all teaching staff members employed in the positions of teacher, principal..., assistant principal, vice-principal, assistant superintendent, and all school nurses..., school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect..., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause...after employment in such district or by such board for:
>
> (a) Three consecutive calendar years...; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years. (emphasis added).

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

Tenure is achieved in a specific position. Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991); Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1337, adopted, Comm'r., 1982 S.L.D. 1356, aff'd., State Bd. of Educ., 1983 S.L.D. 1554. Tenure is achieved in either one of the positions specifically designated in N.J.S.A. 18A:28-5, which are separately tenurable, or in position which requires the teaching staff member to hold an appropriate certificate. Ellicott, supra, 251 N.J. Super. at 347; Duva v. State-Operated School District of the City of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <http://lawlibrary.rutgers.edu/oal/search.html.>.

Pursuant to N.J.S.A. 18A:28-5, a teaching staff member must serve the required probationary period before tenure will accrue. Tenure "arises only by passage of the time fixed by the statute...." Canfield, supra, 97 N.J. Super. at 490. In the within matter, the parties do not contest that part-time employment may be tenure eligible. See Lichtman v. Ridgewood Bd. of Educ., 93 N.J. 362 (1983); Spiewak, supra. Similarly, no debate exists that teaching staff members assigned to positions in adult education programs may gain tenure if the conditions of N.J.S.A. 18A:28-5 are met. See Trenton Education Assoc. v. Trenton Bd. of Educ., 93 N.J.A.R. 2d (EDU) 777, adopted in part and remanded in part, Comm'r, 93 N.J.A.R. 2d (EDU) 780, decision on remand, 93 N.J.A.R. 2d (EDU) 781, modified, Comm'r, 93 N.J.A.R. 2d (EDU) 783, aff'd, State Bd. of Educ., 94 N.J.A.R. 2d (EDU) 328; Rabolli v. Bergen County Vocational-Technical Schools Bd. of Educ., 1983 S.L.D. 196, adopted, Comm'r, 1983 S.L.D. 210, aff'd, State Bd. of Educ., 1983 S.L.D. 217. Equally undisputed is that petitioner was employed by the Board, on a part-time basis, as the Apprentice Coordinator for its Adult Education Program for nine consecutive school years, which is plainly sufficient to meet the service time requirements set forth in N.J.S.A. 18A:28-5. However, the parties' paths diverge concerning whether petitioner served the requisite period of time under an appropriate certificate.

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

The State Board has implemented the certification requirement by authorizing the issuance of three categories of educational certificates: Instructional, Administrative and Educational Services. N.J.A.C. 6A:9-5.2(a). The State Board has designated endorsements under each type of certificate, which identify the specific area in which a certificate holder is authorized to serve. The regulations set forth various endorsements that may be issued under an Educational Services certificate. See N.J.A.C. 6A:9-13.1 et seq. Pertinent to the within matter, the endorsements include a cooperative education coordinator endorsement, N.J.A.C. 6A:9-13.20, and a County apprenticeship coordinator endorsement, N.J.A.C. 6A:9-13.21.

In general, a cooperative education coordinator (CEC) endorsement is required for an individual to serve in the capacity as a coordinator supervising vocational students who are participating in cooperative education experiences in non-hazardous occupations and this endorsement also permits the individual to supervise students participating in any other non-hazardous structured learning experience in any career cluster. N.J.A.C. 6A:9-13.20(a). An individual holding a cooperative industrial education (C.I.E.) endorsement "may serve in a position requiring the CEC endorsement in any career cluster." N.J.A.C. 6A:9-13-20(c).

A separate endorsement is required for the position of County Apprentice Coordinator. N.J.A.C. 6A:9-13.21, which establishes the certification process and requirements for this position, provides in pertinent part:

> The county apprenticeship coordinator endorsement is required for the position of county apprentice coordinator in any county vocational school district conducting an apprenticeship program. The endorsement authorizes the holder to approve and coordinate apprenticeship training programs in accordance with N.J.A.C. 6A:8 and 6A:19.
>
> [N.J.A.C. 6A:9-13.21(a)] [2]

[2] The "certificate" requirement for the position of Apprentice Coordinator was previously codified in N.J.A.C. 6:11-11.4 and included the "Industrial and labor relations" course requirement referred to in the Regulatory Equivalency/Waiver Renewal Form dated January 14, 1999. The new rules adopted as N.J.A.C. 6A:9, effective January 20, 2004, eliminated this course requirement and codified the requirement for a "county apprenticeship coordinator endorsement" in N.J.A.C. 6A:9-13.22. See 36 N.J.R. 469 (January 20, 2004).

In Breitwieser, supra, the Appellate Division addressed whether service under an emergency certificate as a teacher of the handicapped could be tacked on to the petitioner's service under permanent certification as an elementary teacher for purposes of acquiring tenure. The petitioner was appointed as a full-time teacher of the handicapped with the district effective September 1, 1989. When appointed, the petitioner held an emergency certificate for Teacher of the Handicapped and a permanent certificate as an Elementary School Teacher. The petitioner did not obtain or become eligible for a standard certificate as Teacher of the Handicapped during her employment with the district. In March 1990, the petitioner requested a transfer from her position as teacher of the handicapped to a position as an elementary school teacher, which was granted. The petitioner was transferred on March 9, 1990 and, thereafter, was hired as an elementary school teacher for the 1990-1991, 1991-1992 and 1992-1993 school years. By letter dated December 14, 1992, the district advised the petitioner that she was terminated effective February 12, 1993. The pivotal issue concerned whether petitioner's prior service under an emergency certificate as teacher of the handicapped could be counted towards the service period needed for tenure since her service under the elementary school standard certificate fell several weeks short of the period required for tenure.

The Appellate Division observed that "[e]mergency certificates are issued only on the application of a public-school district when the district is unable to locate a suitable standard-certified teacher due to unforeseen shortages or other extenuating circumstances." Breitwieser, supra, 286 N.J. Super. at 639. The court explained that:

> [a] teacher may not acquire tenure solely upon service under an emergency certificate. No matter how long a teacher serves under an emergency certificate, tenure is unavailable.... This is because holders of emergency certificates 'have not fully satisfied the educational prerequisites for standard certification, nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process'.... The requirement that teachers hold a non-emergency certificate to obtain tenure is appropriate because emergency-certified teachers are by definition unqualified to hold their position. They hold their positions temporarily, subject to termination or non-renewal as

> soon as the district locates a provisionally or permanently certified teacher.
>
> [Id. at 640-41]

While recognizing that "emergency-certificate service is not always excluded from calculation of a teacher's period of service for purposes of the tenure statute," the Appellate Division held that "service under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field as the emergency certificate." Id. at 643, 644. Accordingly, since the petitioner never received a standard certificate as teacher of the handicapped, the court concluded her emergency service could not be counted towards tenure and such emergency service was not under an "appropriate certificate" for purposes of the tenure statute. Id. at 645-46.

It is against this backdrop that the parties' positions are considered.

Petitioner asserts that he gained tenure in the part-time position of Apprentice Coordinator and that his "tenure rights were violated when he was not reinstated for the 2005-2006 school year and thereafter." At the hearing, petitioner testified that, during his employment, the district applied for and was granted waivers from the Department of Education, which petitioner understood was a waiver on behalf of the district that authorized his employment. Petitioner indicated that, although the Apprentice Coordinator endorsement existed during his employment, it could not be obtained because a required course was not offered in any State college, acknowledging, however, that petitioner was unaware whether the course was offered out of state. Petitioner argues in his post-hearing submission that "under the circumstances of this case," petitioner "held certification sufficient for employment in the position in question" and held "an appropriate certificate." Specifically, petitioner maintains that he "was certified as a C.I.E. Coordinator," "[b]ased upon the express waiver granted to the District (R-1), this certificate was all that was required for employment as Apprentice Coordinator" and, "[b]ecause a required course was not offered in New Jersey, obtaining an additional certificate, such as Coordinator: Apprentice Programs, was

impossible." In short, the Board contends that since petitioner "does not hold a Certificate for Apprenticeship Coordinator" he "could not accrue tenure status in that part-time position."

The regulations make clear that a County Apprenticeship Coordinator endorsement is a separate and distinct endorsement from a C.I.E. endorsement, and that a County Apprenticeship Coordinator endorsement is required for the position of County Apprentice Coordinator. N.J.A.C. 6A:9-13.21(a). It is undisputed that petitioner does not possess an Apprenticeship Coordinator endorsement. Accordingly, since petitioner did not hold an "appropriate" certificate for the position in issue, he did not accrue tenure status in that part-time position pursuant to N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5. The record reveals that petitioner served as the Apprentice Coordinator for several years, which appears to have been based on waivers granted by the Department of Education to the district.[3] However, while such a waiver may have permitted the district to employ petitioner, similar to an emergency certificate, this service is not under an "appropriate certificate" for purposes of the tenure statute. Indeed, petitioner acknowledged that he did not take steps towards securing the appropriate endorsement during his employment with the Board and no evidence suggests that petitioner applied for an emergency County Apprenticeship Coordinator certificate pursuant to N.J.A.C. 6A:9-13.21(c).

In sum, tenure protection in a position is limited to teaching staff members who hold an appropriate certificate for that position issued by the State Board of Examiners. N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5. This certificate requirement is mandated by

[3] The Equivalency/Waiver Renewal Application Form submitted at the hearing references N.J.A.C. 6:3A. The cited regulations addressed Regulatory Equivalency and Waiver and were recodified as N.J.A.C. 6A:5-1.1, et. seq. In general, the purpose of the regulations is to provide regulatory flexibility for school districts to meet the requirements of the rules contained in Title 6 and Title 6A of the New Jersey Administrative Code and the regulations permit the Commissioner to approve a waiver to a specific rule based upon application submitted by a school district. See N.J.A.C. 6A:5-1.2; N.J.A.C. 6A:5-1.5.

the tenure statutes and is a necessary prerequisite to achieve tenure. Accordingly, I **CONCLUDE** that, since petitioner did not possess the endorsement required for the position in issue, he did not gain tenure in that position.

Seniority refers to an employee's bumping rights upon a reduction in force (RIF). Howley, supra, 1982 S.L.D. at 1339. It is a concept that applies to certain rights of tenured personnel and only has meaning when a RIF is necessary. Id. at 1340. The concept of seniority becomes relevant only after tenure has been achieved. "[S]eniority provides a mechanism for ranking all tenured teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies." Capodilupo v. West Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Dismissals resulting from a RIF must be made on the basis of seniority according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10. See N.J.A.C. 6A:32:5.1. A tenured member dismissed as a result of a RIF must be maintained on a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person is qualified and must be reemployed if and when such vacancy occurs. N.J.S.A. 18A:28-12. As explained in Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 531 (App. Div. 1999), "[w]hen a school board deems it necessary to eliminate a position, 'seniority' is a right afforded to tenured employees entitling the employee to either continue in an existing job opening based upon their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available." Simply put, I **CONCLUDE** that, inasmuch as petitioner did not acquire tenure, he cannot assert a seniority right to the part-time Apprentice Coordinator position reinstated for the 2005-2006 school year.

In view of the foregoing, it is unnecessary to address petitioner's argument that his tenure rights were violated because "the evidence establishes that there was no actual reduction in force or elimination of the Apprentice Coordinator position" but, rather, "the duties and responsibilities of the position were simply transferred, in full, to another employee"; first to Mr. Rooney for the 2004-2005 school year and then to Mr. Williams for

the subsequent years. Notwithstanding, it is observed that the statutory provisions afford boards of education wide latitude in the organization of its staff to meet the district's needs. A board may effectuate a reduction in force for reasons of economy, because of a change in the administrative or supervisory organization or for other good cause. N.J.S.A. 18A:28-9. The courts have consistently recognized that a RIF "whether of tenured or nontenured teachers, if done for reasons of economy, is entirely within the authority of the board." Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979), certif. denied, 81 N.J. 292 (1979). See Jamison v. Morris School Dist. Bd. of Educ., 198 N.J. Super. 411, 414-15 (App. Div. 1985); Klinger v. Cranbury Twp. Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983). Further recognized is that "[t]he determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions." Impey v. Shrewsbury Bd. of Educ., 273 N.J. Super. 429 (App. Div. 1994), aff'd, 142 N.J. 388, 399 (1995). See Klinger, supra, 190 N.J. Super. at 357.

At the hearing, the Board's witnesses described the rationale underlying the Board's determinations to make the Apprentice Coordinator a full-time position for the 2004-2005 school year and to reinstate the part-time position for the subsequent school years. Further, as observed by the Board in its post-hearing submission, by placing the Apprentice Coordinator position under the umbrella of the Director of Adult Education in 2005 and 2006, the Board has essentially effectuated a reduction in force. Suffice it to say, the Board acted within the scope of its authority and the Board's actions cannot be viewed as arbitrary, capricious or unreasonable. Indeed, to the extent that petitioner's arguments can be construed as a challenge to the Board's action in June 2004 to make the position a full-time position, any such claim would appear to be barred under the ninety-day rule. N.J.A.C. 6A:3-1.3.

ORDER

I **ORDER** that petitioner's Verified Petition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

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

April 27, 2007 — Margaret M. Monaco
DATE — **MARGARET M. MONACO**, ALJ

Date Received at Agency: April 27, 2007

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 30 2007
DATE — OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX

List of Witnesses

For Petitioner:

Robert LaGrutta

For Respondent:

Kenneth Williams

James Rodgers

List of Exhibits In Evidence

Joint Exhibits:

JA-1 Stipulation of Facts (pp.5) with the below joint exhibits attached.

J-1 Agreement-Employee Appointment (Part-Time/Temporary) dated October 10, 1995

J-2 Agreement-Employee Appointment (Part-Time/Temporary) dated July 23, 1996

J-3 Agreement-Employee Appointment (Part-Time/Temporary) dated August 5, 1997

J-4 Agreement-Employee Appointment (Part-Time/Temporary) dated August 11, 1998

J-5 Agreement-Employee Appointment (Part-Time/Temporary) dated August 10, 1999

J-6 Agreement-Employee Appointment (Part-Time/Temporary) dated August 8, 2000

J-7 Agreement-Employee Appointment (Part-Time/Temporary) dated August 14, 2001

J-8 Agreement-Employee Appointment (Part-Time/Temporary) dated August 15, 2002,

J-9 Agreement-Employee Appointment (Part-Time/Temporary) dated July 8, 2003

J-10 Certificate Issued by State Board of Examiners, Coordinator, Cooperative Industrial Education

J-11 Evaluation of Administrative Performance dated May 13, 2002 (4 pp)

J-12 Evaluation of Administrative Performance dated December 14, 2001 (4 pp)

J-13 Evaluation of Administrative Performance dated June 28, 2001 (4 pp)

J-14 Evaluation of Administrative Performance dated January 31, 2001 and memorandum dated February 1, 2001 (6 pp)

J-15 Evaluation of Administrative Performance dated June 12, 2000 (3 pp)

J-16 Evaluation of Administrative Performance dated November 29, 1999 (4 pp)

J-17 Evaluation of Administrative Performance dated June 3, 1999 (3 pp)

J-18 Evaluation of Administrative Performance dated December 7, 1998 (4 pp)

J-19 Evaluation of Administrative Performance dated June 9, 1998 (4 pp)

J-20 Evaluation of Administrative Performance dated January 6, 1998 (4 pp)

J-21 Evaluation of Administrative Performance dated June 16, 1997 (4 pp)

J-22 Evaluation of Administrative Performance dated December 10, 1996 (4 pp)

J-23 Evaluation of Administrative Performance dated July 29, 1996 (3 pp)

J-24 Posted Position Available, Apprenticeship Coordinator, with posting date of June 10, 2004

J-25 Posted Position Available, Coordinator of Industrial Education (C.I.E.)/Apprenticeship Coordinator, with posting date of July 6, 2005.

J-26 Posted Position Available, Apprentice Coordinator-Part-Time, with posting date of July 25, 2005

J-27 Excerpt of minutes of Board meeting on September 13, 2005

J-28 Excerpt of minutes of Board meeting on June 27, 2006

J-29 Job Description, Part-Time Apprentice Coordinator, revised/adopted on January 23, 1996 (2 pp)

J-30 Job Description, Part-Time Apprentice Coordinator, revised/adopted on January 23, 1996 (2 pp)

J-31 Job Description, Coordinator of Apprentice and Customized Trade Program, revised/adopted on February 13, 1990 (2 pp)

J-32 Job Description, Apprentice Coordinator, adopted June 8, 2004 (2 pp)

J-33 Apprentice Coordinator Program, Statewide Goals and Objectives and Anticipated Outcomes (2 pp)

J-34 Apprentice Coordinator Program Plan dated April 14, 2000.

For Petitioner:

None.

For Respondent:

R-1 Excerpt from Department of Education website, Requirements for Licensure as Coordinator: Apprentice Programs with handwritten notes; Regulatory Equivalency/Waiver Renewal Form dated January 14, 1999; and abstract from minutes of the meeting of the Board on January 12, 1999 (4 pp)

205-07

#205-07

OAL DKT. NO. EDU 10427-06
AGENCY DKT. NO. 231-6/06

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J.R.-C. and J.G.,	:	DECISION
RESPONDENTS.	:	
	:	

The record, Stipulation in Lieu of Judgment, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/07/07

Date of Mailing: 6/07/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10427-06

AGENCY REF.NO.231-6/06

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Petitioner,

v.

J.R.-C AND J.G.,

Respondent.

Anthony V. D'Elia, Esq., for petitioner (Chasen Leyner & Lamparello, attorneys)

J.R.-C. and J.G., respondents pro se

Record Closed: April 30, 2007 Decided: May 7, 2007

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

The matter was transmitted to the Office of Administrative Law (OAL) on October 11, 2006 for determination as a contested case. A hearing was scheduled for March 27, 2007, which was adjourned due to a possible settlement.

On April 3, 2007, the parties were able to resolve the matter. On April 30, 2007, the undersigned received the original copy of the Stipulation in Lieu of Judgment and the Stipulation of Dismissal. See attached copy.

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

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

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

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

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

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

5/7/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 5-10-07

Mailed to Parties:

MAY 10 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

2007 APR 30 A 7:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, Petitioner, vs. J.R.-C. and J.G., Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO.: EDU10427-06 AGENCY DOCKET NO.: 231-6/06 Civil Action STIPULATION IN LIEU OF JUDGMENT

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon;

IT IS on this _____ day of _____, 2007,

STIPULATED by and between the parties, as follows:

1) Respondent agrees to pay the sum of $3,500.00, which sum Petitioner agrees to accept in full settlement of its claim herein, inclusive of interest, counsel fees and court costs.

2) The sum aforesaid shall be paid by Respondent, Jasmine Rendon-Contello, to Karen Perkins, Business Administrator at 745 Clifton Avenue, Clifton, New Jersey, in the following manner:

(a) $1,500.00 on or before July 1, 1996;

(b) $200.00 per month on or before the 5th day of the months of June, 2007 through May, 2008 (inclusive);

3) In the event Respondent fails to pay in accordance with the terms set forth in this Stipulation then, and in that event, Petitioner shall be entitled to obtain the entry of Judgment against Respondent, Jasmine Rendon-Contello, ex parte, in the sum of $4,500.00, giving Respondent credit for any sums actually paid pursuant to the terms of this Stipulation.

4) In the event of default as aforesaid, Petitioner shall be entitled to obtain the entry of Judgment upon ex parte application, with supporting Certification and with notice to the Respondent only in the form of a copy of the application, addressed to Jasmine Rendon-Contello, at 90 Martha Avenue, Apt. F8, Clifton, New Jersey 07011, by first class mail, postage pre-paid.

We hereby consent to the form and entry of the within Stipulation.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmine Rendon-Contello
Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

STATE OF NEW JERSEY,

COUNTY OF Passaic S.S.:

I CERTIFY that on 04/12/, 2007, Jasmine Rendon-Contello personally came before me and this person acknowledged under oath, to my satisfaction, that:

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

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

Bertha S. Flaz

Notary Public

BERTHA S. FLAZ
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES JANUARY 31, 2012

2007 APR 30 A 7:36
OFFICE OF ADMIN LAW

CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, **Petitioner,** **vs.** **J.R.-C. and J.G.,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **DOCKET NO.: EDU10427-06** **AGENCY DOCKET NO.: 231-6/06** **Civil Action** **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner and Respondent, both agree to dismiss the petition and any cross-claims which may be filed in this matter.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

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OFFICE OF ADMIN LAW

CHASAN LEYNER & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, Petitioner, vs. J.R.-C. and J.G., Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO.: EDU10427-06 AGENCY DOCKET NO.: 231-6/06 Civil Action STIPULATION IN LIEU OF JUDGMENT

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon;

IT IS on this _____ day of _____, 2007,

STIPULATED by and between the parties, as follows:

1) Respondent agrees to pay the sum of $3,500.00, which sum Petitioner agrees to accept in full settlement of its claim herein, inclusive of interest, counsel fees and court costs.

2) The sum aforesaid shall be paid by Respondent, Jasmine Rendon-Contello, to Karen Perkins, Business Administrator at 745 Clifton Avenue, Clifton, New Jersey, in the following manner:

(a) $1,500.00 on or before July 1, 1996;

(b) $200.00 per month on or before the 5th day of the months of June, 2007 through May, 2008 (inclusive);

3) In the event Respondent fails to pay in accordance with the terms set forth in this Stipulation then, and in that event, Petitioner shall be entitled to obtain the entry of Judgment against Respondent, Jasmine Rendon-Contello, ex parte, in the sum of $4,500.00, giving Respondent credit for any sums actually paid pursuant to the terms of this Stipulation.

4) In the event of default as aforesaid, Petitioner shall be entitled to obtain the entry of Judgment upon ex parte application, with supporting Certification and with notice to the Respondent only in the form of a copy of the application, addressed to Jasmine Rendon-Contello, at 90 Martha Avenue, Apt. F8, Clifton, New Jersey 07011, by first class mail, postage pre-paid.

We hereby consent to the form and entry of the within Stipulation.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmine Rendon-Contello
Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

STATE OF NEW JERSEY,

COUNTY OF Passaic S.S.:

I CERTIFY that on 04/12/, 2007, Jasmine Rendon-Contello personally came before me and this person acknowledged under oath, to my satisfaction, that:

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

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

Bertha S. Flaz

Notary Public

BERTHA S. FLAZ
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES JANUARY 31, 2012

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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201-348-6000
ATTORNEYS FOR PETITIONER
08520-0001

BOARD OF EDUCATION OF THE CITY OF CLIFTON, **Petitioner,** **vs.** **J.R.-C. and J.G.,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **DOCKET NO.: EDU10427-06** **AGENCY DOCKET NO.: 231-6/06** **Civil Action** **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner and Respondent, both agree to dismiss the petition and any cross-claims which may be filed in this matter.

Anthony V. D'Elia, Esq.
Attorney for Petitioner,
Clifton Board of Education

Dated: 4-24-07

Jasmne Rendon-Contello, Respondent

Dated: 4/12/07

206-07

OAL DKT. NO EDU 11265-06
AGENCY DKT. NO. 380-10/06

IN THE MATTER OF THE TENURE	:	
HEARING OF GABE PAUL, HUDSON	:	
COUNTY SCHOOLS OF TECHNOLOGY,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

The record, Stipulation of Settlement and Release along with the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/07

Date of Mailing: 6/07/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11265-06

AGENCY DOCKET NO. 380-10/06

IN THE MATTER OF THE TENURE HEARING OF GABE PAUL, HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY

Nicholas Celso, Esq. for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler)

Philip Feintuch, Esq., for respondent (Feintcuch, Porwich & Feintuch)

Record Closed: May 7, 2007 Decided: May 7, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 21, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Several hearings and telephone conferences were conducted. On March 28, 2007 the parties reached a tentative settlement pending Board Resolution. May 7, 2007 the undersigned received a fully executed Settlement Agreement with a certified copy of the Board Resolution approving same, and the record closed that day.

Having reviewed the contents of the attached Stipulation of Settlement, and Board of Education Resolution, I **FIND**:

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

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

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

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

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

May 7, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 5-10-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 10 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMIN LAW

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLC

TEN JAMES STREET • FLORHAM PARK • NEW JERSEY 07932 TEL: 973.301.0001 FAX: 973.301.0203

Please Reply to Florham Park Office.

WWW.SSECK.COM

WRITER'S E-MAIL ADDRESS: mzitomer@sseck.com

May 3, 2007

Via Lawyers Service
Honorable JoAnn LaSala Candido, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Charges Against Gabe Paul, by the Board of Education of the Hudson County Schools of Technology
OAL Dkt. No. EDUTH 11265-2006N

Dear Judge Candido:

Enclosed please find two fully executed copies of the Settlement Agreement in the above referenced matter, together with a certified copy of the Board Resolution approving same.

Thank you for your consideration.

Very truly yours,

Marc H. Zitomer

MHZ/JP
Encl.
c: Philip Feintuch, Esq. (via lawyers service w/encl.)
Colleen Smith, Human Resources Team Leader (via regular mail w/out encl.)

RESOLUTION

8.4

INTRODUCED BY: Mr. Peter Fischbach, Vice President

SECONDED BY: Dr. Robert Van Zanten

WHEREAS this Board of Education does hereby approve the Settlement Agreement and Release ("Settlement") in the matter captioned I/M/O/ Tenure Charges Against Gabe Paul, Hudson County Schools of Technology Board of Education, Hudson County, bearing Docket Number 380-10/06 and OAL Docket Number EDUTH 11265-2006N, in accordance with the terms and conditions set forth therein; and

BE IT RESOLVED, that a copy of the Settlement shall be included in the permanent minutes of this meeting.

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement on behalf of the Board; and

BE IT FURTHER RESOLVED, that the Board Accepts Mr. Paul's resignation effective June 30, 2007.

This is subject to further action as may be directed by the Board.

Date: April 26, 2007

Action Taken: Amend_____
Approve___X___
Defer_____
Ratify_____
Reject_____
Refer to Committee_____

Roll Call:

Anthony R. Comprelli	AYE
Oren K. Dabney, Sr.	AYE
Christopher F. Irizarry	AYE
Anthony P. Vainieri, Jr.	AYE
Dr. Robert Van Zanten	AYE
Peter Fischbach, Vice-Pres.	AYE
Craig Guy, President	AYE

-7- AYES -0- NAYS -0- ABSENT

Certified as a true copy of the Resolution adopted by the Board of Education of the Hudson County Schools of Technology in the County of Hudson on the 26th day of April 2007.

Richard M. Myrlak, Board Secretary

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for the Board of Education of the
Hudson County Schools of Technology.

RECEIVED
2007 MAY -7 A 11:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE CHARGES AGAINST GABE PAUL,

BY THE BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY, NEW JERSEY

BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
AGENCY DOCKET NO. 380-10/06
OAL DOCKET NO. EDUTH 11265-2006N

ADMINISTRATIVE ACTION

STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Board of Education of the Hudson County Schools of Technology ("the Board") is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Hudson County Schools of Technology; and

WHEREAS, Gabe Paul commenced employment with the Board as janitor/boilerman with the District in August 2002; and

WHEREAS, on September 11, 2006, Frank Gargiulo, Superintendent of Schools, filed sworn tenure charges of excessive absenteeism, insubordination, incapacity, unbecoming conduct and/or other just cause for dismissal against Respondent, together with a sworn statement of evidence in support of the charges, with exhibits, with the Board Secretary (See, Exhibits A & B, respectively); and

WHEREAS, on October 19, 2006, after considering the sworn tenure charges and sworn statement of evidence against Respondent, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about October 20, 2006, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about November 6, 2006, an Answer was filed on behalf of Respondent; and

WHEREAS, on or about November 8, 2006, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Joann LaSala Candido; and

WHEREAS, prior to the commencement of the hearing in this matter on March 28, 2007, the parties agreed to settle the matter; and

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

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. **Tenure Charges to be Moot**

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. **Resignation**

Respondent has tendered his irrevocable resignation from all employment with the Board, effective as of the close of business on June 30, 2007.

3. **Payment**

The Board will pay to the Respondent his regular salary, pursuant to contract, through June 30, 2007, excluding the 120 days Respondent was suspended from employment without pay. Respondent waives his right to all other compensation from the Board of any kind, including but not necessarily limited to payment for unused sick, vacation and personal days.

4. **Health Benefits**

The Board agrees to pay the premium for Respondent's health benefits at their current level, through June 30, 2007, after which Respondent shall have the same COBRA rights as any other former employee.

5. Release

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

Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 *et seq.*, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to have the District pay any amounts for his or his dependents' health insurance coverage under COBRA.

6. Surrender of Board Property

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

7. Public Interest

The proposed settlement of this tenure dispute will serve the public interest because, as a result of Respondent having tendered his irrevocable letter of resignation from his employment with the Board, the Board will not have to incur any further legal fees in connection with the prosecution of this matter. Further, the Board's operation will not be disrupted by having staff members out of the District to testify in connection with this matter, nor will it have to pay for substitute employees.

8. Board Approval

The Board President is authorized to execute this Agreement on behalf of the Board of Education.

9. Assent to Terms

Respondent hereby acknowledges that he entered into this agreement with a full understanding of his rights and that he was fully informed of the implications of this agreement by his counsel. Respondent also enters into this agreement without duress of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Marc H. Zitomer, Esq., 10 James Street, Florham Park, New Jersey 07932. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will not be entitled to the entire consideration described herein.

10. Entire Agreement

This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties. All terms of this Agreement are deemed material.

11. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

x Gabe Paul
GABE PAUL

Date: x 1-3-07

WITNESS:

/s/

Date: 1/3/07

FOR THE BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY:

CRAIG GUY, BOARD PRESIDENT

Date: April 26, 2007

ATTEST:

RICHARD M. MYRLAK, BOARD SECRETARY

Date: April 26, 2007

225-07

#225-07

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF :

MAXIMILIAN CAPSHAW, :

UPPER FREEHOLD REGIONAL SCHOOL :

DISTRICT, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district sought to suspend the certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for not providing adequate notice of resignation from his position as a school psychologist in Upper Freehold Regional Schools. Respondent resigned to accept employment with another district out of state, offering 30 days notice, but subsequently left employment in petitioner's district with only 18 days notice of his departure.

The ALJ found that: the facts in this matter are undisputed; respondent violated the statutory sixty day notice requirement; respondent was under pressure from his new employer to begin before the expiration of 60 days and sought to compromise with petitioner by offering 30 days notice; and a one year suspension under the circumstances presented in the record is harsh. The ALJ concluded that respondent should be suspended for a period of three months.

Upon a thorough and independent review, the Commissioner adopts the conclusion of the ALJ that respondent is guilty of unprofessional conduct for failure to give proper notice before resigning. The Commissioner, however, rejects the ALJ's recommendation that respondent's teaching certificate be suspended for only three months, finding that: the facts in this matter are neither unique nor do they warrant the exercise of the Commissioner's discretion; and respondent's desire for early release from his professional obligations was based on personal motives and convenience. Accordingly, the Commissioner ordered suspension of respondent's teaching certificate for a period of one year, and forwarded a copy of the decision to the State Board of Examiners.

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

June 12, 2007

OAL DKT. NO. EDU 12318-06
AGENCY DKT. NO. 432-11/06

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
MAXIMILIAN CAPSHAW, :
UPPER FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a full and independent review of the record, the Commissioner adopts the conclusion of the Administrative Law Judge (ALJ) that respondent, Maximilian Capshaw, is guilty of unprofessional conduct for failure to give proper notice before resigning from his position as a school psychologist. The Commissioner, however, rejects the ALJ's recommendation that - as a consequence of such conduct – respondent's teaching certificate be suspended for only three months.

As recognized by the ALJ, the facts in this matter are undisputed. The record establishes that respondent, a tenured psychologist in the Board's employ, submitted his letter of resignation on August 28, 2006; respondent offered to stay for 30-days but indicated he would like to leave earlier, if possible, in order to begin work in a new position he had accepted in New York City; the Acting Superintendent advised respondent on August 31, 2006 that he was obligated to provide the Board with sixty days notice, that is, until October 26, 2006 – but should the Board be able to find a replacement who could begin working prior to the end of this sixty-

day period – it would release him early; respondent subsequently agreed to work only through September 15, 2006 – a mere 18 days after he notified the Board of his resignation – and he left his position on that date; the Board – despite advertising respondent's position on August 29, October 18 and November 15, 2006, and conducting several interviews – was unable to find a suitable replacement for respondent's position until January 2, 2007.

N.J.S.A. 18A:28-8 establishes the notice requirement necessary when a *tenured* teaching staff member wishes to resign his position and authorizes the Commissioner to suspend the teaching staff member's certificate for a period of up to one year for failure to comply with its provisions.[1] Specifically,

> [a]ny teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

It is well recognized that "[t]he obvious purpose of *N.J.S.A.* 18A:26-10 [and *N.J.S.A.* 18A:28-8] is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." (citations omitted) (*Penns Grove-Carneys Point Board of Education v. Regina Leinen*, 94 *N.J.A.R.* 2d (EDU) 405, 407) In the instant matter, it is undisputed that respondent resigned without providing the requisite notice to the Board. It is, similarly, uncontroverted that the Board refused to release respondent from his 60-day obligation unless and until a suitable replacement was located, which did not happen. As such, the Commissioner concurs with the ALJ's determination that respondent is guilty of unprofessional conduct for his failure to provide the 60-day notice required by statute.

[1] It is noted that *N.J.S.A.* 18A:26-10 is a companion statute applicable to *non-tenured* teaching staff members.

However, unlike the ALJ, the Commissioner is unable to conclude that circumstances in this matter serve to militate against the imposition of a one-year suspension of respondent's teaching certificate and she, therefore, rejects his conclusion that a lesser penalty is appropriate. The Commissioner is fully aware that – pursuant to *N.J.S.A.* 18A:28-8 – whether a teaching staff member's certificate is suspended for failure to give the requisite notice and, if so, the length of such suspension up to the maximum one-year permitted by law, are both discretionary determinations vested in the Commissioner. In making determinations in this regard, the Commissioner has historically evaluated all attendant circumstances specific to each case. As a general rule, however, given the underlying purpose of the statute, this evaluation – with *rare* exception – has resulted in suspension of any and all certificates for the maximum one-year period, particularly where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self interest above the interests of students and their professional obligation to provide adequate notice to the Board. *See East Amwell Township Board of Education v. Patricia Acken*, 1986 *S.L.D.* 2803; *In the Matter of the Suspension of the Teaching Certificate of Vincent Montalbano*, decided by the Commissioner June 11, 2001; *In the Matter of the Suspension of the Teaching Certificate of Mary Elizabeth Farran, School District of the Chathams, Morris County*, decided by the Commissioner March 29, 2005; *In the Matter of the Suspension of the Teaching Certificate of Mary Savino, Rahway Board of Education, Union County*, decided by the Commissioner August 30, 2005.

Those unique instances where the Commissioner has found justification for exception to this general rule were cases which presented compelling mitigating circumstances, *e.g.* 1) *Board of Education of Black Horse Pike Regional School District v. Mooney*, 1984 *S.L.D.* 810, where the Board had a candidate to replace the respondent as of her requested

release date through the end of the school year. Additionally, the respondent made considerable efforts to assist the Board in ensuring a smooth transition for her replacement, including meeting with her successor in order to establish the program, including lesson plans; 2) *In the Matter of the Suspension of the Teaching Certificate of Burgess*, 1983 *S.L.D.* 183, where the Board failed to fulfill its promise to accelerate the replacement process, despite the almost immediate availability of a suitable replacement. Respondent left detailed lesson plans for his successor and even offered to meet with his replacement on his own time to ensure an orderly transition if necessary; and 3) *In the Matter of the Suspension of the Teaching Certificate of Rogers*, 1989 *S.L.D.* 1962 where a non-tenured teacher of the handicapped resigned on short notice to take a position at a state facility, New Lisbon Developmental Center, working with more severely and multiply handicapped children than those in his District. The Board was able to obtain a replacement for his position within one week. Here, the ALJ observed, and the Commissioner concurred, that respondent's early departure "was not to feather his own nest, ***but rather from honest and more noble motivations" in that "[n]otwithstanding the burdens of New Lisbon's work, school districts almost invariably pay better than does the State and the State has considerable difficulty obtaining sufficient dependable staff for that work. Civil service decisions out of the State developmental centers demonstrate a continuing theme of inability to obtain and hold staff due to the pay and working conditions there." *Rogers,* at 1966.

Unlike these rare cases cited above which have justified an exception to the customary one-year suspension, the facts in this matter are neither unique nor do they warrant the exercise of Commissioner discretion. Rather, in the instant matter, respondent's desire for early release from his professional obligations was based on personal motives and his own convenience, with nary a concern about the well-being of the special education students in need

of his assistance, the Board's ability to find a suitable replacement on such short notice, or the increased workload for his co-workers who were required to complete his evaluations and evaluation reports along with assuming his case management responsibilities for over 3-months subsequent to his abrupt departure from the District.

Accordingly, pursuant to *N.J.S.A.* 18A:28-8 and consistent with the penalty assessed in similar matters, respondent Maximilian Capshaw is deemed guilty of unprofessional conduct and his teaching certificate is hereby suspended for a period of one year, effective upon the date of this decision. A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating this decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/07

Date of Mailing: 6/12/07

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12318-06

AGENCY DKT. NO. 431-11/06

IN RE: SUSPENSION OF THE TEACHING CERTIFICATE OF MAXIMILIAN CAPSHAW,

---

Viola S. Lordi, Esq. and **Mary H. Smith**, Esq., for the petitioner, Upper Freehold Regional School District (Wilentz, Goldman & Spitzer, attorneys)

Maximilian Capshaw, respondent, pro se

Record Closed: April 12, 2007 Decided: April 30, 2007

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a complaint filed with the Commissioner by the Upper Freehold Regional Board of Education against its former employee Maximilian Capshaw, pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18:28-8. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15. The Board filed a motion for summary decision under Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995); N.J.A.C. 1:1-12.5. No response has been received.

The facts are undisputed. Respondent, a tenured staff member, submitted his letter of resignation to the Board on August 28, 2006. He offered to stay on for thirty days, but hoped to be released sooner so that he could commence employment in New York City. Dr. Robert E. Smith, the Acting Superintendent, met with respondent on August 31, 2006, and advised him that sixty days notice was required. Dr. Smith indicated that the Board would release respondent sooner if a suitable replacement could be found quickly. Respondent then gave notice that he would work through September 15, 2006. Following respondent's departure the Board advertised for the position and it was filled on January 2, 2007.

Although respondent did not answer the motion, he did submit a letter to the Department dated December 21, 2006 in response to the District's complaint. There he provides some detail, which also appears undisputed. He is originally from New York City; this is where his fiancé resides and where they plan to make their home. The opportunity that arose took longer to finalize then he had hoped and he notified the district as soon as he received a firm offer. His prospective employer was prepared to wait thirty days for him to start, but not sixty days. Once it was clear that thirty days would not satisfy Dr. Smith, respondent felt no obligation to remain that long. This is the substance of the record.

N.J.S.A. 18A:26-10 and N.J.S.A. 18:28-8 make plain that professional staff must give sixty days notice and failing that are subject to certificate suspension for up to one year. Petitioner violated these sections and liability is undisputed. It appears; however, that the penalty sought - one year suspension - is harsh. It is true, as the Board asserts, that short notice burdens other staff, and may deprive students of their due. That said, it also follows that the maximum penalty should be reserved for egregious examples of the infraction. Here, respondent was under pressure from his prospective employer to begin before the expiration of 60 days. He discussed the matter with the District and sought to forge a compromise. There is no indication that he acted with indifference toward his obligations to the Board. Thus, it appears that something well below one year is appropriate.

Based on the foregoing, it is **ORDERED** that the certificate of Maximilian Capshaw be suspended for a period of three months.

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

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

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

4/30/07
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency: 4/30/07

Mailed to Parties:

MAY 3 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

226-07

OAL DKT. NO. EDU 5430-07
AGENCY DKT. NO. 129-5/07

TODDLERTOWN CHILD CARE CENTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this matter – including the audiotape of hearing at the Office of Administrative Law (OAL) – and the recommended Order of the OAL, denying petitioner's application for emergent relief, have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner (Toddlertown) has failed to meet the established criteria for grant of emergent relief in that it had presented nothing compelling in support of its assertions of irreparable harm, could not demonstrate that its claim was based on settled law or that it was likely to prevail on the merits, and failed to establish that the balance of equities and interests lay in its favor. *Crowe v. DeGioia, supra*; *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL is adopted for the reasons expressed therein, and the underlying appeal on the merits shall proceed as determined by the ALJ in consultation with the parties.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/07

Date of Mailing: 6/12/07

[1] It is noted in this regard that the issues remaining in the related matter of *Toddlertown Child Care Center v. Board of Education of the Township of Irvington, Essex County,* Agency Dkt. No. 58-2/07, OAL Dkt. No. EDU 3041-07 (*Toddlertown I*) – which may be appropriate for consolidation in conjunction with the matter herein, as recognized by the ALJ and the parties – need not, pursuant to *N.J.A.C.* 6A:10A-2.3(c)6, first be heard at the Division of Early Childhood Education as is the case with nonrenewal of contracts pursuant to *N.J.A.C.* 6A:10A-2.3(b). The Commissioner further notes that the issue of nonrenewal of petitioner's contract was not raised in *Toddertown I* – either in the Petition of Appeal or the accompanying Application for Emergent Relief – prior to its transmittal to the OAL, but was first raised in a second application for emergent relief filed subsequent to such transmittal at the directive of the ALJ then assigned to the matter. However, during the emergent relief proceedings held (by a different ALJ) in conjunction with *Toddertown I,* the issue of nonrenewal was the sole issue addressed, apparently because petitioner's immediate concern with that issue overrode its concerns about previously articulated disputes that would, in its view at the time, have effectively become moot if the contract nonrenewal was allowed to stand. (Audiotape of Emergent Relief Hearing, *Toddlertown I*)

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 05430-07
AGENCY DKT. NO. 129-5/07

TODDLERTOWN CHILD CARE CENTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION.

Respondent.

Eric Taylor, Esq., representing petitioner, Toddlertown Child Care Center

Jennifer Carrillo-Perez, Esq. and **Sam Della Fera, Jr.**, Esq., representing Board of Education of the Township of Irvington, Essex County (Trenk DiPasquale Webster Della Fera Sodono)

Melissa T. Dutton, DAG, representing N.J. State Department of Education, Division of Early Childhood Education

BEFORE:**IMRE KARASZEGI, J.R.,** ALJ

Petitioner brings this action seeking emergency relief under N.J.A.C. 6A:3-1 et seq. regarding the Department of Education decision upholding the non-renewal of

petitioner's child care center provider contract with the Irvington Board of Education, an Abbot District. On May 15, 2007, the Commissioner of Education received Petitioner's application for emergent relief. On May 16, 2007, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a contested case. On May 30, 2007, oral argument was presented in the Newark offices of the Office of Administrative Law.

The standards for the granting of emergency relief are set forth in N.J.A.C. 6A:3-1.6(b). It may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In the instant case, after hearing the arguments of counsel and any other documentation submitted, I find that petitioner is not entitled to emergent relief because no proofs have been submitted that would establish irreparable harm as a necessary element to grant emergency relief under N.J.A.C. 6A:3-1.6(b). In addition, it is clear that the legal right underlying petitioner's claim is unsettled and emergent relief should be withheld. Petitioner's motion for emergent relief is therefore **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 30, 2007
Date:

IMRE KARASZEGI, JR., ALJ

227-07

#227-07

J.C. AND Z.T., ON BEHALF OF MINOR CHILD, V.T.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
	:	DECISION
V.	:	
DAVID S. LIVINGSTON, SOMERSET COUNTY SUPERINTENDENT OF SCHOOLS, WILLIAM N. KING, WARREN COUNTY SUPERINTENDENT OF SCHOOLS, AND DR. ELAINE TRYJANKOWSKI, DIRECTOR, NEW JERSEY GOVERNOR'S SCHOOL,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioners alleged that their child's application for admission to the Governor's School of Engineering and Technology was rejected on the basis of racial discrimination. Respondents filed a motion to dismiss for lack of jurisdiction, which was denied by the ALJ.

The ALJ found that: petitioners wish to transfer this matter to the Division on Civil Rights (DCR) – contrary to their prior rejection of such transfer upon filing of their appeal with the New Jersey Department of Education, Bureau of Controversies and Disputes – as it now appears to them that limits on the Commissioner's jurisdiction, particularly relating to monetary damages, make the DCR a more attractive venue in which to hear this case; and petitioners agree to dismissal before the Commissioner on the assumption that the matter may be pursued through the DCR. Accordingly, the ALJ ordered that the petition be dismissed without prejudice.

The Commissioner rejected petitioners' assumption that this matter may be summarily transferred to the DCR and proceed as if originally filed with that agency, noting that DCR rules and procedures include a 180-day time limitation for the filing of a complaint and that the right and authority of the DCR to accept or reject complaints in accordance with such rules and procedures may not be preempted by the Commissioner. The Commissioner concluded that the appropriate course of action is to remand this matter to the OAL to be held in abeyance pending petitioners' filing of their complaint with DCR, whereupon petitioners may either withdraw the matter before the Commissioner if their complaint is accepted or continue before the Commissioner if it is rejected. Accordingly, the Initial Decision of the OAL is rejected, and the matter is remanded to the OAL.

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

June 12, 2007

OAL DKT. NO. EDU 6432-06
AGENCY DKT. NO. 221-6/06

J.C. AND Z.T., ON BEHALF OF MINOR CHILD, V.T.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
DAVID S. LIVINGSTON, SOMERSET COUNTY SUPERINTENDENT OF SCHOOLS, WILLIAM N. KING, WARREN COUNTY SUPERINTENDENT OF SCHOOLS, AND DR. ELAINE TRYJANKOWSKI, DIRECTOR, NEW JERSEY GOVERNOR'S SCHOOL,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner cannot accept the OAL's recommended resolution of this matter.

Petitioners have "agreed to dismissal" on the "assumption" that the matter may now be transferred to the Division on Civil Rights (DCR), where it would presumably proceed as if originally filed with that agency.[1] This assumption, however, has no basis in law or fact. The DCR has rules and procedures of its own, including a 180-day time limitation for the filing of a

[1] Pursuant to *N.J.A.C.* 6A:3.1-10(b), such transfer was initially proposed by the Department upon filing of the Petition of Appeal on June 16, 2006; however, it was vigorously opposed by petitioners in their responsive letter dated June 26, 2006. As a result of petitioners' objections, the matter was transmitted to the OAL with instructions to consider the question of Commissioner jurisdiction as a threshold issue and the State respondents duly moved to dismiss the petition on jurisdictional grounds; the ALJ, in an order dated December 26, 2006, denied this motion. The matter then continued, and petitioners now, for reasons of "the limitations on the Commissioner's jurisdiction particularly relating to monetary damages," deem the Commissioner an "unattractive venue" and "would prefer that the matter be transferred to the Division on Civil Rights." (Initial Decision at 2)

complaint,[2] and the Commissioner may not preempt the right and authority of the Director of the DCR to accept or reject complaints in accordance with such rules and procedures. Moreover, the Commissioner is mindful that petitioners in this matter: 1) objected to transferring their dispute to the DCR at the appropriate point in proceedings in accordance with *N.J.A.C.* 6A:3-1.10(b); 2) opposed a motion at the OAL to dismiss the matter before the Commissioner on jurisdictional grounds, notwithstanding that they now seek such dismissal contingent upon acceptance of their complaint in a forum perceived to be more advantageous; and 3) waited nearly a year to change their minds about their preferred venue, during which time the OAL duly expended time and resources in the conduct of contested case proceedings on behalf of the Commissioner. Under these circumstances, the Commissioner is loath to create the appearance that she condones petitioners' conduct or that she expects or urges the DCR to accept petitioners' complaint under the circumstances.

In light of the above, the Commissioner finds that the appropriate course of action is to remand this matter to the OAL with the directive that it be held in abeyance while petitioners file their complaint in the forum of their current choice. Then, upon the DCR's independent determination as to whether or not it will accept the complaint, petitioners may either withdraw their petition before the Commissioner and proceed before the DCR, or continue before the Commissioner if the DCR declines to accept the complaint—without prejudice, however, to respondents' ability to raise such defenses and objections as they deem appropriate, including renewal of their jurisdictional arguments at the end of the contested case pursuant to *N.J.A.C.* 1:1-14.10(j).

[2] See N.J.S.A. 10:5-18; also http://www.state.nj.us/lps/dcr/.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected and this matter is remanded for further proceedings consistent with the holding above.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/07

Date of Mailing: 6/12/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT.NO. EDU 6432-06
AGENCY DKT. NO. 221-6/06

J.C. AND Z.T. o/b/o V.T.,
Petitioners,
v.
DAVID S. LIVINGSTON,
SOMERSET COUNTY OFFICE,
WILLIAM N. KING, WARREN COUNTY
OFFICE AND DR. ELAINE TRYJANKOWSKI,
NEW JERSEY GOVERNOR'S SCHOOL,
Respondents

J.C. and Z.T., on behalf of their minor child, V.T., petitioners, pro se

Melissa T. Dutton, Deputy Attorney General, for the respondents (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: April 30, 2007 Decided: May 2, 2007

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of charges filed with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9, alleging that respondents discriminated against V.T. in the selection process for the New Jersey Governor's School of Engineering and

Technology. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15.

Petitioners have attempted to redress their grievances through the education laws, but it appears to them now that limits on the Commissioner's jurisdiction particularly relating to monetary damages, make this an unattractive venue. They would prefer that the matter be transferred to the Division on Civil Rights consistent with the course originally suggested by the Bureau of Controversies and Disputes. They agree to dismissal here on the assumption that this avenue remains open.

Based on the foregoing, it is **ORDERED** that this matter be **DISMISSED WITHOUT PREJUDICE**.

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

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

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

5/2/07
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency:

MAY 3 2007
DATE

5/2/07
Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

228-07

#228-07

OAL DKT. NO. EDU 9083-02
AGENCY DKT. NO. 267-8/02

JOHN VANDERBAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that neither the file nor the Settlement Agreement includes a copy of a resolution by the respondent board of education approving the settlement and designating a specific individual to sign the agreement on its behalf. Nor is the agreement signed by the board attorney, who is the board's duly authorized representative in litigation. The Commissioner consequently cannot adopt the Initial Decision. Accordingly, the Commissioner hereby remands this matter to the OAL.

The Commissioner notes that the record contains a letter from petitioner's counsel stating that it was petitioner's intent to withdraw the petition, in light of the Stipulation of Settlement into which the parties entered. The Administrative Law Judge (ALJ) may consequently elect to process the case as a withdrawal. In the alternative, the ALJ may request

from respondent a copy of its resolution approving the Stipulation of Settlement and authorizing the signator of the settlement to execute same on its behalf.

IT IS SO ORDERED.[1*]

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/07

Date of Mailing: 6/12/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09083-02
AGENCY DKT. NO. 267-8/02

JOHN VANDERBAS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,

Respondent.

Bernard J. Recenello, Esq., for petitioner

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Campbell, attorneys)

Record Closed: April 30, 2007 Decided: April 30, 2007

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

This matter was transmitted to the Office of Administrative Law on October 15, 2002, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was placed on the inactive list pending outcome of a companion Workers' Compensation case by ALJ Thomas E. Clancy on November 20, 2002.

By letter dated April 25, 2007, counsel for petitioner advised that the matter was settled and forwarded the enclosed Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

4/30/07
DATE

J. HOWARD SOLOMON ALJ

Date Received at Agency: 5-8-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

Stipulation of Settlement

This Agreement between John VanDerBas and the Verona Board of Education made this 23 day of September 2003, sets forth the obligations of the parties to each other.

Whereas, prior to his announced resignation (and retirement), which resignation was accepted with regret by the Verona Board of Education, Mr. VanDerBas enjoyed an excellent reputation for his job performance and had sixteen years of positive evaluations;

Whereas, now that his retirement has become effective, Mr. VanDerBas and the Board of Education wish to resolve any and all potential outstanding issues that remain between them;

To this end Mr. VanDerBas is willing to waive all rights he may have against the Verona Board of Education and its individual members and employees for any violation of his rights of tenure in employment and in exchange the Board is willing to make certain adjustments to Mr. VanDerBas's compensation, in accordance with arrangements in existence with similar employees;

Mr. VanDerBas will receive pay for thirty-five and one half accumulated vacation days, which payment totals eleven thousand, seven hundred and fifteen dollars and zero cents ($11,715.00)

Mr. VanDerBas will receive payment for twenty-two sick days at forty dollars and zero cents for a total of eight hundred, eighty dollars and zero cents ($880.00).

The payments outlined above shall be made by the Board of Education within thirty days of receipt of a properly executed release, in a form acceptable to Board counsel.

Nothing contained in this agreement shall be construed to mean that Mr. VanDerBas has waived any right he has against Dr. Robert Rosado, Individually for acts or omissions taken with regard to Mr. VanDerBas, and any invasion of Mr. VanDerBas's rights.

Witness

CHRISTINE A. MUZZILLO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires JUNE 05, 2006

John VanDerBas

Witness

For the Board of Education

231-07

S.H., on behalf of minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her nephew, S.B., is ineligible to attend West Orange Township schools because she failed to demonstrate a family or economic hardship which would render the parent unable to support or provide care for the child, pursuant to *N.J.S.A.* 18A:38-1(b). Respondent sought tuition reimbursement for the alleged period of ineligible attendance. Petitioner failed to appear at hearing scheduled for October 16, 2006, and the OAL issued an Initial Decision affirming the Board's decision, and granting the application for tuition reimbursement; this Initial Decision was subsequently rejected by the Commissioner and the matter was remanded to the OAL for a hearing on the merits based on petitioner's exceptions, which stated that she failed to appear because she believed the hearing was scheduled for another day. On March 22, 2007, S.B. withdrew from respondent's schools after his arrest for an offense involving a controlled dangerous substance. A second hearing was conducted on April 13, 2007, at which the sole issue was whether S.H. is responsible for tuition reimbursement.

The ALJ found, *inter alia*, that: petitioner kept S.B. in her home, supporting him gratis, for a temporary period, but did not intend to keep and support him for longer than the school year; S.B.'s mother, C.K., failed to demonstrate that she is incapable of supporting or providing care for her son due to family or economic hardship; and concluded that S.B. was not entitled to a free education in West Orange Township schools. The ALJ granted the Board's application for tuition reimbursement for S.B.'s ineligible attendance.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision as the final decision, and ordered petitioner to remit tuition in the amount of $23,208.28 to the West Orange Board of Education for the period from September 2005 to March 22, 2007.

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

June 13, 2007

OAL DKT. NO. EDU 1869-07
(EDU 9150-06 ON REMAND)
AGENCY DKT. NO. 180-5/06

S.H., ON BEHALF OF MINOR CHILD, S.B., :

PETITIONER, :

V. :

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

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that, during the period at issue, S.B. was ineligible to attend the schools of respondent's district under either *N.J.S.A.* 18A:38-1(a) or *N.J.S.A.* 18A:38-1(b).[1]

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and petitioner is hereby directed to remit the sum of $23,208.28 to the West Orange Board of Education, representing tuition for S.B.'s attendance at West Orange High School from September 2005 to March 22, 2007.

IT IS SO ORDERED.[2]

Lucille Eday

COMMISSIONER OF EDUCATION

Date of Decision: 6/13/07

Date of Mailing: 6/14/07

[1] The remaining provisions of *N.J.S.A.* 18A:38-1 are inapplicable to S.B. and were not invoked by petitioner.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1869-07
(On Remand - EDU 9150-06)
AGENCY DKT. NO. 180-5/06

S.H., ON BEHALF OF MINOR CHILD,
S.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY,
Respondent.

Matthew E. Przywozny, Esq., for petitioner (Strugatz & Przywozny, attorneys)

Stephen J. Christiano, Esq., for respondent

Record Closed: April 13, 2007 Decided: May 10, 2007

BEFORE **JOSEPH PAONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.H. appeals the determination of respondent Board of Education of the Township of West Orange (Board) that S.B., petitioner's nephew, is ineligible to

attend the West Orange Township schools because his parent failed to demonstrate a family or economic hardship that would render the parent unable to support or provide care for the child. N.J.S.A. 18A:38-1(b). Respondent requests tuition reimbursement for the alleged period of ineligible attendance.

By letter of October 12, 2005, the Board notified petitioner of its determination. On October 27, 2005, the Commissioner received an appeal from C.K., S.B.'s mother. The New Jersey Department of Education, Bureau of Controversies and Disputes (Bureau) responded and advised C.K. that the appeal must be initiated by petitioner, S.H., with whom her child resides. On May 12, 2006, the Board advised petitioner that due to the failure to file an appeal, S.B. would be disenrolled as of May 19, 2006. On May 19, 2006, the Commissioner received an appeal from petitioner. On July 19, 2006, an Answer was filed on behalf of the Board. On August 9, 2006, the Bureau transmitted the contested case to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for October 16, 2006, and petitioner failed to appear. The hearing went forward without petitioner and the Board's decision to remove S.B. was affirmed. The Board's application for tuition reimbursement was also granted. Petitioner filed exceptions stating that she failed to appear because she had believed the hearing was scheduled for another day. After a review of the matter, the Commissioner concluded that it would be contrary to the interests of justice to deprive petitioner of the opportunity to have the merits of her case adjudicated. The Commissioner rejected the Initial Decision and remanded the matter to the OAL for a hearing on the merits.

On March 22, 2007, S.B. withdrew from West Orange High School after his arrest at the school for an offense involving a controlled dangerous substance. Therefore, S.H.'s appeal is limited to whether S.B.'s parent or guardian is responsible for tuition reimbursement. On April 13, 2007, a hearing was conducted and the record closed.

FINDINGS OF FACT

C.K. testified that she had resided at 243 Nesbit Terrace in Irvington with her son, S.B. When the apartment building was sold, she agreed to vacate her residence on November 20, 2004, in exchange for $1,000. P-1. She placed her personal belongings in storage. The company for which C.K. worked ceased operating in February 2005. Her initial application for unemployment benefits was denied (P-4), but she prevailed on appeal (P-5). It is unclear from the testimony when those benefits commenced, but she received benefits until October 2005. She testified that in July 2005 she and S.B. moved in with her sister S.H., S.H.'s fiancé M.A., and their three children at 30 Edgar Road in West Orange. M.A. owned the home. S.H. and M.A. have since married. S.H. testified that she provided for all of S.B.'s needs and C.K. had signed a document that purportedly gave S.H. guardianship over S.B. She no longer has that document. Notwithstanding S.H.'s understanding to the contrary, she is not the legal guardian of S.B. There is no custody order and legal guardianship was never sought.

On July 25, 2005, S.H. enrolled S.B. in West Orange High School, which is in the Board's district. In the "Affidavit for Non-Resident Pupil Enrollment," S.H. wrote that S.B. had resided with her since July 2005 and she intended to support him gratis; C.K. also resided with her, but would be in Rochester, New York, until May 2006; S.B. would live with C.K. during the summer of 2006; and C.K. would declare S.B. as a dependent for federal income tax purposes. R-1. In the "Affidavit of Parent," C.K. wrote, "I will be returning to N.J. around mid-May. I also reside at 30 Edgar rd. [sic] in West Orange, N.J." R-3. She attested in the affidavit that S.H. would keep and support S.B. "for a longer time than merely through the school term." Ibid.

C.K. testified that she intended to go to Rochester, New York, to seek opportunities and to enter into some type of welfare program, but she returned after five weeks when she learned that she couldn't qualify due to a lack of residency. But, M.A. wrote in an undated document submitted to the Board that his company employs C.K. and that she would travel to Rochester on August 26, 2005, on behalf of his company and remain there until he decides otherwise. R-5. When confronted by the

inconsistency, C.K. explained that she also worked for M.A.'s company and she intended to scout locations for his business. Moreover, in the "Affidavit of Parent," C.K. wrote that she is not capable of supporting or providing for S.B. because she "will be traveling out of State on 8/26/05 to persue [sic] a new business location in Rochester, N.Y." R-3.

On October 12, 2005, the Board advised petitioner that it decided at its October 10, 2005, meeting to deny S.B. admission to its school district because S.B.'s parent failed "to demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child." R-4. In a letter to the Commissioner dated October 20, 2005, C.K. wrote that she "resides at 1108A Stuyvesant Avenue [, Irvington,] in a four-room apartment" with her mother. R-2. C.K. testified that her nephew and sister also lived there. She also wrote in that letter that she was employed by OSI Collection Service, and worked noon to 9 p.m. Monday to Friday and 8 a.m. to noon on Saturdays. She explained that her income was insufficient and her time was limited to care for her son. She testified that she earned $9.50 per hour. C.K.'s employment with OSI terminated in January 2006. In March 2006 she commenced employment with Cingular. In September 2006 C.K. starting working at AIG as a policy assembler, where she now earns $28,000 per year.

C.K. has no other dependents. She owns a 2000 Ford Expedition. She doesn't drive the vehicle, however, because she has not paid for insurance. She car-pools to her job in Berkeley Heights. C.K. explained during the hearing that her criminal conviction for the unlawful distribution of a controlled dangerous substance makes it difficult for her to obtain employment. P-2. She also explained that she has not received child support payments since January 22, 2004. P-3.

The testimony was clear that C.K. has no present intent of leaving Irvington. According to the testimony of S.H. and C.K., when C.K. returned from Rochester, C.K. stayed in S.H.'s West Orange home approximately four nights per week. C.K. conceded, however, that she "never physically wanted to live there." The rest of the week she stayed in Irvington, where she felt more comfortable. Even though she

claimed to be living in West Orange, all her bills and mail were sent to Irvington and her driver's license and pay stub list the Irvington address.

On or about March 22, 2007, S.B. was arrested at West Orange High School after distributing marijuana on school property. He never returned to the school. His mother explained that the Board intended to expel S.B., so she enrolled him in the Irvington school district. C.K. also explained that her mother recently moved out of her Irvington apartment and C.K. remained, establishing it as her primary residence. She now resides there with S.B and her nephew. She is responsible for the rent, but has fallen behind and is presently facing an eviction action.

I **FIND** that the preponderance of evidence has established that:

1. S.B. was kept in the home of S.H., who is domiciled within the Board's district.

2. S.H. agreed to assume all the personal obligations for S.B. relative to school requirements.

3. S.H. supported S.B. gratis.

Because S.H., however, wrote in her affidavit that S.B. would reside with his mother during the summer of 2006, and C.K. would claim him as a dependent for federal income tax purposes, I cannot **FIND** that S.H. intended to keep and support S.H. for longer than the school year. The evidence adduced at the hearing established that C.K. experienced temporary periods of unemployment. She attributes that to a former criminal conviction. Temporary unemployment, however, does not render one necessarily incapable of supporting and caring for a child. Therefore, I also cannot **FIND** that C.K. is incapable of supporting or providing care for her child due to a family or economic hardship.

While C.K.'s inconsistent explanation of the reason for her trip to Rochester raises suspicion, the fact remains that near the start of the 2005-2006 school year, C.K.

had already returned to New Jersey. The testimony that C.K. resided both in Irvington and West Orange appeared contrived. It is inconsistent with C.K.'s letter of October 20, 2005, wherein she wrote that she resided in Irvington. R-2. C.K.'s mail and bills went to her Irvington address. Her driver's license and pay stub listed the Irvington address. Even if I were convinced that C.K. may have stayed several days per week in West Orange, I **FIND** that she intended Irvington to be her domicile. Therefore, I must also **FIND** that C.K. has not established by a preponderance of the competent and credible evidence that S.B. was not residing with S.H. solely to receive a free public education in the Board's district.

The parties have stipulated that the per-pupil cost to the school district was $13,287 during the 2005-2006 school year. R-6. The parties have also stipulated that during the 2006-2007 school year, the cost per student is $77.51 per day. Since S.B. attended West Orange High School during the 2006-2007 school year for 128 days, until March 22, 2007, the total cost for the 2006-2007 school year is $9,921.28. I, therefore, **FIND** as fact that the total cost to the Board for S.B.'s attendance at West Orange High School is $23,208.28.

CONCLUSIONS OF LAW

> Public schools shall be free to . . .
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child . . . and [such other person] will assume all personal obligations for the child relative to school requirements and . . . intends so to keep and support the child gratuitously for a longer time than merely through the school term, and . . . the child's parent . . . is not capable of supporting or providing care for the child due to a family or economic hardship and . . . the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.
>
> [N.J.S.A. 18A:38-1.]

S.B. is not domiciled within the Board's district. N.J.A.C. 6A:22-3.1(a)(1) provides:

> A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

Since I have found that S.B.'s mother is domiciled in Irvington, S.B. cannot be a domiciliary of West Orange. Accordingly, I must **CONCLUDE** that he is not entitled to attend West Orange High School for free pursuant to N.J.S.A. 18A:38-1(a) due to his improper domicile.

Since I could not find by a preponderance of the evidence that: 1) S.B. intended to stay with S.H. beyond the school term; 2) C.K. is incapable of supporting or providing care for S.B. due to a family or economic hardship; and 3) S.B. was not residing with S.H. solely to receive a free public education in the Board's district, I must also **CONCLUDE** that S.B. is not entitled to a free education by the Board pursuant to N.J.S.A. 18A:38-1(b).

The Board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). The parties stipulated that the cost for S.B.'s attendance at West Orange High School from September 2005 to March 22, 2007, is $23,208.28. Accordingly, I **CONCLUDE** that the total due the Board for S.B.'s attendance at West Orange High School is $23,208.28.

ORDER

I hereby **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $23,208.28.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 2007
DATE

JOSEPH PAONE, ALJ

Date Received at Agency: 5-10-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 14 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses

For Petitioner:

S.H.
C.K.

For Respondent:

None

Exhibits

For Petitioner:

P-1 Agreement to vacate premises
P-2 Correspondence from Adecco, dated March 29, 2006
P-3 Notice of Child Support Order
P-4 Request for Refund of Unemployment Benefits
P-5 Notice of Hearing from Appeal Tribunal

For Respondent:

R-1 Affidavit for Non-Resident Pupil Enrollment
R-2 Correspondence from C.K. to Commissioner, dated October 20, 2005
R-3 Affidavit of Parent
R-4 Correspondence from Board of Education to S.H., dated October 12, 2005
R-5 Employment letter from M.A.
R-6 Student Record for S.B.

232-07

OAL DKT. NO. EDU 2600-07
(Remand of EDU 8024-06)
AGENCY DKT. NO. 338-9/06

T.F., on behalf of minor child, A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement, executed by petitioner and respondent's attorney, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The petition and respondent's counter claim are hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

Lucille E Day
COMMISSIONER OF EDUCATION

Date of Decision: 6/13/07

Date of Mailing: 6/14/07

OAL DKT. NOS. EDU 4462-05, EDU 4463-05 AND 4519-05
AGENCY DKT. NOS 158-6/05, 159-6/05 AND 162-6/05

CHRISTOPHER MARTINO.	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUJNTY,	:	
AND	:	
BRAD WILD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTIONS
BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUJNTY,	:	
AND	:	
S.K., on behalf of minor child, S.K.	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUNTY.	:	

The audiocassette tapes of the emergent hearing conducted at the Office of Administrative Law on June 24, 2005 and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Petitioners' and the Board's exceptions were submitted on

June 27, 2005 and were duly considered by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon a thorough and independent review, the Assistant Commissioner concurs that petitioners have failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief.[1] In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein and petitioners' request for emergent relief is, therefore, denied. Notwithstanding the parties' representations at hearing that there are no issues remaining once the emergent relief matter has been resolved, petitioners specifically indicate in their exceptions that there are due process questions that can only be determined upon a full hearing on the merits. Accordingly, this matter shall continue at the OAL for further proceedings on the merits of petitioners' claims as may be deemed necessary.

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/27/05

Date of Mailing: 6/28/05

FAXED TO THE PARTIES 6/27/05

[1] The Assistant Commissioner notes that petitioners acknowledge that their arguments may not meet the *Crowe* standards for emergent relief, stating that "although its application may fall short pursuant to the standards set forth in *Crowe*, the Court Failed to address the issue of the petitioners' claim regarding lack of due process." (Petitioners' Exceptions at 2)

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

235-07E
OAL DKT. NO. EDU 4288-07
AGENCY DKT. NO. 148-6/07

235-07

D.Y., ON BEHALF OF MINOR CHILD, N.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audiotape of proceedings at the Office of Administrative Law (OAL) – and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Commissioner concurs with the ALJ that the evidence presented by the parties show the Board of Education's decision denying N.Y.'s participation in the district's graduation ceremony to have been arbitrary and unreasonable under the circumstances, so that petitioner has clearly demonstrated her entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL directing the Toms River Board of Education to allow N.Y.'s participation in commencement exercises[1] is adopted for the reasons expressed therein. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/13/07

Date of Mailing: 6/13/07 Faxed

[1] The Commissioner clarifies that such participation also includes the practice scheduled for June 13, 2007, as requested by petitioner in her moving papers.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 4288-07
AGENCY DKT. NO. 148-6/07

D.Y. ON BEHALF OF N.Y.,
Petitioner,
v.
TOMS RIVER BOARD OF EDUCATION,
Respondent

D.Y., petitioner, pro se

Jared J. Monaco, Esq., for the respondent (Gilmore & Monahan, attorneys)

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of an application for emergent relief filed by petitioner on June 7, 2007. The matter was transmitted to the OAL by the Department of Education on the same day and an emergent relief proceeding was conducted on June 12, 2007. The question presented is whether N.Y. should be permitted to participate in commencement exercises scheduled for Thursday, June 14, 2007.

The facts are undisputed. N.Y. was born on September 28, 1989 and he began his high school career with respondent. His grades during the 2003/04, 2004/05, and

the first half of the 2005/06 school years were poor. He also received multiple suspensions and engaged in behavior that brought him to the attention of the criminal justice system. He was diverted into alternative school in January 2006 and entered the New Jersey Training School for Boys in September 2006, where he remained until June 2007. N.Y.'s transcripts reveal that his grades improved dramatically during these latter experiences, such that he received mostly A's. He has completed the necessary course work for graduation and the record contains multiple certificates of achievement reflecting his positive performance. N.Y. testified that once he saw the inside of these facilities, it dawned on him that he had taken a wrong turn and he dedicated himself to change. He would like to go on to college.

A February 2007 letter in evidence from Rhonda Hunter, a substance abuse counselor with the Juvenile Justice Commission, to Honorable Marlene Lynch Ford, J.S.C., recommends that N.Y. be released from custody early based on his academic performance, positive attitude, and role model status within the institution. He has undergone counseling, which continues, and he successfully completed anger management training. N.Y. was released from custody early, which has allowed him to make this application.

The school district, through Mr. Lenny Stanziano the high school principal, related that petitioner had many suspensions and difficulties in-district, that participation in commencement exercises is a privilege, and that this decision falls within the District's discretion. This is the substance of the record.

In an emergent relief proceeding the moving party, here petitioner, must show a likelihood of success on the merits, that the law is settled, and that on balance the harm to him if relief is denied is greater than the harm that will befall the district if it is granted, Crowe v. De Gioia, 90 N.J. 126 (1982). This has been done. In the last year and a half N.Y. has performed well academically and has overcome anger issues. Mrs. Hunter wrote glowingly of his maturation in support of his early release. The district does not appear to have lent weight to this progress, but rather, stands on his prior poor behavior while in-district. That was a year and a half ago. No evidence has been advanced that

would suggest N.Y. is currently incapable of comporting himself at these exercises; to the contrary, the indications are that he can. While it is true that school district's have wide discretion in such matters, the failure to attach significant weight to current circumstances is in my view arbitrary and capricious.

Based on the foregoing, it is **ORDERED** that N.Y. be permitted to participate in commencement exercises on Thursday, June 14, 2007.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

6/12/07
DATE

SOLOMON A. METZGER, ALJ

/cad

EXHIBITS

For Petitioner:

P-1 Letter to Honorable Marlene Lynch Ford from Rhonda Hunter, dated February 27, 2007

P-2 N.Y.'s transcript

P-3 Letter to Ms. Maryann Pepe, dated February 6, 2007

For Respondent:

R-1 Toms River Regional School District Policy

WITNESSES

For Petitioner:

D.Y.

N.Y.

For Respondent:

Lenny Stanziano

238-07

L.S.M., ON BEHALF OF MINOR CHILD, A.M., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner sought to have her child return to school as a 10th grader, and sought assurances from the district that she would be protected in the future from religion-based hate crimes. Respondent Board asserted that until such time as A.M. was re-enrolled in the district, no controversy exists under the school laws for the Commissioner to rule on.

The ALJ found that in the course of proceedings in this case, the petitioner shifted her position on re-enrolling her child for the remainder of the 2006-2007 school year, and instead informed the ALJ that she intends to home-school and re-enroll her daughter in September 2007; accordingly, the district is not legally charged with A.M.'s education. The ALJ concluded that there is no cognizable controversy or dispute before the Commissioner, and that the contested case must be dismissed for lack of jurisdiction.

The Commissioner concurred with the ALJ for the reasons clearly stated in his decision, and dismissed the petition. In so holding, the Commissioner stressed that upon A.M.'s re-enrollment in the district's schools, any dispute between petitioner and the Board about A.M.'s appropriate grade placement would be a new cause of action appealable to the Commissioner at that time.

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

June 14, 2007

238-07

OAL DKT. NO. EDU 00050-07
AGENCY DKT. NO. 452-12/06

L.S.M., ON BEHALF OF MINOR CHILD, A.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has removed her dispute from the jurisdiction of the Commissioner by withdrawing A.M. from the public school system. In so holding, however, the Commissioner stresses that – should petitioner re-enroll A.M. in September 2007 as she indicates her intent to do – any dispute between her and the Board about A.M.'s appropriate grade-level placement[1] would be a new cause of action appealable to the Commissioner at that time, provided A.M. remains enrolled in school.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/14/07
Date of Mailing: 6/14/07

[1] The Commissioner notes in this regard that, upon re-enrollment, A.M. must be placed as an eleventh-grader in accordance with petitioner's representation, then assessed in terms of her specific levels of proficiency – not the equivalency of her home school curriculum to the Board's curriculum – to determine if such placement is appropriate. *M.C., on behalf of minor child, L.C. v. Board of Education of the Freehold Regional High School District, Monmouth County*, decided by the Commissioner February 2, 2000.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00050-07
AGENCY DKT. NO. 452-12/06

L.S.M. ON BEHALF OF MINOR CHILD A.M.,

Petitioner,

v.

BOARD OF EDUCATION OF MONROE TOWNSHIP, GLOUCESTER COUNTY,

Respondent.

L.S.M., petitioner, pro se

John J. Armano, Jr., Esq., for respondent (Trimble & Associates, attorneys)

Record Closed: April 23, 2007 Decided: May 8, 2007

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

Petitioner L.S.M. filed a Petition with the Commissioner of Education seeking an order that her daughter A. be allowed back to school as a tenth grader, seeking assurances that she would be protected in the future from religion motivated hate crimes and what appropriate investigations be conducted by the respondent if, in the future, A. sought assistance regarding claims of harassment. A similar matter had apparently been filed in the Superior Court of New Jersey, Chancery Division, Gloucester County, but that matter was apparently terminated due to the

Commissioner's jurisdiction over matters arising under the school laws. The Petition was transferred by the Commissioner to the Office of Administrative Law. An in-person pre-hearing conference was held before this judge on March 12, 2007.

The initial response to the Petition by the respondent suggested that what the parents were actually disputing was a minor disciplinary action against their daughter involving three three- to seven-day suspensions for alleged disrespect towards a teacher. The district also asserted that it had investigated allegations of religion-based harassment and determined that they had not been substantiated. The response stated that the matter was not one "for consideration by the Department of Education." As it was not entirely clear to me whether the respondent was contending that the Commissioner did not have jurisdiction over the case, I wrote to counsel for the Board to seek clarification. On February 15, 2007, counsel responded, advising that he did not mean to suggest that the Commissioner did not have jurisdiction, but that it was his position that the Commissioner should not take any action. However, in the same letter counsel noted that based upon a letter dated February 7, 2007, and the Superior Court hearing held on February 8, it appeared that indeed the Commissioner did not have jurisdiction due to the fact that the M.'s had made it "clear" that they had removed the child from the High School and were home schooling her. Counsel suggested that a dispute might arise in the future if the child were re-enrolled in the district, at which time the "board of education treats the child as any other new or returning child (i.e. assessed as to the acceptance of credits and the appropriate grade level for purposes of placement)" which would be "based on an objective assessment that is given to all students for that subject or grade." He suggested that until such time as the child was re-enrolled in the district there was no "controversy under the school laws for the Commissioner to rule on." N.J.S.A. 18A:6-9.

At the prehearing conference, I explored any prospect for resolving the matter and, without making any legal determination as to jurisdiction, encouraged the parties to work to try to end their dispute. It was agreed that Mrs. M. would re-enroll her child and that a meeting would take place on March 14 to begin the process of assessing A. to determine her proper placement. It was also suggested that the district at least

consider whether it would make any changes in the reporting and investigating process regarding any future contentions by A. of harassment. Further, discussions were held about the prospect of future harassment, the inability to predict the future or to issue any orders that guaranteed that no further trouble would occur, the possible salutary effect of Family Court proceedings already completed against two alleged perpetrators of harassment and the heightened concern of school authorities to do all possible to prevent harassment, particularly in light of recent case law developments. L.W. v. Toms River Regional Schools Board of Education, 189 N.J. 381 (2007). I also reviewed the burden of persuasion that would apply in the case. A letter dated March 14, 2007, to the parties summarized the discussions at that conference.

Having heard nothing regarding the outcome of the March 14th meeting, I wrote to Ms. Miles on April 12 (the letter mistakenly is dated March 12), 2007, inquiring as to whether she was withdrawing her petition or wished the matter to proceed. She responded on April 13, advising that the "meeting did not go well" and that the administration had

> refused to accept any of the home schooling that was done from April 6, 2006 until the present. They are refusing to test/assess A. to determine if she can go into the tenth grade. Therefore I have decided to keep her out of the public school system and continue to home school her in the tenth grade curriculum at home. I have also decided to proceed with the case as the school administration does not believe they need to make changes to provide A. with a safe learning environment. . . . I will plan to re-enroll A. into the public school in September, 2007 as an eleventh grader. I do believe that the school system must have a procedure or protocols to assess home schoolers who enter the system specifically to obtain an actual diploma.
>
> [April 13, 2007, letter from L.S.M. to Hon. Jeff S. Masin.]

As a result of this letter, it is necessary to now consider the jurisdictional issue first raised in Mr. Armano's February 15 letter. The understanding I had after the meeting on March 12 was that A. would be re-enrolled and the Board would then have to formally decide on a placement, which could then presumably be challenged by the

parents if they were not satisfied. Re-enrollment would have placed the child squarely within the responsibility of the public school district to educate the child in a thorough and efficient manner. However, as it stands, Mrs. M. has acknowledged that at the present time she has chosen not to re-enroll A. and to continue to home school her. Thus, the district is not legally charged to educate her. In essence, for a controversy to exist here that provides the Commissioner with jurisdiction, the parents must re-enroll A., the district must declare its decision respecting placement and then, if the decision dissatisfies the parents, a controversy or dispute will exist for which they may invoke the Commissioner's assistance. But, as it now stands, despite the parents' stated intention to re-enroll A. in September 2007, that is only a statement of possibility, not a statement of fact. As such, the Commissioner has no jurisdiction to determine anything and it remains in the hands of the parents to determine whether to actually re-enroll their child and thereby bind the district to take action.

I **CONCLUDE** that there is no cognizable controversy or dispute before the Commissioner and that the contested case must be **DISMISSED** for lack of jurisdiction.

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

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

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

May 8, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

May 8, 2007
Mailed to Parties:

MAY 11 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

Letter dated 12/27/06 from John J. Armano, Jr., Esq., to M. Kathleen Duncan, Director

Letter dated 2/2/07 from Jeff S. Masin, ALJ, to L.S.M. and John R. Armando, Jr., Esq.

Letter dated 2/7/07 from L.S.M. to Hon. Jeff S. Masin

Letter dated 2/15/07 from John J. Armano, Jr., Esq., to Jeff S. Masin, ALJ

Letter dated 2/20/07 from L.S.M. to Jeff S. Masin, ALJ

Letter dated 3/14/07 from Jeff S. Masin, ALJ, to L.S.M. and John R. Armando, Jr., Esq.

Letter dated April 12 (the letter mistakenly is dated March 12), 2007, from Jeff S. Masin, ALJ, to L.S.M.

Letter dated 4/13/07 from L.S.M. to Hon. Jeff S. Masin

241-07

#241-07E

OAL DKT. NO. EDU 5949-07
AGENCY DKT. NO. 162-6/07

E.L., on behalf of minor child, S.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter and the audiotape of the hearing conducted at the Office of Administrative Law on June 13, 2007 – along with the recommended Order of the Administrative Law Judge (ALJ) – have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ's determination that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably, that petitioner has a likelihood of prevailing on the merits of his underlying claim.

Accordingly, the instant application for emergent relief is hereby denied. As recognized by the ALJ, with the denial of this emergent application – seeking that S.L. be allowed to attend her 8th grade prom – there is no subsequent relief available to petitioner and, therefore, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/14/07

Date of Mailing: 6/14/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENCY RELIEF
OAL DKT. NO. EDU 05949-07
AGENCY DKT. NO. 162-6/07

E.L. O/B/O MINOR CHILD S.L.,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

E.L., pro se

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

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

On June 13, 2007, petitioner came before me on an application for Emergency Relief appealing the decision of the District to prohibit S.L. from attending her Eighth Grade Prom on June 14, 2007.

Petitioner contended that the reason given for her ban from the prom was because she answered another student's question during a no-talk time reading class; that the contract that S.L.'s mother signed that would prevent students from attending their ceremonies if they misbehave was vague on certain issues; and that the punishment exceeds the violation.

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Since the requirements are in the conjunctive, all of these criteria must be satisfied by a petitioner in order to be entitled to emergency relief.

I have heard the arguments of all parties and read their submissions and have heard the testimony of Dorothy Douge, Principal of School #10. Around May 16, 2007 parents and students, including S.L. and her mother signed a promotion agreement acknowledging that a student would forfeit the right to participate in the prom and graduation for violation of school rules, policies, rituals and routines including open defiance of school authorities and violation of school and District policies. In subsequent assemblies the administration advised students of the consequences of misconduct. By State mandate there is ten minutes of sustained silent reading every day in homeroom class. Ms. Nunez, S.L.'s homeroom teacher, reported that S.L. and seven other students repeatedly violated this silent reading requirement since the issuance of the prom/graduation contract in May, by speaking out during this exercise. As a result, of repeated misconduct, all eight students have been banned from participating in the prom. For those and other infractions, twenty-six of the seventy-five students in the entire grade have forfeited their privilege to attend the prom.

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. However, the exercise of discretionary powers by a local board of education, or in this case its principal designee, may not be upset unless patently arbitrary, or without reasonable basis, or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). Since there is a presumption of validity, the burden of proving unreasonableness lies with the party challenging the action. Id. at 297. Also see, K.O.H. o/b/o R.H. v. Bd. of Ed. of the Township of Edison, 95 N.J.A.R.2d. (EDU) 275 (1995). Accordingly, the Commissioner's scope of review is limited to determining whether the underlying facts were as those which the finder of fact at the district level found and whether it was unreasonable for the administration to conclude based on those facts as it did as to the appropriate action. The decision below carries a presumption of validity.

Notwithstanding petitioner's argument that the punishment is excessive, there is an acknowledgment that S.L.'s mother signed the contract which has given rise to the pending discipline, and it is undisputed that S.L. and other students were reminded of their obligations as a condition of attending the prom. Under the limited scope of my review of the District's action, namely that it be patently arbitrary or without reasonable basis, even if I might independently disagree with the quantum of punishment imposed here, I must **CONCLUDE** that petitioner has failed to satisfy the Crowe v. DeGioia requirement of a likelihood of prevailing on the merits of the underlying claim. This is so because of the discretion vested in the administration, the admitted violation of school rules and the fact that many students have been similarly disciplined regarding the prom.

Additionally, although it is evident that there will be no subsequent relief available to S.L. if she is denied an opportunity to attend the prom on June 14, 2007, I **CONCLUDE** nevertheless that the harm is such that it would not be irreparable, her extreme disappointment notwithstanding.

For this and any other reasons set forth in my oral opinion issued from the bench on June 13, 2007 I issue the following **ORDER:**

ORDER

I hereby **ORDER** that petitioner's Application for Emergency Relief be **DENIED;** I further hereby **ORDER** that further proceedings regarding this petition be **DISMISSED** as moot.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 13, 2007
DATE

JESSE H. STRAUSS, ALJ

jb

242-07

OAL DKT. NO. EDU 8704-06
AGENCY DKT. NO. 391-10/06

IN THE MATTER OF THE TENURE	:	
HEARING OF MARIAN STEWART,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BERNARDS, SOMERSET COUNTY.	:	

The record of this matter, the parties' Joint Request for Approval of Settlement, Including Withdrawal of Tenure Charges, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07
Date of Mailing: 6/15/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08704-06

AGENCY DKT. NO. 391-10/06

IN THE MATTER OF THE TENURE HEARING OF MARIAN STEWART, BERNARDS TOWNSHIP SCHOOL DISTRICT, SOMERSET COUNTY.

Philip E. Stern, Esq., for petitioner Bernards Township Board of Education (Sills, Cummis, Epstein & Gross, attorneys)

Keith Waldman, Esq., for respondent Marian Stewart (Selikoff & Cohen, attorneys)

Record Closed: February 8, 2007 Decided: May 7, 2007

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

This matter arises from certified tenure charges that the Bernards Township Board of Education ("petitioner") filed alleging that Marian Stewart ("respondent") engaged in unbecoming conduct in connection with her duties as a teacher of Music and Band Director pursuant to allegations contained in a Statement of Charges filed with the Commissioner of Education on October 25, 2006. The Commissioner transmitted this matter to the Office of Administrative Law on November 15, 2006, for

determination as a contested case, pursuant to pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy between these parties.

CARDONICK CONSIDERATIONS

The settlement of this case as proposed in the Joint Request for Approval of Settlement reflects legal and factual issues which both parties have recognized as affecting the hearing of these charges. It appears to the judge from extensive discussions with counsel on the record that the allegations at worst reflected poor judgment on the part of the tenured employee, but the nature of the allegations does not warrant any concern that the alleged actions, even if proven, suggest any cause for concern that this teacher poses any threat to anyone or that her performance as a teacher is otherwise lacking. Indeed, the Board considers this nine year staff member to be a valued employee and she has no prior disciplinary record. The parties have recognized that proof issues exist and have determined that a letter of reprimand will suffice to deal with the judgment matter. I am convinced that this settlement is in the public interest and reasonable. Further, on the record Ms. Stewart acknowledged that she understood that this settlement does not preclude the Commissioner from referring her to the Board of Examiners for consideration of action against her teaching license.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and In Re Cardonick, 1990 S.L.D. 842 and that the settlement should be approved. I

approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 7, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

Mailed to Parties:

MAY 11 2007

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

Philip E. Stern, Esq.
SILLS CUMMIS EPSTEIN & GROSS, P.C.
1 Riverfront Plaza
Newark, NJ 07102
(973) 643-5688
Counsel for Petitioner, Bernards Township
Board of Education

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Respondent,
Marian Stewart

IN THE MATTER OF THE TENURE HEARING OF MARIAN STEWART, SCHOOL DISTRICT OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 08704-06S
AGENCY REF. NO. 391-10/06

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of the School District of Bernards Township ("BOARD") and counsel for its tenured employee MARIAN STEWART ("STEWART") join in moving for an order declaring that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of *N.J.A.C.* 1:1-19.1, recommending that the Settlement Agreement be approved by the Office of Administrative Law ("OAL") and the Commissioner of Education ("Commissioner"), and on condition that the Commissioner approves without

J-1

modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the BOARD be withdrawn and this matter dismissed without prejudice.

PROCEDURAL STATEMENT

This matter arises out of charges certified by the BOARD to the Commissioner on October 24, 2006, against a tenured teaching staff member on grounds of conduct unbecoming. The tenure charges were transmitted to the OAL as a contested case on November 6, 2006. A hearing concerning the BOARD's tenure charges was scheduled before the Honorable Jeff Masin, ALJ, for February 6 and 8, 2007. On the February 6, 2007 hearing date, the parties reached a tentative settlement agreement conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the OAL and the Commissioner in accordance with which the tenure charges might be withdrawn.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that STEWART will be reinstated to a position consistent with her certification as a teacher.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the OAL's and the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against STEWART shall be withdrawn and dismissed without prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet her objections.

The parties have further agreed that neither the BOARD not its agents or employees will take any actions which could be adverse to STEWART's future employment

interests elsewhere.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

Due to the fact that STEWART was prepared to present student witnesses whose testimony would contradict the testimony of the BOARD's student witness, and that several key witnesses have graduated from the school district, are attending school out-of-State and are otherwise unavailable, the BOARD has reviewed the evidence and decided to withdraw the charges upon approval of this settlement by the Commissioner.

CONCLUSION

The Settlement Agreement was negotiated between counsel after certain facts became known during the course of discovery. Counsel, as well as STEWART and the BOARD which unanimously approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss without prejudice the tenure charges and petition of appeal in this consolidated matter.

Respectfully submitted,

SILLS CUMMIS EPSTEIN & GROSS, P.C.
Attorneys for Board of Education of Bernards Township School District

BY: _____
PHILIP E. STERN

DATED: 2/6/07

SELIKOFF & COHEN, P.A.
Attorneys for Marian Stewart

BY: _____
KEITH WALDMAN

DATED: 2/6/12

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of Bernards Township ("BOARD") and its tenured employee MARIAN STEWART ("STEWART").

WHEREAS, STEWART has been continuously employed by the BOARD as a teacher since September of 1998; and

WHEREAS, on October 24, 2006, the BOARD certified tenure charges against STEWART to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING OF MARIAN STEWART, SCHOOL DISTRICT OF BERNARDS TOWNSHIP, SOMERSET COUNTY

OAL DOCKET NO. EDU 08704-06S
AGENCY REF. NO. 391-10/06

WHEREAS, STEWART filed an answer contesting the tenure charges;

WHEREAS, the parties have exchanged reciprocal discovery, and

WHEREAS, the BOARD has reviewed the defenses and evidence and decided to withdraw the charges pending this settlement;

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The BOARD will reinstate STEWART to a position consistent with her certification as a teacher.

2. STEWART agrees in consideration of this Settlement Agreement that, if it is approved by the Commissioner of Education without modification, she will agree to the placement of a letter of reprimand in her personnel file and that she will not grieve or appeal the letter of reprimand;

EXHIBIT A

3. The BOARD voluntarily withdraws the present action, without prejudice, and each party will bear its own attorney's fees, expenses and costs.

4. The parties will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against STEWART to be withdrawn and dismissed without prejudice.

5. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet her objections.

6. STEWART further agrees in consideration of this Settlement Agreement that if it is approved by the Commissioner, she will not assert in any judicial or administrative proceeding that any statements by the BOARD through its attorney concerning the reasons it believes this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

SILLS CUMMIS EPSTEIN & GROSS, P.C. Attorneys for Board of Education of Bernards Township School District	SELIKOFF & COHEN, P.A. Attorneys for Marian Stewart
BY: _____ PHILIP E. STERN	BY: _____ KEITH WALDMAN
DATED: 2/6/07	DATED: 2/6/7

EXHIBIT A

243-07

OAL DKT. NO. EDU 8071-03
AGENCY DKT. NO. 331-8/03

MAE CHANDLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND ANNETTE KNOX,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07

Date of Mailing: 6/15/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8071-03

AGENCY DKT. NO. 331-8/03

MAE CHANDLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY AND ANNETTE KNOX,

Respondent.

Cristal Holmes-Bowie, Esq., for petitioner (Law Office of Michael A. Armstrong, attorneys)

Harold George, Esq., for respondent (Sumners & George, attorneys)

Record Closed: April 17, 2007 Decided: May 15, 2007

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 21, 2003, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was the subject of several telephone

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

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

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

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

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

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

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

5-15-07

DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency:

Fax 5/23/07

Mailed to Parties:

[redacted] AND
[redacted] LAW JUDGE

MAY 24 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

mamf

EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

RECEIVED
2003 MAR 10 P 3:50
STATE OF N.J.
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the City of Camden (BOARD) and its employee Mae Chandler (Chandler).

WHEREAS, Chandler has been continuously employed by the BOARD as a Clerk III for approximately fifteen (15) years; and

WHEREAS, on May 29, 2003 the BOARD voted to withhold Ms. Chandler's increment for "Poor Work Performance"; and

WHEREAS, genuine questions of law and fact exist as to whether the BOARD withholding Chandler's increment was arbitrary and capricious;

WHEREAS, the parties acknowledge and recognize the BOARD's commitment to the letter and spirit of the Withholding increment provisions of the Education Law, *N.J.S.A. 18A*:29-14. More specifically, the BOARD recognizes that under these provision, it is allowed to withhold an increment for good cause. Likewise, Chandler recognizes that the Board's decision may be overturned by the Commissioner, only if the Board's decision is deemed arbitrary or capricious. ;

WHEREAS, the BOARD and Chandler have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities pursuant to Title 18A; and

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

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

2. The BOARD will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, the Board shall increase Chandler's base salary in the amount Three Hundred Seventy-Five Dollars ($375.00)

3. Should the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter continue with its plenary hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the Joint Request for Approval of Settlement, nor any representations of fact set forth in the settlement, this Settlement Agreement or the Joint Request for Approval of Settlement will be admissible for any purpose in the hearing or any appeals arising therefrom.

4. Chandler agrees that she has been fairly and adequately represented and advised at all stages of these proceedings, that she is fully satisfied with the services of counsel and that she is voluntarily and without coercion with a full understanding of her rights and the ramifications of this Settlement Agreement entering into it on her own accord. Chandler fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

5. The signatory for the BOARD acknowledges that the BOARD has ratified this Settlement Agreement at a duly-noticed meeting and that the Governor of the State of New Jersey has indicated that he will not exercise his right to veto this Settlement Agreement pursuant to the Municipal Rehabilitation and Economic Recovery Act, *N.J.S.A.* 52:27BBB-64.

6. The parties further agree in consideration of this Settlement Agreement that if it is approved by the Commissioner, that they will not assert in any judicial or administrative proceeding that any statements concerning the reasons they believe this settlement is not inconsistent with the public's interest are admissions, admissions against interest or competent evidence of any fact.

DATED:

BY: Mae Chandler

MAE CHANDLER

SUMNERS GEORGE, P.C.
Attorneys for
Board of Education of the
City of Camden

BY: _____

HAROLD W. GEORGE

RESOLUTION
#99-SY '06
RESOLUTION OF THE CAMDEN CITY BOARD OF EDUCATION TO CONFIRM SETTLEMENT OF LITIGATION WITH MAE CHANDLER

WHEREAS, the Camden Board of Education ("the Board) and Mae Chandler have been involved in litigation; and

WHEREAS, the Board's Labor Counsel and representatives for Mae Chandler have been involved in negotiations to reach an amicable settlement in this matter; and

WHEREAS, the Board does not admit any liability in regard to the underlying action, entitled Mae Chandler v. the Camden Board of Education, OAL Docket No. EDUOA 08071-2003S, included by not limited to Petitioner's claim of reinstating employment increment or any other matters Ms. Chandler presently has before the Office of Administrative Law, or any other administrative agency or court; and

WHEREAS, both parties desire to settle this matter and dismiss, with prejudice and without an award of costs or attorneys' fees of the complaint filed in the matter; and

NOW, THEREFORE, BE IT RESOLVED, that the Board approves of this settlement with Ms. Chandler, and authorizes counsel to execute all documents pertaining thereto.

Adopted: January 29, 2007

#244-07

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OAL DKT. NO. EDU 4510-07
AGENCY DKT. NO. 164-6/07

D.G., ON BEHALF OF MINOR CHILD, A.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON, CAMDEN COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter and the recommended Order of the Office of Administrative Law (OAL), denying petitioner's application for emergent relief, have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon review, the Assistant Commissioner concurs with the Administrative Law Judge that petitioner has failed to meet the established criteria for grant of emergent relief, particularly with respect to the likelihood of prevailing on the merits of this claim at plenary hearing. *Crowe v. DeGioia, supra*; *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL is adopted for the reasons expressed therein. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[1]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6-14-07
Date of ~~Mailing~~ Faxing: 6-14-07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 4510-07
AGENCY DKT. NO. 164-6/07

D.G. o/b/o A.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON,
Respondents.

David Alan Klein, Esq., for petitioners

Ronald Sahli, Esq., for respondent

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

STATEMENT OF THE CASE

This case concerns whether respondent Board of Education of the Borough of Barrington (BOE) properly suspended petitioner A.L., an eighth grade student, from the BOE's middle school and whether the BOE may bar A.L. from participating in his class's graduation ceremony tonight.

The case can be summarized. Recently, A.L. pleaded guilty to juvenile delinquency by

engaging in an act that, had he been an adult, would constitute harassment relative to a fellow student in violation of N.J.S.A. 2C:33-4(a.). Based on a report of the incident, the BOE suspended A.L. from school and notified petitioners that it would bar him from participating in the graduation ceremony tonight. Procedurally, petitioners contend that the BOE did not comply with A.L.'s due process rights by conducting a hearing before it determined that it should so suspend and so bar him. Substantively, petitioners allege that the incident was minor and that A.L., who has no prior history of danger to himself or others, is not a threat to anyone from school and they submit that the BOE has no reasonable basis for its determinations. The petitioners move for an order granting emergent relief, vacating the BOE's determinations and allowing A.L. to participate in the graduation ceremony. The BOE alleges that its actions are consistent with the parties' agreement before resolution of the juvenile case and the BOE submits that, given A.L.'s plea of guilt to the harassment, its actions should not be upset. See N.J.S.A. 18A:37-1, -2, -2.1, -2.4, -4, -5, -10.

PROCEDURAL HISTORY

On June 13, 2007, the petitioners' papers were filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case as a request for emergent relief to the Office of Administrative Law (OAL), where it was filed on June 13, 2007. N.J.S.A. 52:14B-2(b). On June 14, 2007, I heard the request for emergent relief.

FINDINGS OF FACT

A.L. is an eighth grade student in the BOE's middle school. He has a good relationship with his mother, father and stepfather; he has no prior record of relevant misconduct; and he has complied with all academic requirements for graduation tonight.

On or about May 8, 2007, in a public park in the Borough of Barrington, an incident occurred involving A.L. and other students in the BOE's school system. A.L. has alleged that M.W., a fellow student, assaulted him. No testimony from the participants in the incident was presented here, so I make no finding relative to this allegation. Petitioners have admitted that, after the alleged assault, A.L. uttered words to the effect that, if M.W. did not leave him alone, he

(A.L.) would get back at M.W. A.S., a fellow student overheard A.L.'s utterance and reported it to her grandparent who, on or about May 9, 2007, reported it to the BOE's school system. School officials contacted the police, who interviewed students, and A.L. was the subject of a Superior Court, Chancery Division, Family Part, juvenile case, charging that he had made a terroristic threat.

By letter dated, May 9, 2007, school administrators notified the petitioners that it was determined that A.L. had made a terroristic threat directed at fellow students, that he was suspended indefinitely, and that the BOE would provide homebound instruction. P-A.

By letter, dated May 11, 2007, school administrators notified the petitioners of the BOE's request that they appear for a BOE hearing on May 14, 2007, relative to the charge of terroristic threat, the ongoing police investigation, and the suspension. The letter also stated that the BOE would issue a written determination on the matter. P-B.

On May 14, 2007, the petitioners' attorney appeared before the BOE and a confidential discussion of the matter ensued. Petitioners' attorney has alleged that the parties agreed that the homebound instruction would continue and that they would await the outcome of the juvenile case.

By letter, dated May 15, 2007, school administrators notified the petitioners of the following: The BOE had resolved to continue the suspension, "pending the outcome of an investigation by appropriate law enforcement authorities." The BOE would continue to provide homebound instruction. A.L. would not participate in end-of-year school activities and commencement programs. A psychiatric evaluation must be performed prior to A.L.'s admission to school for the 2007-08 school year. P-C.

On June 4, 2007, the Camden County Prosecutor and petitioners entered into a plea agreement and appeared in the Superior Court, before the Honorable Charles Dortch, J.S.C., who entered a juvenile order, which provided the following: A.L. pleaded guilty to juvenile delinquency and conduct which, had he been an adult would constitute harassment, in violation of N.J.S.A. 2C:3-4(a.). He was placed on continued house arrest. He would submit to a

psychological evaluation and abide by all recommendations in that regard. He was on probation for six months. He would have "no contact with victim(s) or witnesses." He would be subject to a curfew of 5 p.m. on weekdays and 5 p.m. on weekends. He would "attend school with no unexcused absences or tardiness or cuts." He would have "no more trouble passing grades [and] no school [or] home problems." P-D.

After entry of the Superior Court order, the petitioners' attorney spoke with the assistant prosecutor assigned to the case and spoke to Loyola Garcia, Ed.D., superintendent of the BOE's school system, about whether A.L. could participate in the graduation ceremony. There are issues of fact relative to what exactly was stated between petitioners' attorney and Dr. Garcia. The petitioners' attorney represented that he understood that, given the dismissal of the terroristic threat charge, the BOE would allow A.L. to participate in the graduation ceremony. Dr. Garcia testified that she advised the petitioners' attorney that she needed to see documents showing what the court had ordered and that she communicated with the assistant prosecutor and a court official in an effort to determine what the court had ordered.

Dr. Garcia testified that, during the BOE's June 11, 2007 meeting, she reviewed the matter with the BOE and the BOE did not vacate its earlier determination that A.L. should be suspended. No notice was provided to the petitioners that the BOE would consider the matter at that meeting.

CONCLUSIONS OF LAW

It is well established that public school systems have authority to take actions, including suspension of students, in order to maintain a safe environment conducive to learning and that such suspension can be based on incidents which occurred away from school grounds and events. R.R. v. Bd. of Ed. of Shore Regional High School, 109 N.J. Super. 337, 343-44 (Ch. Div. 1970), citations omitted.

The Legislature, which has prohibited harassment and intimidation on school property, has identified causes for suspension of public school students and where public school officials have reason to believe that a student, because of actions after school hours and off of school

property, presents a danger to himself or others, the school system may temporarily suspend the student, pending a full hearing, which will afford the student procedural due process. N.J.S.A. 18A:37-2; R.R. v. Bd. of Ed. of Shore Regional High School, supra, 109 N.J. Super., at 344. In the case of a longer suspension, to satisfy due process, the school system must notify the student of the charge, allow the student to be confronted by and to cross-examine witnesses with evidence against him, and to present a defense. See, e.g., G.F. v. Board of Education of Washington Township, 1 N.J.A.R. 55 (EDU) (1980).

Here, the petitioners were aware of the basis of the suspension and, on June 4, 2007, A.L. pleaded guilty and admitted that he engaged in harassment relative to a fellow student, in violation of N.J.S.A. 2C:33-4(a.), which provides that harassment occurs when a person "[m]akes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm." Ibid.

To succeed in a motion for a temporary restraint and interlocutory injunction, the movant must show, among other things, that, when the case is fully heard, it will probably prevail in its claim and that, if the relief is not granted, it will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

Graduation ceremonies involve environments wherein people, young and old, are often pressed together in limited space and, alarming actions in such circumstances present an opportunity for chaos and harm.

Public entities, such as the BOE, are presumed to act lawfully and in good faith. Given the circumstances here, especially A.L.'s admission of the recent harassment, I do not see that the BOE's determinations can now be viewed as arbitrary, capricious or unreasonable or unlawful or in bad faith. I do not see that the petitioners have met their burden of demonstrating that, when the case is fully heard, they will probably prevail. I do not see that the petitioners have demonstrated that emergent relief should be ordered.

OAL DKT. NO. EDU 4510-07

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 14, 2007
DATE

JOHN R. TASSINI, ALJ

OAL DKT. NO. EDU 4510-07

EXHIBITS

For Petitioners:

P-1 Motion for Emergent Relief with Certification by D.G., June 13, 2007

P-A Letter from school system, May 9, 2007

P-B Letter from school system, May 11, 2007

P-C Letter from school system, May 15, 2007

P-D Superior Court, Ch. Div., Family Part, Juvenile Order, June 4, 2007

For Respondent:

none

WITNESSES

For Petitioners:

none

For Respondent:

Loyola Garcia, Ed.D.

245-07

245-07

OAL DKT. NO. EDU 4819-06
AGENCY DKT. NO. 212-6/06

LAURIE A. HALL,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, BOARD OF EDUCATION OF THE HENRY HUDSON REGIONAL SCHOOL DISTRICT, AND BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,

RESPONDENTS.

AND

OAL DKT. NO. EDU 6428-06
AGENCY DKT. NO. 257-7/06

LAURIE A. HALL,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with one modification. Insofar as both EDU4819-06 and EDU6428-06 have been resolved in one settlement document, the Commissioner hereby consolidates the two cases.

The petitions are hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07

Date of Mailing: 6/15/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 4819-06
AND EDU 6428-06
AGENCY DKT. NOS. 212-6/06
AND 257-7/06

LAURIE A. HALL,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ATLANTIC HIGHLANDS, BOARD OF EDUCATION OF THE HENRY HUDSON REGIONAL SCHOOL DISTRICT AND BOARD OF EDUCATION FO THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,

Respondents.

Wayne J. Oppito, Esq., for petitioner

Michael J. Gross, Esq., for respondents Atlantic Highlands Board of Education and Highlands Borough Board of Education (Kenney, Gross, Kovats & Parton, attorneys)

R. Armen McOmber, Esq., for respondent Henry Hudson Regional School District (McOmber & McOmber, attorneys)

Record Closed: May 3, 2007 Decided: May 4, 2007

BEFORE **ISRAEL D. DUBIN,** ALJ:

These matters were transmitted to the Office of Administrative Law on July 19, 2006 and August 31, 2006, respectively, for determination as contested cases, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 4, 2007
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

MAY 11 2007
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

SETTLEMENT AGREEMENT

Between

MS. LAURIE A. HALL

and

BOARD OF EDUCATION OF BOROUGH OF ATLANTIC HIGHLANDS, BOARD OF EDUCATION OF HENRY HUDSON REGIONAL SCHOOL DISTRICT AND BOARD OF EDUCATION OF BOROUGH OF HIGHLANDS, MONMOUTH COUNTY

RECEIVED
2007 MAY -3 P 12:
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The parties agree as follows:

1. The Atlantic Highlands Board of Education shall compensate Laurie Hall in the amount of $4,000.00, $2,000.00 payable on or about the time the settlement agreement is executed and $2,000.00 on or about July 1, 2007.

2. The two petitions, OAL Docket Numbers EDUOA 04819-2006S and EDUOA 06428-2006S will be withdrawn with prejudice.

3. MUTUAL RELEASES - For their obligations pursuant to this Agreement, the parties hereby release and discharge each other and any and all of former and current trustees, directors, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which the parties may have had, now as or past had for any reason whatsoever on account or arising out of or in consequences of employment relationship amongst the Boards and Ms. Hall.

4. This is the total agreement and understanding of the parties.

Laurie A. Hall
Petitioner

For the Atlantic Highlands
Board of Education

Wayne J. Oppito, Esq.
Attorney for Petitioner

R. Armen McOmber, Esq.
Attorney for Atlantic Highlands
Board of Education

R. Armen McOmber, Esq.
Attorney For the Henry Hudson
Regional Board of Education
As To Form Only

Michael J. Gross, Esq.
Attorney for the Highlands
Board of Education
As To Form Only

246-07

OAL DKT. NO. EDU 7630-06 AND 1425-06 (CONSOLIDATED)
AGENCY DKT. NOS. 188-5/06 AND 374-12/05

SCOTT POWELL,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG,	:	COMMISSIONER OF EDUCATION
WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
AND		
IN THE MATTER OF THE TENURE HEARING OF SCOTT POWELL,	:	
SCHOOL DISTRICT OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY.	:	

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

Upon such review, the Commissioner cannot be satisfied – as she must be in order to meet her obligation to the schools and children of New Jersey – that the proposed agreement meets the established standard for settlement of tenure matters, as set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and *N.J.A.C.* 6A:3-5.6.

In the instant matter, the tenure charges filed against respondent – which substantially center on inappropriate behavior toward, and touching of, special education students in a longstanding pattern of conduct judged likely to recur – are such that the Commissioner cannot approve a settlement that leaves the Board's allegations unadjudicated unless she can be certain that

respondent will no longer be able to work in New Jersey schools or present himself for any type of employment – in New Jersey or elsewhere – as an educator duly licensed by the State. As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County*, decided September 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that the terms of a proposed settlement in a tenure hearing matter call for the teaching staff member's resignation or retirement does not in and of itself assure that the *Cardonick* standards have been met, since the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.

In the present instance, the Commissioner is not unmindful of the settlement term providing that respondent "will never again teach in any public, private, pre/nursery, elementary, secondary, and (sic) post-secondary school located within the State of New Jersey" and that he will immediately surrender his teaching certificate and refund all settlement monies paid by the Board "in the event he attempts to, or teaches in, a school within the State of New Jersey" (Settlement Agreement at 5, Term No. 12). However, the Commissioner observes that: 1) it is unclear how respondent's compliance with such a provision could realistically be monitored or enforced; and 2) respondent expressly retains the right to represent himself as the holder of a certificate in good standing issued by the State Board of Examiners (*Ibid.*), while potential employers will be told upon inquiring of the district only that respondent "voluntarily filed for retirement from employment (*Id.* at 8, Term No. 19). Under these conditions – particularly where the settlement's only real benefit to the Board and public is avoidance of the uncertainty, expense, disruption and threat of future litigation that nearly always accompanies tenure proceedings centered on charges of

unbecoming conduct toward students[1] – the Commissioner cannot find that the agreement in its present form is consistent with the standards of *Cardonick, supra*, notwithstanding its acknowledgement that the Commissioner may refer the matter to the State Board of Examiners for possible suspension or revocation of respondent's certificate.[2] Rather, in the Commissioner's view, the minimum necessary condition for settlement of this matter is the relinquishment by respondent, pursuant to *N.J.A.C.* 6A:9-17.11, of all certificates issued to him by the Board of Examiners.

Accordingly, while not precluding the possibility of settlement in light of respondent's circumstances as set forth in the Settlement Agreement, the Commissioner rejects the Initial Decision of the OAL approving the proposed settlement, and directs instead that this matter be remanded for such further proceedings as are necessary to address the concerns expressed herein. If the parties are unwilling or unable to agree on an appropriately modified agreement,[3] the matter shall then proceed to plenary hearing.

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07

Date of Mailing: 6/15/07

[1] It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986.

[2] In this regard, it is noted that the Board would be obliged to cooperate fully with the Board of Examiners in any hearing held to suspend or revoke respondent's certificate, thus obviating in significant part the benefits of settlement claimed by the Board (Settlement Agreement at 2).

[3] The record must additionally evidence the clear approval of any such agreement by the Board of Education, either by signature of the Board Attorney on the agreement itself or inclusion in the record of the Board resolution approving settlement.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

SCOTT POWELL
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY,
Respondent.

OAL DKT. NO. EDU 07630-06
AGENCY DKT. NO. 188-5/06 &

IN THE MATTER OF THE TENURE HEARING OF SCOTT POWELL, LOPATCONG TOWNSHIP BOARD OF EDUCATION, WARREN COUNTY,

OAL DKT NO. EDU 01425-06
AGENCY DKT NO. 374-12/05

CONSOLIDATED

John B. Comegno, II, Esq., on behalf of petitioner
(Comegno Law Group, LLC.)

Sheldon Pincus, Esq., on behalf of respondent
(Bucceri & Pincus, attys)

Record Closed: April 26, 2007 Decided: May 2, 2007

BEFORE: **CARIDAD F. RIGO,** ALJ

On January 19, 2006, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Several hearings and telephone conferences were conducted.

On April 26, 2007 the parties prepared and submitted the attached settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

May 2, 2007
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 5-8-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

COMEGNO
LAW GROUP, P.C.

JOHN B. COMEGNO, ESQUIRE
MEMBER NJ AND PA BARS

521 PLEASANT VALLEY AVENUE
MOORESTOWN, NJ 08057
888.313.IDEA
856.234.4114
856.234.4262 FAX
COMEGNOLAW.COM

April 25, 2007

FEDERAL EXPRESS

Honorable Caridad Rigo, A.L.J.
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, NJ 07102-3011

2007 APR 26 A 10:12
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Re: In the Matter of the Tenure Charges Against Scott Powell, Lopatcong Township Board of Education
Agency Reference No. 374-12/05
OAL Docket No. EDUTH 01425-2006N

Dear Judge Rigo:

As the Court is aware, we represent Petitioner, Lopatcong Township Board of Education (the "Board"), in the above tenure charge matter.

We are very pleased to enclose a fully executed Settlement Agreement in the action, and would ask that you kindly review same, and if appropriate, incorporate into an initial decision.

On behalf of both parties, we would like to thank Your Honor for your assistance and courtesies in resolving this matter. I am available if Your Honor has any questions.

Respectfully submitted,

JOHN B. COMEGNO II

JBC/dm
c: Sheldon H. Pincus, Esquire (fax and mail, w/out enc.)
Dr. Michael A. Rossi, Jr., Ph.D., Superintendent (mail, w/out enc.)
Teresa E. Barna, Business Administrator

SETTLEMENT AGREEMENT

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2007 APR 26 A 10:42
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

This Agreement is made this 1st day of April, 2007 by and between Scott Powell (hereinafter "Powell"), who resides at 220 Fillmore Street, Philipsburg, New Jersey 08865, and the Lopatcong Township Board of Education, with its principal offices located at 263 Route 57, Phillipsburg, New Jersey 08865 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Powell has been employed by the Board since the 1980-1981 school year and has obtained tenure under his instructional certificate; and

WHEREAS, on December 13, 2005, the Board certified tenure charges of unbecoming conduct and other just cause against Powell and determined to suspend him without pay for a period of 120 days (86 working days), in accordance with *N.J.S.A.* 18A:6-14, pending a determination of the charges pursuant to the Tenure Employee Hearing Law, *N.J.S.A.* 18A:6-10 et seq.; and

WHEREAS, on April 25, 2006, the Board acted to withhold Powell's salary increments for the 2006-2007 school year; and

WHEREAS, on or about December 28, 2005, Powell filed an Answer and Affirmative Defenses denying the tenure charges; requesting dismissal thereof; and further requesting an order of reinstatement to his tenured position; and

WHEREAS, on May 24, 2006, Powell filed a Verified Petition of Appeal contesting the withholding of his salary and adjustment increments for 2006-2007; and

WHEREAS, the Commissioner of Education thereafter determined that the aforementioned matters were contested cases and should be transferred to the Office of Administrative Law for hearings; and

WHEREAS, thereafter the said matters were consolidated for hearing by Order of the Honorable Caridad F. Rigo, A.L.J. filed on August 24, 2006; and hearings scheduled to commence on January 3, 2007 and to continue thereafter on various dates scheduled in the months thereafter;

WHEREAS, the Board has been advised that one (1) of Powell's three (3) children has, and will continue to suffer from, a form of terminal cancer that requires a substantial expenditure of family time and resources that is necessary to provide for the child's care and treatment; and that notwithstanding Powell's determination and intention to fully contest the tenure charges and/or the withholding of his increments, Powell has determined that, based on these family matters, it is both necessary and prudent for him to pursue an early retirement that is now available to him as a member of the New Jersey Teachers' Pension and Annuity Fund; and

WHEREAS, after completion of discovery and a full investigation of the facts through available witnesses, and taking into account the uncertainty of litigation, the parties have concluded that their respective positions can best be addressed through a settlement agreement; and

WHEREAS, the terms of settlement take into account the public interest and that the litigation of these tenure charges would cause disruption to the educational program in the district due to the absence of administrators, teachers and students who will have to testify at the hearings; and that the Board will incur substantial financial costs to continue the litigation, including the salary that Powell will continue to receive until a decision is rendered by the Commissioner of Education; and

WHEREAS, it will be cost effective to negotiate a settlement which would enable the parties to effectuate a mutually acceptable decision on Powell's employment in the District; and

WHEREAS, both the Board and Powell desire to enter into a Settlement Agreement that stipulates the terms of his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of General Releases of any and all claims which the patties may have against the other arising from Powell's employment or otherwise;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Powell agrees to sign an irrevocable letter of resignation due to retirement from all employment with the Board effective at the close of business on October 31, 2007. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be expressly conditioned upon the Board's compliance with this Separation of Employment Agreement and the approval of this Agreement by the Board, the Office of Administrative Law and the Commissioner of Education. The letter of resignation shall be null and void if the terms of the Separation of Employment Agreement are not met or if the required approvals of the Agreement by the Board, the Office of Administrative Law and the Commissioner of Education are not granted. In that event, the parties reserve all respective rights. The resignation is otherwise irrevocable. The Board waives all statutory, regulatory, or contractual claims for notification of Powell's resignation, other than notice as provided herein.

2. The Board, by resolution, will approve and accept the resignation of Powell at its next regularly scheduled meeting, effective the close of business on October 31, 2007.

3. Powell hereby requests a leave of absence with pay commencing the date this Agreement is approved by the Commissioner of Education and ending on October 31, 2007. The form of Powell's letter requesting a leave of absence with pay is attached hereto as Exhibit B.

4. The Board, by resolution, will approve and accept Powell's requested leave of absence with pay commencing the date this Agreement is approved by the Commissioner of Education and ending October 31, 2007.

5. The Board agrees that it will repay to Powell the 86 days of salary that it withheld from him pursuant to *N.J.S.A.* 18A:6-14. The parties stipulate and agree that the gross sum due to Powell for reimbursement of these days is Twenty Nine Thousand, five hundred Dollars and fifty-eight cents ($29,500.58). The Board shall further direct that all salary and pension records be amended to reflect that the restored salary is made part of the base salary for Powell for the 2005-2006 school year.

Powell shall be solely responsible for the reimbursement of any unemployment compensation or benefits he received during this period and for which he is required to repay.

6. The Board agrees that it will restore and repay to Powell the salary and adjustment increment that it withheld from him for the 2006-2007 school year. The parties stipulate and agree that the gross sum due to Powell for the restored increment is Two Thousand Five Hundred Twenty Seven Dollars ($2,527). The Board shall further direct that all salary and pension records be amended to reflect that the restored increment is made part of the base salary for Powell for the 2006-2007 school year.

7. Based on the required amendment of salary and pension records required by Paragraphs 5 and 6, the parties stipulate that Powell's base salary for the 2005-2006 is Sixty Eight Thousand, Six Hundred Six Dollars ($68,606); and, for 2006-2007, it is Seventy One Thousand, One Hundred Thirty Three Dollars ($71,133).

8. The gross sums due in accordance with Paragraphs 5 and 6, shall be paid by the Board to Powell, net of applicable taxes and the usual and customary deductions (including

pension), within thirty (30) days of approval of this settlement agreement by the Commissioner of Education.

9. Throughout the two month period of September 1, 2007 - October 31, 2007, Powell shall be paid two months' salary for the 2007-2008 school year. The parties stipulate that the Powell's 2007-2008 salary rate is Seventy Three Thousand Five Hundred Dollars ($73,770). Powell shall receive two months of salary paid to Powell in the normal course of business, net of applicable taxes and the usual and customary deductions (including pension).

10. From the present time and until October 31, 2007, the Board shall continue to provide Powell all of the medical, prescription and dental insurance coverage(s) that it is presently provided to Powell and other teaching staff members under the collective negotiations agreement between the Board and the Lopatcong Education Association.

11. As a condition of Powell's retirement, the Board agrees that it will pay Powell a lump sum longevity payment that is required to be paid under Article XVII of the collective negotiations agreement between the Board and the Lopatcong Education Association. The parties stipulate the lump sum amount required to be paid to Powell is Eleven Thousand, Seven Hundred Dollars ($11,700). Powell acknowledges that the lump sum payment will not be paid outright to him, but instead credited to a Section 403B account that must be established by him with the Board and/or Section 403B Custodian before the sum may be credited.

12. Powell agrees that he is permanently retiring and will never again teach in any public, private, pre/nursery, elementary, secondary, and post-secondary school located within the State of New Jersey. Powell agrees that in the event he attempts to, or teaches in, a school within the State of New Jersey, he is obligated to immediately surrender his teaching certificate and immediately repay all payments made hereunder to the Board. Notwithstanding this agreement,

the Board agrees that it is not requesting that Powell voluntarily relinquish his teaching certificate inasmuch as the parties expressly recognize that the certificate is a valuable credential in the event that Powell ever determines to pursue non-teaching employment in the future.

13. The Board agrees that the Tenure Charges in this matter bearing Agency Docket No. 374/12/05 and O.A.L. Dkt. No. EDUTH 0145-2006N shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education, and the terms of this agreement.

14. Powell agrees that the Verified Petition of Appeal in this matter bearing Agency Docket No. 188-5/06 and O.A.L. Dkt. No. EDUOR 07630-2006N shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

15. Powell's entry into this Settlement Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on his part.

16. Powell waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that Powell shall not, as of the effective date of his resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

17. In consideration of the above, Powell agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board ("Releasees"), past, present and future; of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims seeking employment or reemployment with the Board, claims for contributions and/or in tort, contract, by statute, or

on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board.

Notwithstanding the signing of the release by Powell, the Board shall remain obligated, to the extent required by law, to indemnify Powell against claims of third parties arising on or prior to October 31, 2007 pursuant to *N.J.S.A.* 18A:16-6 and 6.1, if applicable.

18. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Powell from any and all claims which it may have against Powell. It specifically releases Powell from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency (including the filing and/or certification of tenure charges under the N.J. Tenure Employees' Hearing Law), or any other federal or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or

cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

19. In accordance with Executive Orders Nos. 9 and 11 and Trenton Times Corp. v. Bd. of Ed. of Trenton, 138 N.J. Super. 357 (App. Div. 1976) the parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Powell shall be channeled solely to the Superintendent of Schools, Dr. Michael A. Rossi, Jr. or the then current Superintendent of Schools. Responses to such inquiries shall be limited to providing the dates of Powell's employment, his position, his salary, and for the reason for separation, stating only that Powell voluntarily filed for retirement from employment on October 31, 2007.

20. The parties acknowledge that this Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval. In the event that the Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Agreement shall be null and void and shall not be evidential or used by either party in any proceeding involving any party to this Agreement. In addition, the parties shall return to the same positions which they held prior to this Agreement, and all rights are reserved in such event.

21. Powell acknowledges that, notwithstanding his entry into this Agreement, the Commissioner of Education may undertake to refer this matter to the New Jersey State Board of Examiners for action concerning his teaching certificate as it deems appropriate.

22. The Board and Powell agree that Powell shall be provided a mutually convenient opportunity to obtain whatever personal belongings of his remain within the school district, as well as to return any district materials that Powell has in his possession.

23. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

24. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. This shall include cooperation in filling out and submitting in timely fashion any documents related to Powell's application for early retirement effective November 1, 2007. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

25. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

26. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

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

terms. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

28. All terms of this Settlement Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

29. This Settlement Agreement incorporates and settles all claims and disputes which may exist between Powell and the Board arising from his employment or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Powell and Powell's separation from employment.IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Rebecca Powell
Witness
Rebecca Powell
Dated: 4/15/2007

Scott D. Powell
Scott Powell
Dated: 4/1/07 Scott D. Powell

Teresa E. Barna
Board Secretary/Administrator
Teresa E. Barna
Dated: 4-24-07

Ernest D. Gallant
Board President
Ernest Gallant
Dated: 4-24-07

EXHIBIT A

SCOTT POWELL
220 Fillmore Street
Phillipsburg, New Jersey 08865

April 1st, 2007

_____, Board President
Lopatcong Township Board of Education
263 Route 57
Phillipsburg, New Jersey 08865

Re: Letter of Resignation

Dear.

Pursuant to the terms of the Settlement Agreement between the Lopatcong Township Board of Education and myself, I hereby submit my irrevocable resignation from the position of Teacher, effective the close of business on October 31, 2007 and due to my retirement effective November 1, 2007. This resignation is expressly conditioned upon the approval of the Settlement Agreement by the Office of Administrative Law and the Commissioner of Education; and, the Board's compliance with the terms of the parties' Separation of Employment Agreement and the general releases contained therein; and, is of no force and effect, even if accepted, unless said Settlement Agreement and the general releases contained therein which I have executed are fully performed by the Board.

Sincerely,

Scott P. Powell
Scott Powell

Exhibit B

SCOTT POWELL
220 Fillmore Street
Phillipsburg, New Jersey 08865

April 1st, 2007

_____, Board President
Lopatcong Township Board of Education
263 Route 57
Phillipsburg, New Jersey 08865

Re: Letter Requesting Leave of Absence

Dear:

Pursuant to the terms of the Settlement Agreement between the Lopatcong Township Board of Education and myself, I hereby request that I be granted a leave of absence with pay according to the terms of the Agreement, dated April 1st, 2007. I request that this leave begin effective the date that the Agreement is approved by the Commissioner of Education and end on October 31, 2007.

Sincerely,

Scott D. Powell
Scott Powell

247-07

247-07E

OAL DKT. NO. EDU 5790-07
AGENCY DKT. NO. 139-5/07

O.E., on behalf of minor child, A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,	:	DECISION ON
	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law on June 8, 2007, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ's determination that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably, irreparable harm. As set forth in the ALJ's oral decision from the bench, during the period of his suspension A.E. has received instruction in each of his academic courses; there has been no showing that he is academically disadvantaged, and the school year is scheduled to end on June 15, 2007.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits as contemplated by the ALJ and the parties.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07

Date of Mailing: 6/15/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF

OAL Docket No.: EDU 05790-07
Agency Docket No.: 139-5/07

O.E. o/b/o A.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY.

Respondent.

O.E., pro se, o/b/o minor child **A.E.**, petitioner

Walter M. Slomienski, Jr., Esq., representing Board of Education of the Borough of Wallington, Bergen County

BEFORE:**IMRE KARASZEGI, J.R.**, ALJ

Petitioner brings this action seeking emergency relief under N.J.A.C. 6A:3-1 et seq. regarding the Board of Education of the Borough of Wallington, Bergen County, decision to suspend A.E., a minor child, from regular classroom study.

On May 25, 2007, the Commissioner of Education received Petitioner's application for emergent relief. On June 4, 2007, the Commissioner of Education transmitted the matter to the Office of Administrative Law where it was filed as a contested case. On June 8, 2007, oral argument was presented in the Newark offices of the Office of Administrative Law.

The standards for the granting of emergency relief are set forth in N.J.A.C. 6A:3-1.6(b). It may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In the instant case, after hearing the arguments of petitioner and counsel for the Wallington Board of Education and considering any other documentation submitted, I find that petitioner is not entitled to emergent relief because no proofs have been submitted that would establish irreparable harm as a necessary element to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Petitioner's motion for emergent relief is therefore **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order

shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Date: June 8, 2007

IMRE KARASZEGI, JR., ALJ

cml

248-07

#248-07E

OAL DKT. NO. EDU 4509-07
AGENCY DKT. NO. 163-6/07

CHASEN BYNUM-GRANTHAM,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF TRUSTEES OF THE CHARTER TECH HIGH SCHOOL FOR THE PERFORMING ARTS, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6, particularly with respect to his likelihood of prevailing on the merits of his claim at plenary hearing. The Commissioner further concurs that, because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and the matter is appropriately dismissed.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief and dismissing the Petition of Appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07

Date of Mailing: 6/15/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 4509-07

AGENCY DKT. NO. 163-6/07

CHASEN BYNUM-GRANTHAM.,

Petitioner,

v.

CHARTER TECH HIGH SCHOOL FOR THE PERFORMING ARTS,

Respondent.

Chasen Bynum-Grantham, petitioner, pro se

Richard A. Carlucci, Esq., for respondent (Griffith and Carlucci, attorneys)

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 6, 2007, petitioner learned that he was required to obtain a 95 on his Physics final examination in order to pass the course. Unfortunately, he received a 67. Since he has not passed Physics, he has only ten credits in science instead of the fifteen credits required in science for graduation from high school under N.J.A.C. 6A:8-5.1(a)(3). As a result, the respondent has determined that he may not participate in the graduation ceremonies. Mr. Bynum-Grantham petitioned the Commissioner of Education for emergent relief and the matter was transferred to the Office of

Administrative Law. A hearing was held on June 15, 2007. Graduation is scheduled for 6:30 p.m. on June 15, 2007.

The Board has presented documentary evidence that Mr. Bynum-Grantham failed to pass Physics. His teacher, William J. Murray, has provided a letter dated June 14, 2007, indicating that he failed the course with a grade of 67. The Board has not presented any evidence that it has a written policy regarding who may participate in the graduation ceremonies. Mr. Bynum-Grantham has presented interim progress reports from May 16, 2007, and June 3, 2007, indicating that, at the time, he had a C or higher in the Physics course. Nevertheless, Mr. Bynum-Grantham advised that he was told on Wednesday, June 6, 2007, that he needed to obtain a 95 on his final exam in order to pass the course. While he does not specifically contend that he in fact did pass and therefore is entitled to receive the credits to the course and to graduate pursuant to the graduation requirements previously cited, nevertheless, he implores that he would like to participate in the graduation ceremony with his classmates, having worked very hard during his four years at the school and believing that, in some instances, his progress therein has been thwarted by others who have "sabotaged" his efforts. He feels he has "earned something" due to his efforts over his high school years.

APPLICABLE LAW

Petitioner carries the burden in seeking emergent relief. The standard is set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340 (1997). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

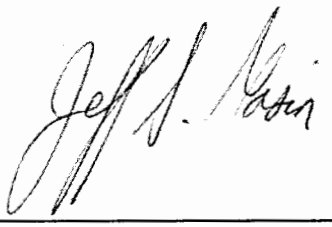
4. The relative hardship to the parties in granting or denying relief must be considered. Id. at 132-34.

The burden not only rest with petitioner to meet the emergent relief standards but petitioner also has the burden of proving unreasonableness for actions that are within the management's prerogative. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. Board decisions will not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." Ibid. Local boards of education have reasonable discretion for various managerial matters. For example, the Commissioner has held that the matters of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a `management prerogative' of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." Paddock v. Demarest Bor. Bd. of Educ., 1974 S.L.D., 435, 440; See also, Kopera v. Bd. of Educ. Tp. Of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

Petitioner has not met the aforementioned elements necessary for emergent relief. Fundamentally, the petitioner has failed to establish a preliminary showing that there is a reasonable likelihood that he could prevail on the merits of this case. The Board of Education is certainly not acting unreasonably in determining that those who are not eligible to graduate pursuant to State standards should not be permitted to participate in the graduation ceremony. While certainly the Board could make another decision and could make some provision for students otherwise in good standing to participate in some fashion in this ceremony, it would be difficult to conclude that there is a reasonable likelihood of success in establishing that failure to make such accommodation constitutes an unreasonable action on the part of the Board. Even without a written policy, the Board's decision can hardly be deemed arbitrary, and Mr. Bynum-Grantham had notice as to the grade he needed to obtain in order to graduate.

The very concept of a graduation ceremony implies that it is for those who are graduating. As such, since the Commissioner is loathe to interfere with the action of a local Board of Education unless it is arbitrary, capricious or unreasonable, it cannot be said that Mr. Bynum-Grantham has a reasonable likelihood of success in overturning the Board's action. While there may be some debate as to whether preventing a student from participating in a graduation ceremony constitutes sufficient psychic damage as to rise to the level of irreparable harm, in the end Mr. Bynum-Grantham's ability to obtain emergent relief is not established. Therefore, since I **CONCLUDE** that the Board's action is not unreasonable, and since there are no further issues to be resolved as the request for emergent relief is being heard just prior to the graduation ceremony for which relief is sought, I **CONCLUDE** that this contested case must be **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



June 15, 2007
DATE

JEFF MASIN, ALJ

/sd

APPENDIX

Documents in Evidence

For Petitioner:

P-1 Interim Progress Report, May 16, 2007

P-2 Interim Progress Report, June 3, 2007

For Respondent:

R-1 Letter from William J. Murray, June 14, 2007

R-2 Report Card, Marking Period 3

R-3 Transcript Data, June 13, 2007

Witnesses

For Petitioner:

Chasen Bynum-Grantham, petitioner, pro se

For Respondent:

None

ChARTer~TECH High School for the Performing Arts - Interim Progress Report

P-1 G. Le

CHASEN GR THAM	00002212	12	4
Student Name	ID Number	Grade	Marking Period

2006-2007	Mr. Erickson	9
School Year	Homeroom Teacher	Total Absent

SUBJECTS	TEACHER NAME	TEACHER COMMENTS
ENGLISH IV 1-2	FIORDIMONDO	
GEOMETRY (11)1B	MURRAY	Is presently in danger of failing.
H&PE IV 1A	HENRY	Is a pleasure to have in class.;Is presently earning a C or higher.
HISTORY TM 2-2	ERICKSON	Is a pleasure to have in class.;Is presently earning a C or higher.
MATH SKILLS 1-4	MURRAY	
PHYSICS 2-3	MURRAY	Is a pleasure to have in class.;Does not pay attention in class.;Is presently earning a C or higher.
TV IV 1-3	ROEHM	Is presently earning a C or higher.

	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
EXCUSED ABSENT	0	0	1	1	1	1	0	0	0	0
UN-EXCUSED ABSENT	0	0	2	0	0	1	2	0	0	0
EXCUSED TARDY	1	1	1	0	3	3	1	1	1	0
UN-EXCUSED TARDY	2	2	3	5	4	8	3	3	3	0

Came in Graduation Pkg.

05/16/2007

PARENT/GUARDIAN OF CHASEN GRANTHAM
259 NORFOLK AVENUE
EGG HARBOR CITY, NJ 08215

Please return the bottom to your homeroom by Monday, May 21, 2007. Final exam schedule is enclosed.

Parent Signature

CD

chARTer~TECH High School for the Performing Arts - Interim Progress Report

P-2 Erickson

CHASEN GRANTHAM	00002212	12	4
Student Name	ID Number	Grade	Marking Period

2006-2007	Mr. Erickson	11
School Year	Homeroom Teacher	Total Absent

SUBJECTS	TEACHER NAME	TEACHER COMMENTS
H&PE IV 1A	HENRY	Is a pleasure to have in class.;Is presently earning a C or higher.
GEOMETRY (11)1B	MURRAY	Is presently in danger of failing.
ENGLISH IV 1-2	FIORDIMONDO	
HISTORY TM 2-2	ERICKSON	Is a pleasure to have in class.;Is presently earning a C or higher.
TV IV 1-3	ROEHM	Is presently earning a C or higher.
PHYSICS 2-3	MURRAY	Is a pleasure to have in class.;Does not pay attention in class.;Is presently earning a C or higher.
MATH SKILLS 1-4	MURRAY	

	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
EXCUSED ABSENT	0	0	1	1	1	1	0	0	0	0
UN-EXCUSED ABSENT	0	0	2	0	0	1	2	0	2	0
EXCUSED TARDY	1	1	1	0	3	3	1	1	1	0
UN-EXCUSED TARDY	2	2	3	5	4	8	3	3	7	1

Given to me by Mr. Tebbs.

06/03/2007

PARENT/GUARDIAN OF CHASEN GRANTHAM
259 NORFOLK AVENUE
EGG HARBOR CITY, NJ 08215

Please return the bottom to your homeroom by Monday, May 21, 2007. Final exam schedule is enclosed.

Parent Signature

chARTer~TECH

High School for the Performing Arts

Report Card

CHASEN GRANTHAM	08002212	12	3
Student Name	ID Number	Grade	Marking Period

CHARTER TECH HIGH SCHOOL	MR. ERICKSON	04/17/2007
School	Homeroom Teacher	Issued

SUBJECT	TEACHER NAME	Semester One 1st Exam	2nd Exam	Semester Two 1st Exam	2nd Exam	Final	TEACHER COMMENTS
[illegible]	[illegible]	91	NR	85	78	NR	
Chemistry (1110)	[illegible]	74	NR	86	79	NR	
[illegible]	[illegible]	87	93	90	88		78
[illegible]	[illegible]				4	[illegible]	
[illegible]	[illegible]	72	NR	[illegible]	78	NR	
[illegible]	[illegible]						
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]

	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
EXCUSED ABSENT	2	6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
UN-EXCUSED ABSENT	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
EXCUSED TARDY	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Grading Scale

PARENT/GUARDIAN OF CHASEN GRANTHAM

[illegible] 04/15

R-1 Evidence

chARTer~TECH High School
for the Performing Arts
www.chartertech.org

Janice Strigh, Principal	JStrigh@chartertech.org	413 New Road
Arthur Tubbs, Vice Principal	ATubbs@chartertech.org	Somers Point, NJ 08244
Ann F. Garcia Ph.D., Business Administrator	AGarcia@chartertech.org	phone : 609-926-7694
Lewis London, Artistic Coordinator	LLondon@chartertech.org	fax: 609-926-8472

June 14, 2007

To Whom It May Concern:

This to verify that my student, Chasen Granthum, failed his physics course with a grade of 67 during semester 2 at chARTer~TECH High School.

Sincerely yours,

William J. Murray
Physics Teacher

R-8 Evidence

chARTer-TECH High School for the Performing Arts
413 New Road, Somers Point, NJ 08244 PH:609-926-7694 FAX:609-926-8472

Transcript Data

Personal Information

Date run: 6/13/07

Student: Chasen Grantham	**Student ID #:** 2212
Birthday: 5/25/89	
Address: 259 Norfolk Avenue	**Parents/Guardians:** Ms. Shirley Bynum
Egg Harbor City, NJ 08215	

Academic Information

Year 1

School year: 2003 - 2004
School Attended: chARTer-TECH High School
Grade: 9
Days Absent: 8
Days Tardy: 7
GPA: 1.733
Weighted GPA: 1.733
Class Rank: 29/59
Total Credits Awarded: 46

Course Name	Grade	Credits Awarded
Engl 9/1	77	5
Spanish	86	5
Health I/Physical Education I	86	5
World History	86	5
General Science	62	5
Pre Algebra	78	5
TV Production I	80	10
Spanish I (Summer School)	85	5
General Science (Sum Sch)	93	5

Year 2

School year: 2004 - 2005
School Attended: chARTer-TECH High School
Grade: 10
Days Absent: 12
Days Tardy: 14
GPA: 1.714
Weighted GPA: 1.714
Class Rank: 56/60
Total Credits Awarded: 40

Course Name	Grade	Credits Awarded
English II	77	5
Spanish II	89	5
Drivers Ed/Physical Ed II	87	5
US History I	77	5
Biology	71	5
Algebra I	70	5
TV Production II	70	10

Year 3

School year: 2005 - 2006
School Attended: chARTer-TECH High School
Grade: 11
Days Absent: 16
Days Tardy: 19
GPA: 1.875
Weighted GPA: 1.875
Class Rank: 48/64
Total Credits Awarded: 30

Course Name	Grade	Credits Awarded
Algebra II	0	5
Health II/Physical Ed II	80	5
Chemistry	78	5
English III	59	5
Geometry	0	5
Physics	0	5
TV Production III	0	10

Comment:

Year 4

School year: 2006 - 2007
School Attended: chARTer-TECH High School
Grade: 12
Days Absent:
Days Tardy:
GPA:
Weighted GPA:
Class Rank:
Total Credits Awarded:

Course Name	Grade	Credits Awarded
Geometry	71	5
Health IV/Physical Ed IV	88	5
Chemistry	75	5
English IV	72	5
US History II	83	5
Physics	67	5
TV Production IV	In progress	
English III (adult eve. schl)	D	5

Comments: CUM GPA: 1.780

Testing Data

Test	Score	Status
HSPA Language Arts:	236	Proficient
HSPA Mathematics:	216	Proficient

Transcript is unofficial unless stamped with school seal

Principal's Signature

248-07

#248-07E

OAL DKT. NO. EDU 4509-07
AGENCY DKT. NO. 163-6/07

CHASEN BYNUM-GRANTHAM,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION
BOARD OF TRUSTEES OF THE CHARTER TECH HIGH SCHOOL FOR THE PERFORMING ARTS, ATLANTIC COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6, particularly with respect to his likelihood of prevailing on the merits of his claim at plenary hearing. The Commissioner further concurs that, because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and the matter is appropriately dismissed.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief and dismissing the Petition of Appeal is adopted for the reasons expressed therein.

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07

Date of Mailing: 6/15/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 4509-07

AGENCY DKT. NO. 163-6/07

CHASEN BYNUM-GRANTHAM.,

Petitioner,

v.

CHARTER TECH HIGH SCHOOL FOR THE PERFORMING ARTS,

Respondent.

Chasen Bynum-Grantham, petitioner, pro se

Richard A. Carlucci, Esq., for respondent (Griffith and Carlucci, attorneys)

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 6, 2007, petitioner learned that he was required to obtain a 95 on his Physics final examination in order to pass the course. Unfortunately, he received a 67. Since he has not passed Physics, he has only ten credits in science instead of the fifteen credits required in science for graduation from high school under N.J.A.C. 6A:8-5.1(a)(3). As a result, the respondent has determined that he may not participate in the graduation ceremonies. Mr. Bynum-Grantham petitioned the Commissioner of Education for emergent relief and the matter was transferred to the Office of

Administrative Law. A hearing was held on June 15, 2007. Graduation is scheduled for 6:30 p.m. on June 15, 2007.

The Board has presented documentary evidence that Mr. Bynum-Grantham failed to pass Physics. His teacher, William J. Murray, has provided a letter dated June 14, 2007, indicating that he failed the course with a grade of 67. The Board has not presented any evidence that it has a written policy regarding who may participate in the graduation ceremonies. Mr. Bynum-Grantham has presented interim progress reports from May 16, 2007, and June 3, 2007, indicating that, at the time, he had a C or higher in the Physics course. Nevertheless, Mr. Bynum-Grantham advised that he was told on Wednesday, June 6, 2007, that he needed to obtain a 95 on his final exam in order to pass the course. While he does not specifically contend that he in fact did pass and therefore is entitled to receive the credits to the course and to graduate pursuant to the graduation requirements previously cited, nevertheless, he implores that he would like to participate in the graduation ceremony with his classmates, having worked very hard during his four years at the school and believing that, in some instances, his progress therein has been thwarted by others who have "sabotaged" his efforts. He feels he has "earned something" due to his efforts over his high school years.

APPLICABLE LAW

Petitioner carries the burden in seeking emergent relief. The standard is set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340 (1997). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

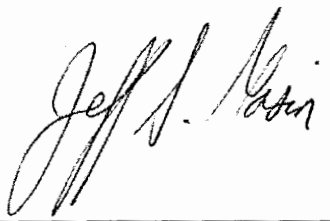
4. The relative hardship to the parties in granting or denying relief must be considered. Id. at 132-34.

The burden not only rest with petitioner to meet the emergent relief standards but petitioner also has the burden of proving unreasonableness for actions that are within the management's prerogative. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. Board decisions will not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." Ibid. Local boards of education have reasonable discretion for various managerial matters. For example, the Commissioner has held that the matters of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a `management prerogative' of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." Paddock v. Demarest Bor. Bd. of Educ., 1974 S.L.D., 435, 440; See also, Kopera v. Bd. of Educ. Tp. Of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

Petitioner has not met the aforementioned elements necessary for emergent relief. Fundamentally, the petitioner has failed to establish a preliminary showing that there is a reasonable likelihood that he could prevail on the merits of this case. The Board of Education is certainly not acting unreasonably in determining that those who are not eligible to graduate pursuant to State standards should not be permitted to participate in the graduation ceremony. While certainly the Board could make another decision and could make some provision for students otherwise in good standing to participate in some fashion in this ceremony, it would be difficult to conclude that there is a reasonable likelihood of success in establishing that failure to make such accommodation constitutes an unreasonable action on the part of the Board. Even without a written policy, the Board's decision can hardly be deemed arbitrary, and Mr. Bynum-Grantham had notice as to the grade he needed to obtain in order to graduate.

The very concept of a graduation ceremony implies that it is for those who are graduating. As such, since the Commissioner is loathe to interfere with the action of a local Board of Education unless it is arbitrary, capricious or unreasonable, it cannot be said that Mr. Bynum-Grantham has a reasonable likelihood of success in overturning the Board's action. While there may be some debate as to whether preventing a student from participating in a graduation ceremony constitutes sufficient psychic damage as to rise to the level of irreparable harm, in the end Mr. Bynum-Grantham's ability to obtain emergent relief is not established. Therefore, since I **CONCLUDE** that the Board's action is not unreasonable, and since there are no further issues to be resolved as the request for emergent relief is being heard just prior to the graduation ceremony for which relief is sought, I **CONCLUDE** that this contested case must be **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



June 15, 2007
DATE

JEFF MASIN, ALJ

/sd

APPENDIX

Documents in Evidence

For Petitioner:

P-1 Interim Progress Report, May 16, 2007

P-2 Interim Progress Report, June 3, 2007

For Respondent:

R-1 Letter from William J. Murray, June 14, 2007

R-2 Report Card, Marking Period 3

R-3 Transcript Data, June 13, 2007

Witnesses

For Petitioner:

Chasen Bynum-Grantham, petitioner, pro se

For Respondent:

None

ChARTer~TECH High School for the Performing Arts - Interim Progress Report

P-1 E.D.

CHASEN GRANTHAM	00002212	12	4
Student Name	ID Number	Grade	Marking Period

2006-2007	Mr. Erickson	9
School Year	Homeroom Teacher	Total Absent

SUBJECTS	TEACHER NAME	TEACHER COMMENTS
ENGLISH IV 1-2	FIORDIMONDO	
GEOMETRY (11)1B	MURRAY	Is presently in danger of failing.
H&PE IV 1A	HENRY	Is a pleasure to have in class.;Is presently earning a C or higher.
HISTORY TM 2-2	ERICKSON	Is a pleasure to have in class.;Is presently earning a C or higher.
MATH SKILLS 1-4	MURRAY	
PHYSICS 2-3	MURRAY	Is a pleasure to have in class.;Does not pay attention in class.;Is presently earning a C or higher.
TV IV 1-3	ROEHM	Is presently earning a C or higher.

	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
EXCUSED ABSENT	0	0	1	1	1	1	0	0	0	0
UN-EXCUSED ABSENT	0	0	2	0	0	1	2	0	0	0
EXCUSED TARDY	1	1	1	0	3	3	1	1	1	0
UN-EXCUSED TARDY	2	2	3	5	4	8	3	3	3	0

Came in Graduation Pkg.

05/16/2007

PARENT/GUARDIAN OF CHASEN GRANTHAM
259 NORFOLK AVENUE
EGG HARBOR CITY, NJ 08215

Please return the bottom to your homeroom by Monday, May 21, 2007. Final exam schedule is enclosed.

Parent Signature

CD

chARTer~TECH High School for the Performing Arts - Interim Progress Report

P-2 Evidence

CHASEN GRANTHAM	00002212	12	4
Student Name	ID Number	Grade	Marking Period

2006-2007	Mr. Erickson	11
School Year	Homeroom Teacher	Total Absent

SUBJECTS	TEACHER NAME	TEACHER COMMENTS
H&PE IV 1A	HENRY	Is a pleasure to have in class.;Is presently earning a C or higher.
GEOMETRY (11)1B	MURRAY	Is presently in danger of failing.
ENGLISH IV 1-2	FIORDIMONDO	
HISTORY TM 2-2	ERICKSON	Is a pleasure to have in class.;Is presently earning a C or higher.
TV IV 1-3	ROEHM	Is presently earning a C or higher.
PHYSICS 2-3	MURRAY	Is a pleasure to have in class.;Does not pay attention in class.;Is presently earning a C or higher.
MATH SKILLS 1-4	MURRAY	

	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
EXCUSED ABSENT	0	0	1	1	1	1	0	0	0	0
UN-EXCUSED ABSENT	0	0	2	0	0	1	2	0	2	0
EXCUSED TARDY	1	1	1	0	3	3	1	1	1	0
UN-EXCUSED TARDY	2	2	3	5	4	8	3	3	7	1

Given to me by Mr. Tebbs.

06/03/2007

PARENT/GUARDIAN OF CHASEN GRANTHAM
259 NORFOLK AVENUE
EGG HARBOR CITY, NJ 08215

Please return the bottom to your homeroom by Monday, May 21, 2007. Final exam schedule is enclosed.

Parent Signature

chARTer~TECH

High School for the Performing Arts

Report Card

CHASEN GRANTHAM	00002212	12	3
Student Name	ID Number	Grade	Marking Period

CHARTER TECH HIGH SCHOOL	MR. ERICKSON	04/17/2007
School	Homeroom Teacher	Issued

SUBJECT	TEACHER NAME	Semester One 1st Exam	2nd Exam	Exam	Semester Two 1st Exam	2nd Exam	Final	TEACHER COMMENTS
Algebra II	Henry	91	NR 91	92	78	NR		
Geometry (1110)	Wurms	74	NR 75	56	73	NR		
English II-2	Fernandez	57	93	80	86		72	
Biology II-2	Brooks				4	INC		
[illegible]	Rubin	77	NR 73	90	75	NR		
Physics 2	Burns				2	64		
[illegible]	[illegible]	89	NR 91	94			79	

	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
EXCUSED ABSENT	0	0						0	0	0
UN-EXCUSED ABSENT	0	0								0
EXCUSED TARDY										
[illegible]										

Grading Scale

PARENT/GUARDIAN OF CHASEN GRANTHAM

[illegible] 08/15

R-1 Evidence

chARTer~TECH High School
for the Performing Arts
www.chartertech.org

Janice Strigh, Principal	JStrigh@chartertech.org	413 New Road
Arthur Tubbs, Vice Principal	ATubbs@chartertech.org	Somers Point, NJ 08244
Ann F. Garcia Ph.D., Business Administrator	AGarcia@chartertech.org	phone : 609-926-7694
Lewis London, Artistic Coordinator	LLondon@chartertech.org	fax: 609-926-8472

June 14, 2007

To Whom It May Concern:

This to verify that my student, Chasen Granthum, failed his physics course with a grade of 67 during semester 2 at chARTer~TECH High School.

Sincerely yours,

William J. Murray
Physics Teacher

chARTer - TECH High School for the Performing Arts
413 New Road, Somers Point, NJ 08244 PH:609-926-7694 FAX:609-926-8472

Transcript Data

Personal Information

Date run: 6/13/07

Student: Chasen Grantham	**Student ID #:** 2212
Birthday: 5/25/89	
Address: 259 Norfolk Avenue	**Parents/Guardians:** Ms. Shirley Bynum
Egg Harbor City, NJ 08215	

Academic Information

Year 1

School year: 2003 - 2004
School Attended: chARTer-TECH High School
Grade: 9
Days Absent: 8
Days Tardy: 7
GPA: 1.750
Weighted GPA: 1.750
Class Rank: 29/56
Total Credits Awarded: 40

Course Name	Grade	Credits Awarded
English I	79	5
Spanish I	86	0
Health I/Physical Education I	86	5
World History	86	5
General Science	62	0
Pre Algebra	78	5
TV Production I	80	10
Spanish I (Summer School)	85	5
General Science (Sum Sch)	93	5

Year 2

School year: 2004 - 2005
School Attended: chARTer-TECH High School
Grade: 10
Days Absent: 12
Days Tardy: 14
GPA: 1.714
Weighted GPA: 1.714
Class Rank: 56/60
Total Credits Awarded: 40

Course Name	Grade	Credits Awarded
English II	77	5
Spanish II	80	5
Drivers Ed/Physical Ed II	87	5
US History I	77	5
Biology	71	5
Algebra I	70	5
TV Production II	70	10

Year 3

School year: 2005 - 2006
School Attended: chARTer-TECH High School
Grade: 11
Days Absent: 16
Days Tardy: 19
GPA: 1.875
Weighted GPA: 1.875
Class Rank: 48/64
Total Credits Awarded: 30

Course Name	Grade	Credits Awarded
Algebra II	70	5
Health II/Physical Ed II	93	5
Chemistry	67	5
English II	59	5
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
TV Production II	[illegible]	10

Comment:

Year 4

School year: 2006 - 2007
School Attended: chARTer-TECH High School
Grade: 12
Days Absent:
Days Tardy:
GPA:
Weighted GPA:
Class Rank:
Total Credits Awarded:

Course Name	Grade	Credits Awarded
Geometry	71	5
Health IV/Physical Ed IV	88	5
Macroeconomics	76	5
French IV	72	5
U.S. Government	83	5
History	67	5
TV Production V	In progress	
English II (adult eve. schl)	D	5

Comments: CUM GPA: 1.780

Testing Data

Test	Score	Status
HSPA Language Arts:	236	Proficient
HSPA Mathematics:	216	Proficient

Transcript is unofficial unless stamped with school seal

Principal's Signature

249-07

OAL DKT. NO. EDU 4507-07
AGENCY DKT. NO. 154-6/07

SEAN MC ANDREW,[1]	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6, particularly with respect to his likelihood of prevailing on the merits of his claim at plenary hearing.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons expressed therein. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/15/07
Date of Mailing: 6/15/07

[1] Because petitioner is legally an adult, it is unnecessary to refer to him by initials pursuant to N.J.A.C. 6A:3-1.3(a)1.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
Mercerville, New Jersey 08625
(609) 588-6532

Joseph Lavery
Administrative Law Judge t/a

VIA FAX TRANSMISSION

June 14, 2007

Lucille Davy
Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500 (fax: 609-292-4333)

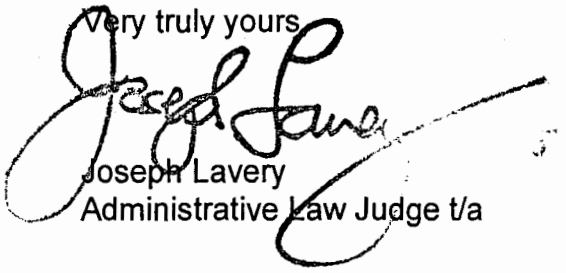
Attn: M. Kathleen Duncan, Director of Controversies & Disputes

RE: **S.Mc.A. V. BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY**
OAL DKT. NO. EDU 4507-07; AGENCY DKT.

Dear Commissioner Davy:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown, under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,



Joseph Lavery
Administrative Law Judge t/a

mph
c: Joseph Dochney, Esq. (fax: 732-244-1300)
Arthur Stein, Esq. (fax: 609-693-0121)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON EMERGENT RELIEF
OAL DKT. NO. EDU 4507-07
AGENCY DKT. NO. 154-6/07

S.Mc.A.,
Petitioner,
v.
BOARD OF EDUCATION OF LACEY TOWNSHIP,
Respondent.

Joseph Dochney, Esq., for petitioner

Arthur Stein, Esq., for respondent (Stein & Supsie, attorneys)

Record Closed: June 14, 2007 Decided: June 14, 2007

BEFORE **JOSEPH LAVERY,** ALJ t/a:

STATEMENT OF THE CASE

This is an appeal for emergent relief from a decision by the Board of Education, Lacey Township, prohibiting petitioner from participating in the graduation ceremony for the class of 2007, of which he is a graduating member.

Respondent Lacey Township Board of Education opposes the motion.

Today's order denies the emergent relief sought by petitioner, S.Mc.A

PROCEDURAL HISTORY

This matter was filed in the Office of Administrative Law by the agency on June 12, 2007, for hearing. The case convened for oral argument today, June 14, 2007, on which date the record closed and this initial decision issues.

ANALYSIS OF THE RECORD

Background:

Petitioner, S. McA., has been a student in the Lacey Township School System for thirteen years. During his attendance in high school, petitioner has been on the honor roll for four years, compiling a laudable academic record. Additionally, he has captained both the basketball and football teams, and has accrued numerous honors county and state-wide for his accomplishments. The high school principal and the supervisor of his elementary school have unreservedly supported his college applications with letters of recommendation.

In contrast to this admirable record is an event which occurred on April 1, 2007, while petitioner was driving his car at 1:22 a.m. At that time, petitioner was stopped by the Lacey Township Police, and issued a summons for violation of N.J.S.A 39:4-50 and 39:4-50.14 (driving while under age and intoxicated) N.J.S.A. 39:4-96 (reckless driving), and N.J.S.A. 39:4-81 (failure to observe traffic signal). The administrative disposition which followed this occurrence included a ten-day out-of-school suspension beginning on April 2, and a nine week co-curricular restriction, beginning on April 24. Proper measurement of the length of the suspension and of the restriction are in dispute. A

Board hearing attended by petitioner's parents, but not petitioner, was held on June 7, 2007.

What petitioner will be denied as a consequence, a denial from which he here seeks relief, is an opportunity to be honored with his classmates by participating in the public receipt of a diploma at the graduation ceremony for the entire Lacey Township High School Class of 2007. Petitioner's actual graduation will occur nonetheless on the same day.

Petitioner and respondent school district presented their arguments for and against emergent relief during today's oral argument.

Arguments of the Parties:

Petitioner's argument:

Without denying the error in judgment which has caused his predicament, petitioner asks that the acknowledged record of distinction in his studies and in his athletic achievements, together with his laudable personal history be taken into account. His accumulated background should ameliorate a penalty far in excess of what is reasonable, he argues, i.e., denial of graduation with those classmates who have been party to experiences which are the stuff of memories cherished life-long. Also relevant is his ready acknowledgement of wrongdoing already punished enough elsewhere, petitioner states.

As a matter of law, petitioner points out there is no distinction in the Student/Parent Handbook (Exh. J-5) between the method for calculating days for suspension and the measure for calculating days for co-curricular restriction. His suspension should therefore be measured in calendar days, with the result that completion of the nine-week co-curricular restriction would end before the graduation ceremony, allowing his inclusion therein. Any ambiguity in the language of rules and

handbooks should be resolved in favor of students. Further, petitioner believes he was denied due process at the Lacey Township Board of Education hearing because no notices were ever addressed to him. Thus, the matter should be remanded. Meanwhile, he should be allowed to graduate with his peers, petitioner insists.

Respondent Lacey Township Board of Education's argument :

Through its witness, Michael Adamski, the Principal of Lacey Township High School for fifteen years until 2005, submits that ten-day out-of-school suspensions are measured in school days. Nine week co-curricular restrictions would be measured in calendar days. A spring break therefore would stop the clock on a suspension, and resume it with the return to school. Mr. Adamski testified that this was his and the Board's unwavering interpretation during his tenure as principal.

The Board argues as a matter of law that emergent relief is not appropriate under Crowe v. DiGoia, 90 N.J. 126 (1982), contending that not all four prongs of its holding have been satisfied. Moreover, the Board's action is entitled to a presumption of correctness. It may be reversed by the Commissioner of Education only if the record compiled by the administrative law judge warrants a finding that the action was arbitrary, capricious and unreasonable. The Board cites numerous administrative cases upholding the need to maintain order and discipline, and affirming the equally important need to enforce rules uniformly so as to serve as a deterrent from future prohibited behavior. The Board is certain that its rules fall within these justifiable standards.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

To resolve disputes of material fact, I make the following **FINDINGS**:

1. The longstanding practice of the Lacey Township Board of Education since at least 1990 is to count ten-day out-of-school suspensions in school days, and to count restrictions from co-curricular activities in calendar days. This is the legislative intent and has been the consistent legislative interpretation of its rules (Exh. J-1) as well as of its handbook (Exh. J-5).
2. Petitioner's ten-day out-of school suspension ran from April 2 to through April 5 (four school days) and from April 16 through and including April 23 (six school days).
3. Petitioner, an adult of eighteen years now and on June 7, the date of the informal hearing, knew of the Lacey Township Board of Education meeting, but did not attend.

Conclusions of Law

There is no dispute that the applicable legal standard is well-settled in the law: The Board's action is entitled to a presumption of correctness, and its ruling may be overturned only if found to be arbitrary, capricious or unreasonable. Thomas v. Board of Education of the Twp. Of Morris, 89 N.J. Super. 327, 328 (App. Div. 1965), affirmed 46 N.J. 581 (1966). The affirmative showing required to cause this reversal is a heavy burden to carry, as the several cases cited in the Board's brief confirm. Especially pertinent here is the case, P.G., et al. v Board of Education of the Greater Harbor Regional High School District, OAL Dkt. No. EDU 4210-89 (June 9, 1989), adopted by the Commissioner of Education (student barred from graduation exercises for consumption of alcohol during school trip). For this reason, petitioner's case is not focused in the main on the power of the Board of Education to exclude a student from the graduation ceremony because of a DWI offense. All agree the power exists. It is the circumstances underlying the Board decision which petitioner maintains amount to fatal legal flaw, thus nullifying the Board's decision.

As noted above, most of the critical facts are not in dispute. The case turns on the proper calculation of the days in issue fixed by the Board for suspension and

restriction because of the DWI. These days represent the period during which petitioner's discipline may be imposed under Board rules, a fact not argued otherwise by the Board in this case.

1. The first contention of petitioner is that calculating the dates for the ten-day out-of school suspension should be consistent, and that both the suspension and the co-curricular restriction of nine weeks should be counted as calendar days. This, he maintains, fits the plain language of the Student/Parent Handbook (Exh. J-5) and the Discipline Rules of the Board, R 5600 (Exh. J-1).

The argument is not persuasive. The threshold of preponderating evidence required in administrative hearings [CITE] has been satisfied through the credible testimony of former Lacy Township High School principal Michael Adamski, who recalled that during his fifteen-year tenure through 2005, the measurement for out-of-school suspension was by school-day only. Under the preponderance standard, this may safely be accepted as the longstanding practice and interpretation to date, as well. With the suspension beginning April 2, 2007, and, excluding the spring break which began on April 6, 2007 and ended on April 16, 2007, this would end petitioner's nine-week co-curricular prohibition on June 26, 2007. This date is well beyond the graduation ceremony to be held tomorrow, June 15.

2. Second, petitioner asserts the existence of a gap in the ten-day suspension, which he contends should not have occurred. If this time were eliminated from consideration, he argues, his period of discipline, the sole bar to graduation ceremony, would have ended beforehand. In support, he cites the testimony of Michael Adamski, who recounted his own practice of never allowing a lapse of time between (a) the end of out-of school suspension with a principal's conference and (b) the onset of co-curricular restriction.

It must be held now that spring break was not a comparable "gap," any more than Thanksgiving, Columbus Day or winter break would be. The fact of spring break is

not disputed. The ten-day suspension beginning April 2 and measured by the number of in-school days forfeited, ended six *school* days *after* the break extending from April 6 to April 16, and the principal-student conference memorializing it's ending was on or about that date.

3. Third, petitioner insists that fundamental due process was violated. No written or verbal notice was provided petitioner, legally an adult of eighteen, that the appeal to the Board of Education by his parents was to convene on June 7. Accepting, arguendo, the testimony of petitioner and his father that all family members knew of the appeal date but were unaware petitioner could attend, petitioner's position still falls short. There has been no cited authority to offset the Board's legal position: ten-day out-of-school suspensions and nine-week co-curricular restrictions are not mandatory appeal issues for the Board. Consequently, the standard Lacy Township Board of Education practice of notifying parents only can still prevail as adequate notice.

Additionally, and in any event, possible due process flaws by the Board below are rectified in the Office of Administrative Law. Due process is conferred through opportunity for submission of evidence and argument before the administrative law judge, followed by decision from the Commissioner of Education. It would be absurd, in the legal sense, to grant the remedy sought, participation in graduation ceremonies (as petitioner suggests) and then return the appeal to the Board of Education for hearing on whether it was deserved.

4. Fourth and finally, the standard of Crowe v. DiGioa, supra, has not been satisfied. First, petitioner will not be irreparably harmed. He will graduate, and neither physical nor emotional damage requiring remedy is likely, nor have any such preponderating proofs been offered, other than through letters from petitioner's parents, to suggest otherwise. Second, all of petitioner's legal due process rights have been provided through this appeal opportunity. Third, given the admitted standards and case law conceded or cited above, there is small likelihood of success in any plenary hearing to follow this emergent proceeding. Fourth, the need to maintain discipline and to deter

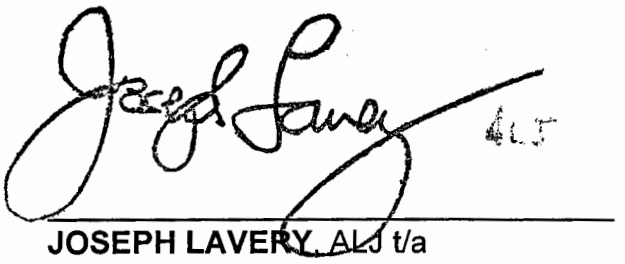
bad behavior through consistent imposition of penalties to accomplish these goals across-the-board within the school district more than outweighs in balance the inconvenience brought on by petitioner's admitted misstep.

For all these reasons, relief may not be granted.

ORDER

I ORDER, therefore under the above rationale that petitioner's motion for emergent relief be, and hereby is, **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



June 14, 2007
DATE

JOSEPH LAVERY, ALJ t/a

mph

APPENDIX

WITNESSES

For the Petitioner:

B. McA.

For the Respondent:

Michael Adamski

EXHIBITS

Joint Exhibits:

J-1 File forwarded from the Department of Education (61 pages)
J-2 Letter: William W. Zylinski, Principal to Mr. and Mrs. Mc.A.
J-3 Lacy Township Discipline Report : S. Mc.A.
J-4 Letter: Richard Starodub to Mr. and Mrs. Mc.A., dated June 11, 2007
J-5 Student/Parent Handbook, Lacey Township High School, 2006-07
J-6 Fax Cover Sheet: M. Kathleen Duncan to B. Mc.A., June 12, 2007

250-07

0AL DKT. NO. EDU 4508-07
AGENCY DKT. NO. 161-6/07

J.E., on behalf of minor child, A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY,	:	DECISION ON MOTION
OCEAN COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126, 132-34 (1982), and *N.J.A.C.* 6A:3-1.6, particularly with respect to the likelihood that petitioner will prevail on the merits.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons expressed therein. Because the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[1]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6-15-07

Date of ~~Mailing~~ Faxing: 6-15-07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 4508-07
AGENCY DKT. NO. 161-6/07

J.E., ON BEHALF OF MINOR CHILD, A.E.,
Petitioner,
v.
BOARD OF EDUCATION
OF LACEY TOWNSHIP,
OCEAN COUNTY,
Respondent.

Terry Brady, Esq., on behalf of petitioner (Mulvaney, Coronato & Brady, attorneys)

Arthur Stein, Esq., on behalf of respondent (Stein and Supsies, attorneys)

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 12, 2007, J.E. (petitioner) filed an application for emergent relief with the New Jersey Department of Education, Office of Special Education Programs. The application requested that A.E. be permitted to participate in graduation ceremonies schelеduled for Friday, June 15, 2007. The Lacey Board of Eduction (Board) suspended A.E. for ten days and prohibited her from participating in any extracurricular

activities for nine weeks as a result of A.E. being charged with driving under the influence of alcohol (DWI).

On June 13, 2007, the matter were transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief on June 15, 2007, at 9:00A.M. The case heard in the OAL, Trenton (Hamilton Township), and the record closed on that date.

STATEMENT OF FACTS

Some of the facts are undisputed. On May 19, 2007, A.E. was arrested and charged with driving under the influence of alcohol, (N.J.S.A. 39:4-50), refusing to submit to breath testing (N.J.S.A. 39:4-50.4a), underage drinking (N.J.S.A. 39:4-50.14), and failure to maintain a lane (N.J.S.A. 39:4-88). A.E. has entered pleas of not guilty to all charges, and her trial is scheduled for July 10, 2007.

According to the police report, the arresting officer smelled a strong odor of alcohol from A.E., and she admitted consuming alcohol, by admitting that she had "two sips of Malibu over a friend's house"(P-1). This has not been contradicted or disputed. The officer also wrote that A.E. failed the field sobriety tests (P-1)

The Lacey Township Policy 5600 provides in part:

> During the academic school year in cooperation with law enforcement officials, any student issued a summons or arrested for being under the influence, using, distributing, and/or possessing drugs, alcoholic beverages, or weapons off school ground will be subject to same penalties as if the action had taken place on school grounds. (R-3)

The first offense penalties include a ten-day out-of-school suspension, a nine week restriction on co-curricular activities for the equivalent of one marking period, which includes attendance and participation in graduation activities (R-2).

DISCUSSION OF THE LAW

A party seeking emergent relief must satisfy the standards in Crowe v. DeGioia, 90 N.J. 126 (1982), which requires the movant to establish:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

The Commissioner has consistently found that denial of attendance at graduation exercises does not constitute irreparable harm. The case law is remarkably consistent that attendance at graduation ceremonies is a privilege, not a right. That privilege may be withheld in the interest of maintaining an orderly and efficient school system. Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County, State Board of Education decision dated April 17, 1996, citing Camden City Board of Education v. NJSLAA, Docket #A-2802-91T2 (App. Div. 1992); Burnside et al. v. NJSIAA, 1984 S.L.D. 1695 (App. Div. 1984), cert. denied 101 N.J. 236 (1985). The determination of whether or not they may attend is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm. Denial of attendance at graduation exercises is, therefore, not irreparable harm.

I disagree

Local boards of education have been expressly charged with protecting the health, safety, and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294. The issue to be determined is whether the action of the Board and its policy to discipline a student based upon an arrest or charge is arbitrary and unreasonable.

Petitioner argues that an arrest standing alone cannot give rise to punishment. This may be true if the policy applied to a pending DWI charge only. Defenses could exist as to whether or not the individuals was under the influence .

However, this case involves underage drinking. Petitioner admitted in the police report she did consume alcohol beverages. The office smelled the odor of alcohol and opined that she failed the field tests. I **FIND** there is substantial evidence to conclude that A.E. consumed alcoholic beverages. The Board's actions were not solely based on the arrest, but the circumstances surrounding the arrest.

N.M. v. Bd of Education of Wall Twp., OAL Dkt. No. EDU 8895-01 (December 21, 2001), Adopted by the Commissioner of Education December 28, 2001, involved a similar situation. Several students, including N.M., were involved with the consumption or possession of alcoholic beverages in a private home, and N.M. was prevented from participating in extra-curricular activities.

The Board's disciplinary policy not only authorizes it to suspend a student for such conduct, but also renders the student ineligible to participate in any school activities. As a result, I **FIND** that Board's actions in applying its policy to prohibit A.E. from attending and participating in graduation ceremonies due to her conduct, no matter how regrettable and unfortunate this may be for her, cannot be disturbed. Consequently, I further **FIND** it unlikely that the petitioner would have prevailed on the merits.

As stated above, the actions of boards of education have a presumption of validity. A specific policy and punishment was established by the Board with respect to underage drinking and enumerated in the School Handbook. Based on these factors, I **FIND** that the petitioners did not meet their burden of proof that there is a legal right underlying the claim.

Clearly, the petitioner have a substantial interest in attending and marching in the processional at graduation. However, the Board also has a substantial interest in ensuring that its disciplinary policies are applied as to prevent underage drinking. If it did not enforce its disciplinary policies, or treat A.E. differently than other students in the school, the Board would be sending the wrong kind of message and possibly establishing a dangerous precedent. Consequently, I **FIND** that the Board will suffer greater harm than Petitioner if the requested relief is granted.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m)1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and all three petitioners have failed to satisfy any of the four requirements, I **CONCLUDE** that the Petitioner has failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the Petition of A.E. for emergent relief is **DENIED** without prejudice.

OAL DKT. NO. EDU 4508-07

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 15, 2007
DATE

DONALD J. STEIN, ALJ

/bdt

OAL DKT. NO. EDU 4508-07

LIST OF EXHIBITS

For petitioner:

P-1 Petition for Emergent Relief and Motion

For respondent:

R-1 Police Report

R-2 School Policy 5600

R-3 School Policy R5600

R-4 Respondent's Brief

R-5 Letter Brief

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAX TRANSMITTAL

Date: June 15, 2007

TELECOPIED TO:	**FAX NO.:**
Kathleen Duncan	609 292 4333
Terry Brody, Esq.	732 2401032
Arlene Stein	609 693 0121

FROM: ALJ Stein (Beth) **Office of Administrative Law**

PHONE NO.: 609 588-6533 **Trenton**

FAX NO.: 609 588-6574

There are 7 **pages to follow. If you do not receive all of the pages, please call the sender at the telephone number listed above. Thank you.**

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252-07

252-07

M.L., on behalf of minor children, S.L. and S.L., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner contested respondent Board's determination that her children, S.L. and S.L., were ineligible to attend West Orange Township schools. Petitioner asserted that the children spent the night in Irvington on nights when their father – from whom petitioner was separated – helped them with homework. Respondent alleged that S.L. and S.L. were domiciled in Irvington, and sought tuition reimbursement for the period of their ineligible attendance.

The ALJ found, *inter alia*, that: both children were domiciled in Irvington during the time they attended school for fifty-six days in West Orange; petitioner only intended to reside temporarily in West Orange until her family unit was reunited; and petitioner failed to demonstrate that her children were entitled to a free public education in the District's schools. Accordingly, the ALJ granted the Board's application for tuition reimbursement in the amount of $6,621.44 for S.L and S.L.'s ineligible attendance.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision as the final decision, and ordered petitioner to remit tuition to the West Orange Board of Education for the period from October 6, 2005 to January 10, 2006.

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

June 19, 2007

252-07

OAL DKT. NO. EDU 1122-06
AGENCY DKT. NO. 314-11/05

M.L., on behalf of minor children, S.L. and S.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon independent and careful review of the record in this matter, and according due deference to the Administrative Law Judge's (ALJ) credibility determinations,[1] the Commissioner agrees with the ALJ's conclusion that M.L. and her children, S.L. and S.L., were not domiciliaries of West Orange and, thus, the children were not entitled to a free public education in that District.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons set forth therein. Petitioner is directed to pay the Board $6,621.44 for her children's ineligible attendance in its schools during the period October 6, 2005 to January 10, 2006 and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/19/07

Date of Mailing: 6/19/07

[1] The Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner provides no cause for modification or rejection in this regard.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01122-06
AGENCY DKT. NO. 359-12/05

M. L. o/b/o MINOR CHILDREN, S.L. AND S.L.,
Petitioner,
v.
TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

M. L., petitioner, pro se

Stephen J. Christiano, Esq, for respondent

Record Closed: May 15, 2007 Decided: May 16, 2007

BEFORE **JOANN LASALA CANDIDO,** ALJ:

PROCEDURAL HISTORY

On November 8, 2005, petitioner, M.L., filed a residency appeal on behalf of her two children, S.L. and S.L., grades 4 and 6, respectively. On December 7, 2005, the Township of West Orange Board of Education (BOE or respondent) filed an Answer with the State Department of Education (DOE) seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of her two minor children

in the BOE's school district from October 6, 2005 to January 10, 2006. The DOE transmitted this matter to the Office of Administrative Law (OAL) on January 6, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The matter was assigned to Judge Edith Klinger on January 6, 2006, was subsequently assigned to Judge Diana Sukovich, and ultimately to the undersigned on April 20, 2007. A hearing was held on May 15, 2007, on which date the record closed.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS:**

M.L. had resided at 35 Laurel Avenue in Irvington with her husband and two children. When she began having marital problems, she separated from her husband in July 2005 and in August 2005 moved in with her sister who resided at 52 Hazel Avenue in West Orange. Other than providing shelter, there was no testimony that the sister contributed to the support of the children. M.L., along with her two children, continued to reside with her sister until January 2006, when M.L.'s family reconciled. M.L. and her sister testified that the children would go to Irvington to do homework with their father, but would stay at the West Orange home two or three nights per week. The children then returned to Irvington in January 2006 where they continue to attend school. Although M.L. provided a driver's license and pay stubs reflecting the West Orange address, nevertheless it was her intent that this was a temporary residence until her family was reunited. (Exhibit "P-1").

Frank Guarneri, the district registrar and former investigator for the district, gave compelling and credible testimony. On October 6, 7, 10 and 11, 2005, he observed a silver Toyota Landcrusier drop off S.L. and S.L. at the home of M.L.'s sister at approximately 7:15 a.m. and then observed the children enter the house. On each occasion, he thereafter observed one child exit the home at approximately 7:35

a.m. and walk to Hazel Ave. and Pine Street to board the #329 bus. The other child exited the home at approximately 8:25 a.m. and cross the street to attend the Hazel Avenue School. Guarneri further observed mail in the mail box at the Irvington home addressed to M.L. On October 11 and 12, 2005, at 6:30 a.m., Guarneri observed an adult female and S.L. and S.L. exit the Irvington residence, enter the Landcruiser and drive to Birch Street and Wellington Avenue in West Orange where both children exited the vehicle and walked to 52 Hazel Street. (Exhibit "R-2")

The individual cost to the BOE for that period of time for S.L., the fourth grader, was $3,146.08 and $3,475.36 for S.L. the sixth grader. (Exhibit "R-3"). This was calculated upon the daily cost for each student at the rate of $56.18 and $62.06, respectively. The combined total cost for both children to attend school in West Orange for fifty six school days was $6,621.44.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is not economic or family hardship as provided for in N.J.S.A. 18A:38-1(b), but whether S.L. and S.L. were domiciled students during the fifty-six days they attended school in West Orange.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

Local school districts must also provide a free education to any person who is kept in the home of another person domiciled within the district and supported by such other person gratis as if he/she were such other person's own child, upon the filing by that person with the pertinent board of education of a sworn statement. Such statement shall, if so required by the board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement must also state that he/she intends to keep and support the child gratuitously for a longer time than merely through the school term. A copy of certain documents regarding residency shall also be filed. The parent/guardian shall file with the board a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely to receive a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. Id. at § (b)(1). Here, there were no proofs that M.L.'s sister contributed to the support of the children.

From the evidence submitted, it is clear that both children were domiciled in Irvington during the time they attended school for fifty six days in West Orange. M.L. failed to demonstrate, by a preponderance of the credible evidence, that her children were entitled to a free public education in West Orange. To the contrary, the BOE has proven that they were not since they were not domiciled there. N.J.A.C. 6A:22-3.1(a)(1) provides:

> A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977). The question of domicile is one of fact and must be

determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. State v. Benny, 20 N.J. 238, 251 (1955). A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Ibid.

Based upon the facts adduced, I **CONCLUDE** that S.L. and S.L. were domiciled in Irvington during the fifty six school days they attended in West Orange. M.L. only intended to reside temporarily in West Orange until the family unit was reunited and then return to Irvington. Additionally, the children were observed leaving their Irvington address early in the morning over the course of several days and driven to West Orange to attend school. Accordingly, they were not entitled to attend schools in West Orange and given a free public education there pursuant to N.J.S.A. 18A:38-1(a).

A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). S.L. and S.L. were not entitled to a free public education in West Orange. Accordingly, respondent is entitled to reimbursement from M.L. in the sum of $6,621.44 for the cost of providing a public education to both children from October 6, 2005 until January 10, 2006, and I so **CONCLUDE.**

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, M.L., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that M.L. reimburse respondent the total sum of $6,621.44 for tuition costs associated with the attendance of her children, S.L. and S.L., in West Orange between October 6, 2005 and January 10, 2006.

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

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

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

May 16, 2007

DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: May 16, 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 17 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

WITNESSES

Petitioner

M.L.

Carline Auguste

Respondent

Frank Guarneri

EXHIBITS

Petitioner

P-1 current and expired driver's license and pay stubs of M.L.

Respondent

R-1 Board Of Education letter dated October 25, 2005

R-2 Residency investigation report dated October 24, 2005

R-3 Student printouts and tuition costs

OAL DKT. NO. EDU 1593-02
AGENCY DKT. NO. 505-12/01

ELVI RODRIGUEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/20/07

Date of Mailing: 6/20/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1593-02
AGENCY DKT. NO. 505-12/01

ELVI RODRIGUEZ,

Petitioner,

v.

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

Respondent.

Nancy I. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, LLC)

Karen Murray, Esq., for Respondent
(Murray, Murray & Corrigan)

Record Closed: May 17, 2007 Decided: May 18, 2007

BEFORE **IMRE KARASZEGI,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 5, 2002 for hearing as a contested case, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On May 16, 2007, the parties, having reached an amicable resolution of the matter, submitted a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

May 18, 2007

DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 5-24-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 24 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent Elizabeth Board of Education

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2007 MAY 17 P 3:53

ELVI RODRIGUEZ, **Petitioner,** **v.** **BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **OAL DKT. NO.: EDUOA 01593-2002N** **AGENCY DKT. NO.: 505-12/01** **SETTLEMENT AGREEMENT**

SETTLEMENT AGREEMENT

Petitioner **ELVI RODRIGUEZ** (E.R.) hereby agrees, with the Respondent, the **ELIZABETH BOARD OF EDUCATION** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall reinstated to Petitioner, E.R., a total of two (2) sick days for sick days utilized on October 1 and 2, 2001.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, E.R., agrees that this Settlement resolves any and all claims that he had, or may have had against Respondent relative to any issue raised in or related to this matter.

4. Petitioner, E.R., agrees to waive any rights he had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education, Division of Worker's Compensation, Office of Administrative Law and/or the Public Employment Relations Commission, relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for his injuries that occurred on or about August 6, August 13 and August 20, 2001.

5. Petitioner, E.R., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred on or about August 6, August 13 and August 20, 2001.

6. Petitioner, E.R., agrees that he has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, E.R., agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree and enter into the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Board of Education

Date:

ELVI RODRIGUEZ

Elvi Rodriguez, Petitioner

Date:

OXFELD & COHEN, P.C.

Nancy I. Oxfeld, Esquire
Counsel for Petitioner

Date: 4/24/07

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2007 MAY 17 P 3:54

BOARD OF EDUCATION

RESOLUTION

OAL Docket No.: EUDOR-1593-2002N
Settlement Agreement

WHEREAS, the Elizabeth Board of Education and Petitioner, Elvi Rodriguez, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-1593-2002N and Agency Docket Number 505-12/01, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED that the Board hereby agrees to accept the confidential Settlement Agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MAY 10, 2007

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

06-266

254-06SEC

RECEIVED BY
CONTROVERSIES
& DISPUTES

2006 JUL 18 A 10:07

WILLINGBORO BOARD OF EDUCATION	:	**BEFORE THE SCHOOL ETHICS COMMISSION and THE COMMISSIONER OF EDUCATION**
V.	:	
ROBERT SMITH, *WILLINGBORO BOARD OF EDUCATION BURLINGTON COUNTY*	:	**SEC DOCKET NO. C33-05**
	:	**CONSENT DECREE**

WHEREAS, Complainant, Willingboro Board of Education represented by Thomas Eschleman, Esq. and Respondent, Robert Smith, represented by John Goins, Esq., have mutually agreed to settle the above-captioned matter pending before the School Ethics Commission, Paul C. Garbarini, Chairperson; and

WHEREAS, this matter arose from a complaint that was filed with the School Ethics Commission alleging that Mr. Smith violated the School Ethics Act when, as a member of the Willingboro Board of Education, he engaged in conduct that some employees found improper and offensive;

WHEREAS, Mr. Smith denied that any conduct that he engaged in violated the Act; and

WHEREAS, prior to the School Ethics Commission's probable cause hearing on this matter, the parties reached a resolution with Mr. Smith agreeing to certain remedial measures as follows:

1. Robert Smith agrees to a sanction of reprimand for violating N.J.S.A. 18A:12-24.1(e) of the Act, which prohibits a board member from taking private action that may compromise the board;

2. Robert Smith agrees to issue a public apology regarding this matter at the next school board meeting. The language of the apology will be as follows:

   > I would like to apologize for any past behavior on my part, which unintentionally resulted in individuals feeling harassed or intimidated. It was never my intention that any individual experience these feelings of discomfort, and I will specifically refrain from such actions and conduct in the future.

3. Robert Smith agrees to attend and complete sexual harassment training courses as designated by the Willingboro Board of Education;

4. Robert Smith agrees that he will not initiate any direct contact with employees T.L. and B.W.;

5. Robert Smith agrees to recuse himself in any matters that come before the Board of Education involving T.L. and B.W.; and

6. Robert Smith agrees to abide by the Willingboro Board of Education's policy regarding school visits;

7. Robert Smith will surrender any identification in his possession that allows him specialized access to schools;

8. Robert Smith agrees to abide by the Willingboro Board of Education's policy on sexual harassment; and

9. Robert Smith will not act as a hearing officer in any proceeding in which T.L. and/or B.W. are participants.

WHEREAS, the School Ethics Commission finds that a sanction of a reprimand is appropriate in light of his agreement to make a public apology and undergo training; and

WHEREAS, the Commission hereby forwards this signed agreement to the Acting Commissioner with its recommendation that she impose a sanction of reprimand in this matter; and

NOW THEREFORE BE IT RESOLVED, that the parties, the School Ethics Commission and the Acting Commissioner of Education hereby consent to this Resolution in settlement of the above matter imposing on Robert Smith a sanction of reprimand.

Dated: 7/20/06

Lucille E. Davy, (as to penalty, only)
Acting Commissioner of Education

Dated: 7/14/06

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: 6/05/06

Thomas Eschleman, Esq.
On behalf of the Willingboro Board of Education

Dated: 6/26/06

John Goins, Esq.
On Behalf of Robert Smith

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

June 19, 2007

Daniel R. Esposito, Esq.
Kalison, McBride, Jackson & Murphy
25 Independence Boulevard
P.O. Box 4990
Warren, NJ, 07059

Cynthia Ann Raymond, DAG
NJ Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, NJ 08625-0112

Dear Parties:

KENTWOOD ACADEMY V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, AGENCY DKT NO. 319-9/06, OAL DKT NO. EDU 9997-06, COMMISSIONER DECISION NO. 253-07

We are enclosing a copy of the decision of the Commissioner of Education dated June 19, 2007, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/pp:o/dec ltr/Kentwood-253-07
Enclosure
c: Jones Addo, State Library

OAL DKT. NO. EDU 9997-06
AGENCY DKT. NO. 319-9/06

KENTWOOD ACADEMY,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
	:	
RESPONDENT.	:	

The record of this matter and Stipulation of Settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement – pursuant to *N.J.A.C.* 1:1-19.1(c) and (d) – is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/19/07

Date of Mailing: 6/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9997-06
AGENCY DKT. NO. 319-9/06

KENTWOOD ACADEMY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Daniel R. Esposito, Esq., for petitioner (Kalison, McBride, Jackson & Murphy, P.A., attorneys)

Cynthia Raymond, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: May 16, 2007 Decided: May 18, 2007

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on September 25, 2006, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, and assigned to the undersigned.

A hearing was scheduled on September 26, 2006 and continued December 12, 2006 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing on December 12, settlement discussions were held and a partial settlement was reached. An intitial decision partial settlement was rendered on December 13, 2006.

The parties continued numerous settlement discussions and a settlement was reached. On May 16, 2007, the parties submitted an executed Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

May 18, 2007
DATE

BARRY N. FRANK, ALJ

Date Received at Agency: 5-23-07

Mailed to Parties:

MAY 23 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

Kalison McBride Jackson & Murphy, P.A.
25 Independence Blvd.
P.O. Box 4990
Warren, New Jersey 07059
(908) 647-4600
Attorneys for Petitioner, Kentwood Academy

RECEIVED
2007 MAY 16 A 11: 20
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

KENTWOOD ACADEMY, Petitioner, v. STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION	BEFORE THE OFFICE OF ADMINSTRATIVE LAW DEPARTMENT OF EDUCATION Agency Docket No: 319-9/06 OAL Docket No: EDU 9997-06 **STIPULATION OF SETTLEMENT**

THIS MATTER having been opened before the Office of Administrative Law by Kalison, McBride, Jackson & Murphy, P.A., attorneys for Petitioner Kentwood Academy ["The Academy"] and the parties having conferred during a conference before the Hon. Barry Frank, A.L.J. on April 13, 2007, and having negotiated and come to an agreement in the interest of resolving amicably the outstanding issues of the pending appeal, and as result of said conference all parties agreeing to terms placed on the record on that day;

IT IS on this 15th day of May 2007 hereby STIPULATED AND AGREED:

1. Kentwood Academy shall have until March 31, 2008 in order to establish an Average Daily Enrollment [ADE] of 24 public school placement students;

2. The ADE of Kentwood Academy shall be determined based on Kentwood's enrollment established between April 1, 2007 through March 31, 2008;

3. Within two weeks of the execution of this Stipulation of Settlement, the Department of Education shall issue the attached letter, which is incorporated by reference, to all sending districts;

4. The Department of Education shall not issue any letter to the sending districts regarding Kentwood's compliance with the April 1, 2007 through March 31, 2008 ADE requirement prior to February 13, 2008;

5. Kentwood shall provide quarterly year-to-date copies of its school register(s) with a demarcation as to which students are private placements, complete a department generated spreadsheet with monthly actual and year-to-date information along with projected enrollment(s) for the remaining month(s). This year-to-date information shall be provided monthly beginning with the time period ending January 31, 2008. These documents shall be provided in accordance with the following schedule: July 15, 2007, October 15, 2007, January 15, 2008, February 15, 2008, March 15, 2008, and April 15, 2008.

Daniel R. Esposito, Esq.
Kalison, McBride, Jackson & Murphy
Attorneys for Petitioner

Cynthia Raymond
Cynthia Raymond, D.A.G.
Office of the N.J. Attorney General
Attorneys for Respondent

DRAFT CR

May 10, 2007

Ms. Diane Richards
Kentwood Academy
10 Tierney Road
Lake Hopatcong, NJ 07849

Dear Ms. Richards:

This correspondence will serve to rescind Ms. Yut'se Thomas' letter to you dated March 14, 2007 which required Kentwood Academy to attain an average daily enrollment (ADE) of 24 public school placement pupils for the 2006-2007 school year. The letter indicated that Kentwood Academy must attain an ADE of 24 public school placement pupils for the 2006-2007 school year or the school's preliminary approval status will be revoked and the school will be unable to operate as an approved private school for students with disabilities effective July 1, 2007. The time period to meet the ADE of 24 public school placement pupils has been revised from the July 1, 2006 to June 30, 2007 school year to the period of April 1, 2007 through March 31, 2008.

Any county offices of education that forwarded Ms. Thomas' original letter dated March 14, 2007 to school districts are asked to forward this letter to school districts. If the original letter was not forwarded, please do not forward this letter.

If you have any questions concerning this matter, please do not hesitate to contact Jim Verner at (609) 984-4229 or jim.verner@doe.state.nj.us or Elise Sadler-Williams at (609) 777-4483 or elise.sadler-williams@doe.state.nj.us.

Sincerely,

Katherine P. Attwood
Assistant Commissioner

KPA/JV/esw/r:elise/word/ADE Letter/Kentwood academy fy05-06 revised.doc
Enclosure
c: Willa Spicer
Barbara Gantwerk
William King
Penelope Lattimer
Donna Arons
County Superintendents
County School Business Administrators
County Supervisors of Child Study
Beth Brooks
Yut'se Thomas
Roberta Wohle
Cecelia Downey
Judyth Vazquez
Jim Verner
Elise Sadler-Williams

258-07

OAL DKT. NO. EDU 583-01
AGENCY DKT. NO. 24-1/01

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/21/07
Date of Mailing: 6/21/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 583-01

AGENCY DKT. NO. 24-1/01

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN,

Respondent.

Louis Cappelli, Jr., Esq., for petitioner

John T. Barbour, Esq., for respondent (Barbour & Barbour, attorneys)

Record Closed: May 1, 2007 Decided: May 7, 2007

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

STATEMENT OF THE CASE

Petitioner Board of Education of the Gloucester County Institute of Technology (GCIT) claimed that respondent Board of Education of Delran Township (Delran) should pay tuition and transportation costs for a student, domiciled in Delran's district, who attended petitioner's GCIT.

Delran answered the petition and the parties agreed to await the outcome of another case involving the GCIT and similar issues: K.B. v. Rancocas Valley High School Board of Education, EDU 2190-00 (EDU 6974-97 on remand)', EDU 6096-00, Initial Decision (March 1, 2002), decision, Comm'r (July 18, 2002), decision, State Board of Educ. (July 2, 2003), aff'd, No. A-6814-02T4 (App. Div. November 12, 2004), pet. for certif. denied, 182 N.J. 431 (2005). As shown on the attached Stipulation of Settlement Agreement and Settlement Confirmation, the parties have settled this case. N.J.A.C. 6A:1-1.13.

PROCEDURAL HISTORY

On January 22, 2001, the petition was filed with the Department of Education and, on February 14, 2001, the answer was so filed. N.J.S.A. 18A:6-9, N.J.A.C. 6A:3-1.1 et seq. The Department transmitted the contested case to the Office of Administrative Law (OAL) where it was filed on February 22, 2001. N.J.S.A. 52:14B-2(b). The case was placed on the inactive list to await the outcome of the above-cited case. By letter, dated March 30, 2006, petitioner's attorney advised (Judge Richard Wells, then assigned to the case) that the parties had settled and that a settlement agreement would be submitted. By letter, dated February 20, 2007 (Judge Wells having left the OAL to serve in the Superior Court), I requested that the attorneys submit a settlement agreement and confirm that the respective boards had approved it. On the record closed date, I received copies of the Settlement Agreement and Settlement Confirmation.

FINDINGS OF FACT

1. The petitioner understood the Settlement Agreement and the parties voluntarily entered in to it.

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

The case involved substantial issues of fact. The Settlement Agreement avoids the time and expense of full hearing and further litigation. The terms of the Settlement Agreement are reasonable and in the public interest.

CONCLUSIONS OF LAW

This Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved. See N.J.A.C. 6A:3-1.3.

ORDER

I **ORDER** that the parties comply with the Settlement Agreement and that these proceedings be concluded.

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

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

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

May 7, 2007
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Date Received at Agency:

MAY 11 2007

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY BOARD OF EDUCATION Petitioner	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION
vs.	:	OAL DOCKET NO. EDU-583-01 AGENCY DKT # 241/01
DELRAN BOARD OF EDUCATION Respondent	:	SETTLEMENT CONFIRMATION

We the undersigned, John T. Barbour, Esquire as Board Attorney for the Respondent Delran Board of Education and Louis Cappelli, Jr., Esquire as Board Attorney for Petitioner Gloucester County Institute of Technology, do hereby certify and affirm that the settlement of the above matter set forth in the attached SETTLEMENT AGREEMENT has be duly approved and adopted at respective public meeting of and by the parties herein. Further that the terms thereof have been complied with and that all matters which were or could have been the subject of this litigation have now been completely and finally resolved by and between the parties in accordance with the terms and conditions as set forth in the attached SETTLEMENT AGREEMENT.

For Delran Board of Education

By: John T. Barbour, Esq.
Attorney for the Delran
Board of Education

For Gloucester County Institute of Technology

By: Louis Cappelli, Jr., Esq.
Attorney for the Gloucester County Institute of Technology Board of Education

Dated: April 25, 2007

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OFFICE OF ADMIN LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT

WHEREAS, the Gloucester County Institute of Technology (hereinafter "G.C.I.T.) operates a Performing arts Academy with enrollment open to both in-county and out-of-county residents;

WHEREAS, the pupil(s) from the Delran Township Board of Education, (hereinafter "Delran") County of Burlington applied to and were accepted at GCIT's Performing Arts Academy commencing with the 1997-1998 school year and continuing through the 2004-2005 school year; and,

WHEREAS, GCIT has filed a Petition of Appeal with the Commissioner of education, State of New Jersey, seeking the payment of and out-of-county fee for each pupil residing within the geographical boundaries of Delran and attending GCIT, together with the costs of transportation for those pupils and interest on the unpaid tuition; and,

WHEREAS, Delran has, in good faith, denied GCIT's claims; and,

WHEREAS, All possible legal proceedings have been undertaken and exhausted on behalf of Delran with respect to the issues presented in defense of GCIT's claims; and,

WHEREAS, GCIT and Delran have undertaken, through their respective counsel settlement negotiations as it is in both school district's financial interest to reach an amicable resolution of this matter without further legal proceedings or delay.

IT IS HEREBY AGREED by and between and to settle and terminate any and all disputes between them by executing this Settlement Agreement ("Agreement") as follows"

1. Delran shall pay, within sixty (60) days of execution of this Agreement, the sum of $26,799.00 representing payment in full for all disputes between the parties and that were made a part of the Petition of Appeal.

2 .Both GCIT and Delran do hereby remise, release and forever discharge each other, their respective Boards of Education and their officers, members, employees, agents, respective successors and assigns, heirs, executors and administrators, of and from any and all manner of action and causes of action, suits, debts, claims and demands whatsoever in law or in equity, which they ever had, now and up through and including June 30, 2005.

3. Board will take the appropriate action at its next regularly scheduled meeting to approve and accept the terms of the within settlement.

4. By entering into this Agreement, neither party is making any admission with respect to any of the issues raised by the respective parties.

5. Each party is to bear their own cost and attorney fees.

6. Both GCIT and Delran agree and acknowledge that the Agreement and the parties described herein and the settlement and termination of any claim that the parties have against each other, as set forth herein, is not and shall not be construed to be an admission of any violation of any federal, state or local statute or regulation or of any duty owed by and between the parties.

7. By signing this Agreement, the parties certify that they have had the opportunity to discuss the Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this agreement and all other aspects of this case and they

enter into this Agreement knowingly, willingly, and without any coercion or improper inducement.

8. In the event that any portion of this Agreement is determined to be illegal, the parties agree in advance, to reform the Agreement so that each party receives the full benefit of the bargain,.

9. By signing this Agreement, each signator represents that he or she is a party or has been duly authorized by a party to sign that party's behalf.

10. The parties agree that this Agreement may be signed and counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, GCIT and Delran execute the foregoing Agreement this _____ day of _____, 2006.

Witness:

BOARD OF EDUCATION OF
GLOUCESTER COUNTY
INSTITUTE OF TECHNOLOGY

BOARD SECRETARY

BOARD PRESIDENT

_____
BOARD SECRETARY

DELRAN BOARD OF EDUCATION

_____
BOARD PRESIDENT

#259-07

OAL DKT. NO. EDU 2151-07
AGENCY DKT. NO. 67-3/07

G.H., on behalf of minor children, J.H. and C.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement and adopts it as the final decision in this matter. In so doing, however, the Commissioner observes that Term 2 requires effectuation prior to final agency approval, contrary to *N.J.A.C.* 1:1-19.1. The parties herein – and all litigants in controverted matters – are accordingly reminded that parties to proposed settlements act at their peril when including terms requiring effectuation prior to the Commissioner's approval, since the Commissioner may ultimately disapprove the term(s) in question.

The present settlement having been approved, this matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/21/07
Date of Mailing: 6/22/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2151-07

AGENCY DKT NO. 67-3/07

G.H. ON BEHALF OF MINOR CHILDREN J.H. AND C.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY.

Respondent.

Lance D. Brown, Esq., for petitioner (DePinto & Brown, attorneys)

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & Staub, attorneys)

Record Closed: May 10, 2007 Decided: May 24, 2007

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter involves petitioner's challenge of the Board of Education's residency determination concerning the minor subject children. Thereafter, the case was transmitted to the Office of Administrative Law (OAL) on March 16, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A.

52:14F-1 to -13 and was assigned to the undersigned Administrative Law Judge (ALJ) for hearing.

At the plenary hearing scheduled for May 10, 2006, the parties entered into successful settlement negotiations and executed a Stipulation of Settlement.

The Stipulation of Settlement indicating the terms thereof is attached and fully incorporated herein.

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

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

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

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

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

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

May 24, 2007

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency: 5/29/07 Fax

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE MAY 30 2007

OFFICE OF ADMINISTRATIVE LAW

/lam

5/10/07 STIPULATION OF SETTLEMENT

1. GLADYS HENDRIX SHALL PAY TO THE HAMILTON TOWNSHIP BOARD OF EDUCATION the sum of $4,800.00 for tuition for J.H. & C.H.

2. Payment shall be at the rate of $300.00 per month without interest commencing June 1, 2007, and on the 1st day of each month thereafter until the full sum is paid.

3. Payment shall be delivered to the office of Dennis M. DeSantis, Esq., at 247 Whitehorse Avenue, Hamilton, N.J. If payment is made by check, check shall be made payable to the Hamilton Township Board of Education.

4. Should Gladys Hendrix not make any payment when due which continues for 10 days, then the Hamilton Township Board of Education shall be due the sum of $9,000.00 less any payments made pursuant to this Agreement. The Board may then obtain judgment from ~~the~~ Gladys Hendrix for the balance due.

Dennis M. DeSantis, atty for the Board

Gladys Hendrix
Gladys Hendrix

260-07

- #260-07E

OAL DKT. NO. EDU 5929-07
AGENCY DKT. NO. 144-6/07

DENCQ CONSTRUCTION, INC.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY AND RIEFOLO CONSTRUCTION COMPANY,	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	

The record of this emergent matter, which included audiotapes of the hearing conducted at the Office of Administrative Law on June 15, 2007, along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ's determination – for the reasons extensively set forth in his oral decision from the bench – that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably, the probability of prevailing on the merits of the underlying claim.

Accordingly, the instant application for emergent relief is hereby denied. My temporary restraining order of June 8, 2007 – continuing the restraints originally imposed by Judge Thomas F. Brogan, P.J.S.C., of the Law Division of the Superior Court in Passaic County

– is hereby lifted. This matter shall proceed to plenary hearing on its merits as contemplated by the ALJ and the parties.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/21/07

Date of Mailing: 6/21/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, N.J. 07102
(973) 648 - 6024
FAX. (973) 648 - 2358

Joseph A. Paone
Administrative Law Judge

June 18, 2007

James J. Tarnofsky, Esq.
Hedinger & Lawless, L.L.C.
147 Columbia Turnpike, Suite 200
Florham Park, N.J. 07932

Jane Gallina Mecca, Esq.
Fogarty & Hara, Esqs.
16-00 Route 208 South
Fairlawn, N.J. 07410

Shuan Blick, Esq.
Carroll McNulty & Kull, L.L.C.
P.O. Box 650
120 Mountain View Blvd.
Basking Ridge, N.J. 07950

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
N.J. State Dept. of Education
100 Riverview Plaza, Route 29, P.O. Box 500
Trenton, N.J. 08625-0500

RE: *Denco Construction, Inc. v. Wayne Township BOE and Riefolo Construction Co.*
OAL DKT. NO. EDU 05929-07
AGENCY DKT. NO. 144-6/07

Dear Parties:

Enclosed please find a copy of an Order in the above-referenced matter.

Very truly yours,

Joseph A. Paone
Administrative Law Judge

JAP/lr
c: William Speziale, Deputy Clerk

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
(201) 791-3432 Facsimile

FACSIMILE TRANSMITTAL SHEET

TO: Hon. Joseph A. Paone, A.L.J. James J. Tarnosfsky, Esq. Shaun Blick, Esq.	FROM: Jane Gallina Mecca, Esq.
COMPANY: Office of Administrative Law Hedinger & Lawless, L.L.C. Carroll, McNulty & Kull, L.L.C.	DATE: June 18, 2007
FAX NUMBER: 973-648-2358/Paone 973-301-9191/Tarnofsky 908-848-6310/Blick	TOTAL NO. OF PAGES INCLUDING COVER: 4
PHONE NUMBER:	SENDER'S REFERENCE NUMBER: 310
RE: Denco Construction, Inc., v. Wayne Township Board of Education and Riefolo Construction Company	DOCUMENT FAXED: Order

☐ URGENT ☑ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

IF YOU ENCOUNTER A PROBLEM WITH THIS TRANSMISSION, PLEASE CONTACT ELIANA AT 201-791-3340 EXT. 14.

NOTES/COMMENTS:

A hard copy will follow via regular mail.

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FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY
JANE GALLINA MECCA

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June 18, 2007

Honorable Joseph A. Paone, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Denco Construction, Inc. v. Wayne Township Board of Education and Riefolo Construction Company
Agency Ref. No.: 144-6/07
Our File No.: 310

Dear Judge Paone:

Pursuant to the hearing which took place on June 15, 2007, enclosed please find a proposed Order in connection with the above-referenced matter. Kindly return a conformed copy of the Order to the undersigned, in the self-addressed, stamped envelope provided herein.

Respectfully submitted,

FOGARTY & HARA

BY: _____
THOMAS SCAPOLI

TS:eb
Enclosure
cc: James Tarnofsky, Esq. w/enc.
Shaun Blick, Esq. w/enc.
Dr. Maria Nuccetelli - w/enc.
Superintendent of Schools
Mr. Gary Ottmann - w/enc.
Business Administrator/Board Secretary
Mr. Richard Cahill - w/enc.
Assistant Business Administrator

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Attorneys for Respondent,
Wayne Township Board of Education
Our File No. 310

DENCO CONSTRUCTION, INC., Petitioner, v. WAYNE TOWNSHIP BOARD OF EDUCATION and RIEFOLO CONSTRUCTION COMPANY, Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DEPARTMENT OF EDUCATION Agency Ref. No.: 144-6/07 OAL Docket No.: **ORDER**

This matter being opened to the Commissioner of the Department of Education by James J. Tarnofsky, Esq. of Hedinger & Lawless, L.L.C., attorney for petitioner, Denco Construction, Inc., and upon notice to Jane Gallina Mecca, Esq. of Fogarty & Hara, Esqs., attorney for Respondent, Wayne Township Board of Education and Shaun Blick, Esq. of Carroll, McNulty & Kull, L.L.C., attorney for Respondent, Riefolo Construction Company, Inc., for an Order to Show Cause with Temporary Restraints, and the Commissioner having granted such Temporary Restraints and referred this matter to the Office of Administrative Law for a hearing on whether such Temporary Restraints shall be continued,

and the Court having considered the papers filed in this matter and the arguments of counsel;

IT IS ON THIS 15th day of June, 2007,

ORDERED that petitioner's Order to Show Cause with Temporary Restraints is hereby denied; and it is further

ORDERED that a telephone conference be held so a pre-hearing order can be entered pursuant to N.J.A.C. 1:1-13.2; and it is further

ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days of its receipt.

This Order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Joseph A. Paone, A.L.J.

261-07E

261-07

OAL DKT. NO. EDU 4648-07
AGENCY DKT. NO. 174-6/07

KRISTINE MARTIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter – including the proceedings held at the Office of Administrative Law (OAL) – and the recommended Order of Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has not demonstrated entitlement to attend Project Graduation on an emergent basis, having failed to make the necessary showing of irreparable harm, settled law, likelihood of success on the merits, and balancing of the equities in her favor. *Crowe v. DeGioia, supra; N.J.A.C.* 6A:3-1.6. The Commissioner further concurs that, all issues in dispute between the parties having been resolved herein, no further proceedings are necessary and the matter is appropriately dismissed.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief and dismissing the Petition of Appeal is adopted for the reasons set forth therein.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: June 21, 2007
Date of Faxing: June 21, 2007

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

INITIAL DECISION
OAL DKT. NO. EDU 464-07 S
AGENCY DKT.

K. M.

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent,

MICHAEL D. HALEFISH, Esq., for petitioner (Halefish & Tunney, attorneys)
VIOLA LORDI, Esq., respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 21, 2007 Decided: June 21 , 2007

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

Petitioner seeks emergent relief after being barred by the respondent from attending tonight's Project Graduation post-graduation party. The action occurred as the result of the Board's determination that she was involved in a water ballon throwing fracas in a hallway of the high school on June 20, 2007. The emergent relief application was argued before me this afternoon. Ms. M. asserts in her certification she did not throw any water ballons; the district has filed certifications which explain that students were warned to go to the auditorium and not to D Hall where the incident occurred. Ms. M. apparently acknowledges that she was at least in the vicinity of the incident and claims all those who were in the vicinity and did not escape were charged and are being punished.

Tine does not permit a full recitation of all arguments made by counsel on the record. However, applying the Crowe v. DeGioia standard, 90 N.J. 126, 132-134 (1982), it is abundantly clear that the inability to attend a party is not irreparably harmful. The Board determined to lessen the initial penalty that it had intended to impose on Ms. M., that is her being barred from both the graduation ceremony and from the party, by allowing her to attend the graduation. By doing so, it is allowing her to attend what is a meaningful and traditional function associated with graduation. That she cannot attend the school sanctioned party thereafter can hardly be said to rise to the level of irreparable harm. Thus, Ms. M. cannot meet the Crowe standard. Additionally, while it is not clear what a full hearing on the merits would demonstrate, the fact that Ms. M.

OAL DKT. NO. 4648-07S

may not have herself thrown a balloon, if that is indeed the case, does not mean that she could not reasonably be held accountable as a participant in the incident, as a supporter of it or as a person who by her presence violated the school's directives. She has not demonstrated that she has a reasonably likelihood of success on the merits. Finally, weighing the public interest to be advanced by either the grant of emergent relief or its denial, the ability of the school to control its students and assure the safety of large numbers of students who inhabit the building trumps whatever public interest may be advanced by allowing her to attend this event. As for allegations of procedural deficiencies, it musr be remembered that the extremely short time between the event and the graduation tonight does necessitate that procedural protections be accorded with a due respect both to the students' rights and the short time in which the Board's action must be taken.

For the reasons stated and incorporating the far more extensive comments on the record, I **CONCLUDE** that the application for emergent relief must be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

DATE June 21, 2007

ALJ

Jeff S. Masin

State of New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

June 14, 2007

David Alan Klein, Esq.
Ten Grove Street
Post Office Box 117
Haddonfield, NJ 08033

Ronald Sahli, Esq.
1145 South White Horse Pike
Post Office Box 601
Hammonton, NJ 08037-0601

Dear Parties:

D.G. on behalf of minor child, A.L. V. BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON, CAMDEN COUNTY, Agency Dkt. No. 164-6/07

We are enclosing a copy of the decision of the Assistant Commissioner of Education dated June 14, 2007 in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Finally, by copy of this letter, we are advising the OAL Clerk that the enclosed decision requests return of the file to the Department pursuant to *N.J.AC.* 1:1-3.3.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Jones Addo, State Library
Clair Applegate
Clerk, OAL

264-07

264-07E

OAL DKT. NO. EDU 4655-07
AGENCY DKT. NO. 176-6/07

DIASHA WOODS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audiotape of proceedings – and the recommended Order of the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33.

Upon such review, the Deputy Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6, particularly with respect to her likelihood of success on the merits of the underlying appeal.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted as the final decision in this matter, which shall proceed at the OAL as necessary to bring it to closure. [1]

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: June 22, 2007

Date of Faxing: June 22, 2007

[1] It is unclear from the record whether petitioner wishes – her emergent request to participate in graduation ceremonies having been denied – to continue with her underlying appeal of the Board's denial of course credit based on absences exceeding the number permitted by district policy.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 4655-07
AGENCY DKT. NO. 176-6/07

D.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

D.W., petitioner, appearing pro se

Jeffrey F. Belz, Esq., for respondent

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 22, 2007, D.W. (petitioner) filed an application for emergent relief with the New Jersey Department of Education, Office of Special Education Programs. The application requested that she be permitted to participate in graduation ceremonies scheduled for Friday, June 22, 2007. The Ewing Board of Education (Board) determined that D.W. has been absent for more than eight days and has prohibited her from participating in any extracurricular activities

On June 22, 2007, the matter was transmitted to the Office of Administrative Law (OAL) for an oral argument on the requested emergent relief on June 22, 2007, at 11:30 A.M. The case was heard in the OAL, Trenton (Hamilton Township).

STATEMENT OF FACTS

Some of the facts are undisputed. D.W. has been tardy fifteen days, late three days, and has one late arrival during the first period class (R-1). The Board has alleged that she also has two unexcused absences during that class.

Pursuant to school policy R5200 B (7) B, each tardiness results in a one-third absence (R-2). A student is marked late instead of tardy when they are more than fifteen minutes late. Therefore, the board alleges that the D.W. was absent 11 days during the semester (February to June 2007). Policy R5200 A4(C) states that unexcused absences may not exceed eight for any half-year course (R-1).

The School sent nine letters to the parents of D.W. at her address between February 23, 2007, and May 30, 2007 (R-4 thru R-12), advising of the absences and lateness, as well as the consequences. The letter also states to contact the school if they believe that the absences or lateness were incorrect.

D.W. testified that she was passing her classes, and the reason for the tardiness was because she had to take care of her nine-year brother and make sure he went to school, and take care of her mother who is suffering from depression and other health issues. She explained that a doctor's note was sent for the two unexcused absences (R-2). However, after Dr. Logan explained that school called the doctor and was told that she was not there on those dates, she explained that the doctor told her to stay home from school. Even if D.W. was given the benefit of the doubt for the two unexcused absences, she would still be left with nine unexcused absences.

D.W. testified that she could not document any other absences, or latenesses. She testified that the late arrival was due to the fact that she had to take her mother to

the doctor and get her brother to school. However, no letter from her mother's doctor has been supplied.

Y.W. testified that the absences were her fault because D.W. had to take care of her and her brother. E.W. testified that he thought his daughter was being singled out, because she had some problems in the past in the school. He said that D.W. worked very hard and has come so far, and her tardiness of less than fifteen minutes should not prevent her from graduating.

Dr. Logan, the school principal, testified that D.W. was not treated differently or unfairly. The School has attempted to work with her. The school semester is ninety days, and counting excused absences, unexcused absences, and a three day suspension, D.W. has missed thirty days of school during the semester. The school also sent numerous letters to the house to address the situation.

CONCLUSIONS OF LAW

A party seeking emergent relief must satisfy the standards in Crowe v. DeGioia, 90 N.J. 126 (1982), which requires the movant to establish:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

The Commissioner has consistently found that denial of attendance at graduation exercises does not constitute irreparable harm. The case law is remarkably consistent that attendance at graduation ceremonies is a privilege, not a right. That privilege may be withheld in the interest of maintaining an orderly and efficient school system. Martin A. Domacasse v. Board of Education of the North Warren Regional

School District, Warren County, State Board of Education decision dated April 17, 1996, citing Camden City Board of Education v. NJSLAA, Docket #A-2802-91T2 (App. Div. 1992); Burnside et al. v. NJSIAA, 1984 S.L.D. 1695 (App. Div. 1984), cert. denied 101 N.J. 236 (1985). The determination of whether or not they may attend is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm. Denial of attendance at graduation exercises is, therefore, not irreparable harm.

Local boards of education have been expressly charged with protecting the health, safety, and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294.

Petitioner argues she is doing the best she can. She has responsibilities that few students have at her age, and that her lateness issues revolves around her care of her younger brother and mother.

However, there is no evidence that this was brought to the attention of the school administration before this action was taken. Notices were sent to the household advising of the problem and potential effect on D.W. No response was given to the school until this action was taken. I **FIND** there is substantial evidence to conclude that D.W. violated the attendance and lateness policy. As a result, I **FIND** that Board's actions in applying its policy to prohibit D.W. from attending and participating in

graduation ceremonies due to her conduct, no matter how regrettable and unfortunate this may be for her, cannot be disturbed. Consequently, I further **FIND** it unlikely that the petitioner would have prevailed on the merits.

As stated above, the actions of boards of education have a presumption of validity. A specific policy and punishment was established by the Board with respect to absences and lateness are enumerated in the School Handbook. Based on these factors, I **FIND** that the petitioners did not meet their burden of proof that there is a legal right underlying the claim.

Clearly, the petitioner has a substantial interest in attending and marching in the processional at graduation. She has worked extremely hard to pass all her classes and be in a position to graduate. However, the Board also has a substantial interest in ensuring that its disciplinary policies are applied as to excessive lateness and absences. If it did not enforce its disciplinary policies, or if it did treat D.W. differently than other students in the school, the Board would be sending the wrong kind of message and possibly establishing a dangerous precedent. Although petitioner has worked so hard and diligently, would have been the first to graduate in her family in three generations, I **FIND** that the Board would suffer greater harm than petitioner, if the requested relief was not granted.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m) 1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and the petitioner has failed to satisfy all four requirements, I **CONCLUDE** that the petitioner has failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the petition of D.W. for emergent relief is **DENIED** without prejudice.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Donald J Stein

June 22, 2007
DATE

DONALD J. STEIN, ALJ

/bdt

WITNESSES

For Petitioner:

D.W.

Y.R. (mother)

E.W. (father)

For Respondent:

Dr. Rodney Logan

LIST OF EXHIBITS

For petitioner:

None

For respondent:

R-1 Attendance report for D.W.

R-2 Excuse slip

R-3 Regulation R5200 Attendance, Board of Education

R-4 Letter from Ewing High School to parents/guardians of D.W., dated February 23, 2007

R-5 Letter from Ewing High School to parents/guardians of D.W., dated February 26, 2007

R-6 Letter from Ewing High School to parent/guardian of a Ewing High School student, dated February 27, 2007

R-7 Letter from Ewing High School to parents/guardians of D.W., dated February 27, 2007

R-8 Letter from Ewing High School to parent/guardian of a Ewing High School student, dated March 5, 2007

R-9 Letter from Ewing High School to parent/guardian of a Ewing High School student, dated March 16, 2007

R-10 Letter from Ewing High School to parents/guardians of D.W., dated April 4, 2007

R-11 Letter from Ewing High School to parents/guardians of D.W., dated April 23, 2007

R-12 Letter from Ewing High School to parents/guardians of D.W., dated May 30, 2007

#273-07R

IN THE MATTER OF THE TENURE HEARING OF UMA SWAMINATHAN, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION

SYNOPSIS

In August 2004, petitioning school district certified tenure charges of incapacity and conduct unbecoming against respondent – a tenured middle school social studies teacher – alleging chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. Respondent denied the charges and contended that she is a victim of racism based upon her Asian Indian heritage. The matter was transmitted to the OAL in September 2004 and – after multiple delays – hearings commenced in November 2005. Settlement negotiations occurred during the summer of 2006, but were unsuccessful. Subsequently, petitioner requested leave from the ALJ to withdraw tenure charges, and submitted certification indicating that the continued financial cost and diversion of resources necessary to sever the employment relationship with respondent could no longer be justified. In the fall of 2006, the OAL transmitted the case file – marked "WITHDRAWAL" – to the Commissioner for review. In October 2006, the Commissioner remanded the matter to the OAL for further proceedings, or for a settlement or withdrawal that meets the standards required pursuant to *N.J.A.C.* 6A:3-5.6(a), stating that petitioner was obligated to provide a reasonably specific explanation of why it was in the public interest not to pursue the tenure charges previously certified. The school district subsequently renewed its request for leave to withdraw the tenure charges, based on a proposed reassignment of respondent to a newly created position in which she would provide individualized instruction to high school students on long-term suspension.

On remand, the ALJ found that the rationale provided by the petitioning school district in its renewed request for leave to withdraw the tenure charges now satisfies the six standards required by *N.J.A.C.* 6A:3-5.6(a), and provides satisfactory explanations concerning: the district's need for a teacher to provide educational services to students on long-term suspension; why the respondent would be suitable for this position; and how her reassignment would best serve the public interest. The ALJ concluded that: the district's request to withdraw tenure charges should be granted; any back salary and seniority to which respondent is entitled should be restored to her; and the matter should be dismissed.

The Commissioner concurred with the findings of the ALJ; adopted the Initial Decision as the final decision; granted petitioner's application to withdraw the tenure charges against respondent, provide her back salary as appropriate, and recognize any tenure and seniority rights; and dismissed the matter.

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

July 5, 2007

#273-07R

OAL DKT. NO. EDU 8539-06
(EDU 8108-04 on Remand)
AGENCY DKT. NO. 289-8/04

IN THE MATTER OF THE TENURE HEARING OF UMA SWAMINATHAN, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Initial Decision on Remand (Initial Decision) of the Office of Administrative Law (OAL), the exhibits appended thereto, and the record of this case have been reviewed. The Commissioner adopts the Initial Decision as the final decision in this matter for the reasons set forth by the Administrative Law Judge (ALJ).

Accordingly, the Commissioner grants petitioner's application to withdraw the tenure charges certified against respondent, provide any back salary to which she is entitled under Title 18A, and recognize any tenure and seniority rights which respondent has accrued pursuant to *N.J.S.A.* 18A:28-5 and *N.J.A.C.* 6A:32-5.1. This matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/05/07

Date of Mailing: 7/05/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8539-06
ON REMAND – EDU 8108-04
AGENCY DKT. NO. 289-8/06

IN THE MATTER OF THE TENURE HEARING OF UMA SWAMINATHAN, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY

David B. Rubin, Esq., appearing for petitioner

Lennox Hinds, Esq., appearing for respondent (Stevens, Hinds & White, P.C., attorneys)

Record Closed: April 24, 2007 Decided: May 18, 2007

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter is on remand from the Commissioner of Education who, in a decision dated October 25, 2006, rejected the Piscataway Township School District's proposed withdrawal of the tenure charges it had certified against Uma Swaminathan on August 19, 2004. These charges of incapacity and conduct unbecoming alleged that Ms. Swaminathan had chronically failed to meet professional expectations and reacted to supervision by District personnel with unprofessional and hostile behavior. In her

answer dated August 31, 2004, Ms. Swaminathan denied the charges and claimed that she had been the victim of racism based upon her Asian Indian heritage.[1]

The matter was initially transmitted to the Office of Administrative Law on September 7, 2004.[2] Although the prehearing conference was held as scheduled on October 1, 2004, subsequent hearing dates were repeatedly adjourned for reasons including scheduling conflicts, settlement negotiations, and other good cause. The hearing began on October 21, 2005, and continued on October 31, 2005, November 16 and 18, 2005, December 21, 2005, February 2 and 7, 2006, March 29, 2006, and June 8, 2006, but was far from over. In fact, it was abundantly clear that numerous additional dates would be required to hear this matter to conclusion.

In the meantime, the parties continued to engage in settlement discussions until July 27, 2006, when counsel notified me that they had been unable to resolve their differences and were requesting that a settlement conference be convened before the hearing resumed in the fall of 2006. The conference was subsequently held on August 31, 2006, and although some progress was made, approximately one week later the District received word that Ms. Swaminathan had rejected its final proposal and had made no counter offer. At or about the same time, the District received a letter from Ms. Swaminathan's counsel, Lennox Hinds, Esq., stating that his client had received a "finding of Probable Cause" from the New Jersey Division on Civil Rights and intended to seek a Right to Sue Letter from the EEOC and add civil rights causes of action to the lawsuit she had filed against the District in federal court.

On September 25, 2006, the District requested leave to withdraw the tenure charges and submitted the certification of its Superintendent, Robert L. Copeland, in support of the request. In his certification, Mr. Copeland reiterated the District's dissatisfaction with Ms. Swaminathan's performance as follows:

---

[1] Ms. Swaminathan filed a complaint with the New Jersey Division on Civil Rights following the withholding of a salary increment at the conclusion of the 2002-2003 school year, alleging that the District's action was based on her Indian ethnicity. She filed additional charges after the District certified tenure charges against her in 2004, again alleging that the District's action had been motivated by anti-Indian bias.

[2] Although transmitted on September 7, 2004, the papers were not received and filed by the OAL until September 22, 2004.

> [A]fter reviewing her record and conferring extensively with her building principal and other supervisors, I was satisfied that she possessed neither the skills nor the professional attitude necessary to be an effective middle school social studies teacher in this District. She had rejected virtually all attempts to assist her in improving her skills, and reacted to any criticism of her performance with unfounded accusations of racism. After having given her every opportunity to rehabilitate her job performance, I was convinced that further attempts would be futile....
>
> [W]e remain convinced that she should not be teaching middle school students in this District .... Based on her historical unwillingness to take direction from any supervisor with whom she disagrees, we have serious concerns about the prospects for success at another grade level without a substantial change in attitude on her part.[3]

Nevertheless, Mr. Copeland went on to state that the continued financial cost and diversion of resources necessary to sever Ms. Swaminathan's employment with the District could no longer be justified.

On September 28, 2006, the case file – marked "WITHDRAWAL" – was returned to the agency for the Commissioner's review.[4] Approximately one month later, on October 25, 2006, the Commissioner issued her decision rejecting the requested withdrawal and remanding the matter for further proceedings. Specifically, the Commissioner rejected the District's request because it did not satisfy standards 2 through 5 of N.J.A.C. 6A:3-5.6(a).

Among other things, the Commissioner held that once tenure charges have been filed, financial considerations alone cannot justify abandoning them. Rather, the District must provide "a reasonably specific explanation of why it is now in the public interest not to pursue them." Commissioner's Decision, citing In the Matter of the Tenure Hearing of

[3] Since the original file bearing OAL Docket No. EDU 8108-04 was not retained by the Clerk's office, this section of Mr. Copeland's certification has been copied directly from the Commissioner's Decision #368-06.

[4] N.J.A.C. 1:1-19.2 provides that "[i]f the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition."

Kenneth Smith, School District of Orange, Essex County, Commissioner's Decision on Remand (June 16, 1983), aff'd. with modification, State Board of Education (November 2, 1983), aff'd., Superior Court (January 30, 1986) (emphasis in the Commissioner's Decision). Therefore, she stated that in the event the District decided to submit a new request, it would have to satisfy the six standards set forth in N.J.A.C. 6A:3-5.6(a) and have its request evaluated by an Administrative Law Judge in an Initial Decision.

The Commissioner's Remand was received and filed by the OAL on November 2, 2006, and a prehearing/status conference was conducted on December 7, 2006. During this first of several conferences, the District's counsel, David B. Rubin, Esq., indicated that his client was considering the possibility of renewing its request to withdraw the tenure charges on other than financial grounds. More specifically, Mr. Rubin stated that with the State Board of Education's adoption of N.J.A.C. 6A:16-7.3(a)9, the District had decided to provide suspended students with in-school instruction under the supervision of a fully-certified teacher as of the fifth day of their suspensions, and was considering assigning Ms. Swaminathan to that position.

On January 16, 2007, the District submitted the Supplemental Certification of Superintendent Copeland in support of its renewed request for leave to withdraw the tenure charges. In this certification, Mr. Copeland provided the following rationale for the District's request:

> Since then (the Commissioner's rejection of the initial request), there has been a change in circumstances in the District that presents a new basis for withdrawing these charges that did not exist at the time of our original application. In 2005, the State Board of Education adopted new regulations requiring that students on suspension be provided with "educational services, either in or out of school" within five days of the commencement of the suspension. N.J.A.C. 6A:16-7.3(9)(1) (sic).[5] We have recently concluded that, while home instruction may legally suffice under this regulation, the best interests of both the District and the student might well be served by continuing their education in a classroom-like setting in the District as of the fifth day of their suspension, separated from the general

[5] The actual citation is N.J.A.C. 6A:16-7.3(a)9i.

population but under the supervision of a fully-certified teacher who would provide individualized instruction from lesson plans already prepared by the student's regular teacher. I have determined to initiate this program on an experimental basis at Piscataway High School.

The staffing of this class presents several concerns, however. Reassigning a current teacher at the High School would disrupt class schedules already in place. We could staff the position with a new hire, but that individual would have no familiarity with the District or our students. We could assign individuals from our substitute teacher list to oversee the class, but that would provide no continuity for students who may be there long-term. After due consideration, I have concluded that Ms. Swaminathan should be assigned to fill this position.

I believe that this assignment is in the public interest, and not inconsistent with the positions taken earlier in this matter concerning Ms. Swaminathan's performance as middle school social studies teacher. The factors that prompted the filing of these tenure charges dealt largely with poor lesson planning, a teacher-centered lecturing style, and what we perceived as difficulties Ms. Swaminathan had dealing specifically with children of middle school age. We never disputed Ms. Swaminathan's knowledge of the subject matter, or the possibility that she could succeed in a different educational environment with older students, but were under no obligation to fashion out of whole cloth a position that did not exist.

In this new assignment, which we anticipate creating as of the Spring 2007 semester, Ms. Swaminathan would have no responsibility for lesson planning. She would be administering one-on-one instruction without lecturing, and would be dealing with older students, all under the guidance of high school supervisors with whom there has been no prior history of conflict. It would be my intention to assign Ms. Swaminathan to this position promptly upon the Commissioner's approval of the withdrawal of the charges. For the reasons stated above, I believe that withdrawing the tenure charges and assigning Ms. Swaminathan to this position would be in everyone's best interests.

As I noted in my earlier certification, if the Commissioner determines to grant our application, we would restore to Ms. Swaminathan whatever back salary she is entitled to under Title 18A. She would be supervised in her new position as we deem appropriate, but would receive

> neither preferential nor adverse treatment as a result of our prior experience. Whether she receives salary increments in the future would depend entirely on her performance. We recognize that Ms. Swaminathan's discrimination claims in federal court will continue, but are prepared to defend ourselves there and are confident that we will be vindicated.
>
> We are hopeful of success with this new venture but, in the event that this experimental program does not meet our expectations and must be discontinued, will of course honor whatever tenure and seniority rights Ms. Swaminathan may have at that point in any decisions concerning future assignments.
>
> [Supplemental Certification of Robert L. Copeland, ¶¶ 3-8]

By letter dated February 13, 2007, Mr. Hinds initially stated that he had shared the District's proposed withdrawal of the tenure charges with Ms. Swaminathan and advised her of her rights. He then stated that "[a]fter consultation with counsel, Ms. Swaminathan with full understanding of her rights, wishes to inform the court that she does not object to the Board's request to withdraw the subject matter tenure charges." Hinds Correspondence, February 13, 2007.

On April 24, 2007, Mr. Hinds, at my request, submitted a certification from Ms. Swaminathan indicating that she had, in fact, been advised of her rights in connection with, and consented to, the District's proposed withdrawal of the tenure charges against her. Ms. Swaminathan also stated that she had been "advised of the Commissioner's duty to refer Tenure Determinations resulting in the loss of position to the State Board of Examiners for possible suspension or revocation of certificate(s) which is not applicable in the instant matter." Swaminathan Certification, ¶ 4.

Pursuant to N.J.A.C. 6A:3-5.6(a),

> Once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the following standards established by the State Board of Education in the

matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (*S.L.D.*) 842, 846):

1. Accompaniment by documentation as to the nature of the charges;

2. Explication of the circumstances justifying settlement or withdrawal;

3. Consent of both the charged and charging parties;

4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing that the agreement is in the public interest; and

6. Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

After careful consideration of the record in this matter, I find that the parties have satisfied these six standards, which shall be addressed sequentially.

1. Documentation. The Tenure Charges and Statement of Evidence filed in support of the charges have been appended to this Initial Decision as Exhibits P-1 and P-2, respectively.

2. Explication. In his certification, Superintendent Copeland stated that with the State Board of Education's adoption of N.J.A.C. 6A:16-7.3, the District had a need for a teacher to provide educational services to students on long-term suspension, and believed that placing Ms. Swaminathan in this position "would be in everyone's best interests." As he explained, the factors that prompted the filing of the tenure charges were Ms. Swaminathan's inability to prepare appropriate lesson plans in a timely manner, a teacher-centered lecturing style, and difficulties dealing with middle school-aged students. But in this new position she would have no responsibility for lesson planning, would be administering one-to-one instruction, and would be dealing with

older students, all under the guidance of high school supervisory personnel with whom she has had no prior history of conflict. In other words, she would be given a new position and a clean slate.

3. Consent. Although the parties have argued that a withdrawal is, by definition, a unilateral act, they have nonetheless consented to the withdrawal of the tenure charges. The District's consent is implicit in its request and stated intention to recognize Ms. Swaminathan's continued status as a tenured teaching staff member. Ms. Swaminathan's consent may be found in Mr. Hinds's February 13, 2007, correspondence and her certification in which she stated that "with full understanding of my rights, I consent to the Board's withdrawal of the ... Tenure Charges."

4. Understanding of Rights. Since the parties were unable to resolve this matter, there was no settlement agreement for Ms. Swaminathan to "enter into," with or without the advice of counsel. Nevertheless, in her certification, Ms. Swaminathan stated that she had consulted with her attorney, been advised of her rights, and that "with full understanding of my rights, I consent ...." Swaminathan Certification, supra, ¶ 3.

5. Agreement in the Public Interest. As stated above, the parties were unable to resolve this matter and, as a result, there is no settlement agreement per se. Still, Mr. Copeland has established to my satisfaction that the District's requested withdrawal of the charges would be in the public interest.

Mr. Copeland laid the framework by stating that the District had "never disputed Ms. Swaminathan's knowledge of the subject matter, or the possibility that she could succeed in a different educational environment with older students, but [had been] under no obligation to fashion out of whole cloth a position that did not exist." Supplemental Certification of Robert L. Copeland, supra, par. 5. Now, with the adoption of N.J.A.C. 6A:16-7.3(a)9i, the District had the opportunity to create a new position teaching high school students serving suspensions.

Mr. Copeland then explained that he had several options when it came time to fill this position. He could assign a current High School teacher to the position, but that

would disrupt class schedules already in place. He could also assign individuals from the District's substitute teacher list, but that would provide no continuity for students with long-term suspensions. And a new hire unfamiliar with the District and its students would not be as effective as an experienced teaching staff member instructing and supervising students with disciplinary problems. Therefore, the assignment of Ms. Swaminathan would best serve the public interest.

6. Referral to State Board of Examiners. Clearly, the proposed withdrawal of the charges will not result in a loss of position. To the contrary, it will enable Ms. Swaminathan to retain her position as a tenured teaching staff member and will not, therefore, obligate the Commissioner to refer the matter to the State Board of Examiners for possible suspension or revocation of her teaching certificate. Nevertheless, in her certification, Ms. Swaminathan stated that she had been advised of the Commissioner's duty, "which is not applicable in the instant matter." Swaminathan Certification, ¶ 4.

Based upon the foregoing, I conclude that the Piscataway Township School District's request for leave to withdraw the tenure charges certified against Uma Swaminathan should be **GRANTED**; that the District should restore to Ms. Swaminathan any back salary and seniority to which she may be entitled under N.J.S.A. 18A:28-5; and that this matter should be **DISMISSED**. It is so **ORDERED**.

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

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

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

May 18, 2007
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

5-21-07

MAY 22 2007
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

EXHIBITS

For Petitioner:

P-1 Tenure Charges

P-2 Statement of Evidence

P-3 Supplemental Certification of Robert L. Copeland

For Respondent:

R-1 Hinds Correspondence dated February 13, 2007

R-2 Certification of Uma Swaminathan

274-07

IN THE MATTER OF THE TENURE HEARING OF JANNETTE DURAN, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, and	:	
IN THE MATTER OF THE TENURE HEARING OF ROSALYN VINSON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, and	:	COMMISSIONER OF EDUCATION DECISION
IN THE MATTER OF THE TENURE HEARING OF JANICE JONES, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	

SYNOPSIS

The Camden Board of Education certified tenure charges of insubordination, conduct unbecoming and neglect of duty against three teachers based on allegations that they were involved in a fraudulent attempt to receive payment for attendance at meetings of their respective School Leadership Councils – when no such meetings ever took place – and then attempted to cover up the facts during the district's investigation by filing fabricated documents and giving false information. The cases were tried together because the charges against each respondent stemmed from the same alleged activities and raised the same issues regarding their obligations as tenured employees.

The ALJ found that the Board had proven the charges against each of the three respondents and that – notwithstanding prior unblemished records, absence of venal motives, and circumstances that helped explain their conduct – dismissal from tenured employment with the district was, in fact, the appropriate penalty for respondents' conduct.

The Commissioner concurred with the ALJ that all charges had been proven by the Board and that respondents' conduct warranted dismissal from their tenured employment. The Commissioner referred all three matters to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.6(a)1 for action against respondents' certificates as that body deems appropriate.

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

July 5, 2007

#274-07

OAL DKT. NOS. EDU 6754-06, EDU 6887-06 and EDU 6957-06
AGENCY DKT. NOS. 307-9/06, 305-9/06 and 308-9/06

IN THE MATTER OF THE TENURE HEARING OF JANNETTE DURAN, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, and	:	
IN THE MATTER OF THE TENURE HEARING OF ROSALYN VINSON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, and	:	COMMISSIONER OF EDUCATION DECISION
IN THE MATTER OF THE TENURE HEARING OF JANICE JONES, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	

The record of these matters – heard together because they arose from the same alleged activities – and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions to the Initial Decision were filed pursuant to *N.J.A.C.* 1:1-18.4 by Rosalyn Vinson, Jannette Duran and the Camden Board of Education, respectively; none filed replies, and no submission of any kind was received from Janice Jones.

In her exceptions, Rosalyn Vinson (Vinson) contends that the Administrative Law Judge failed to consider, or make findings of fact indicating, that "there were distinct differences in the procedures used in the meetings that resulted in

cooperation offered by the Wilson staff and lack of cooperation by the Wiggins staff" and that these differences – together with the loyalty, trust and fear inspired by Wiggins Principal Juanita Worthy, whose directive to "continue the lie" Vinson dutifully followed – "discouraged [Vinson] from coming forward with the truth when asked" and led to the conduct that has now threatened her tenured employment. Vinson urges that teachers, while held to a higher standard as public employees and role models, are "susceptible to [the] same pressures and demands [as] any other individuals," and that, on balance, she is a "loyal and dedicated employee perhaps to a fault" who does not deserve to lose her tenure rights as a result of the incident in question. (Exceptions of Rosalyn Vinson at 1-3, quotations at 2-3)

Similarly, Jannette Duran (Duran) argues on exception that the ALJ failed to consider sufficiently the situation in which her conduct arose, specifically that she was "out of school and ill during the critical period of the investigation," so that she had "no understanding of the peripheral matters" related to it; had she had such knowledge, she contends, she would not have submitted the fabricated meeting matrix – which she had signed at the directive of her principal – and would instead have acted as did her colleagues, who received letters of reprimand because they did not submit such matrices although they had previously signed meeting attendance sheets. According to Duran, "it cannot be ignored that there are a number of teaching staff members who did essentially the same things with which [she] has been charged, and who have received only letters of reprimand," so that, under all of the circumstances, the appropriate penalty for her additional act of submitting a matrix is the withholding of her increment and forfeiture of the 120 days' pay withheld pursuant to *N.J.S.A.* 18A:6-14 – not the "extreme measure of

termination" as recommended by the ALJ. (Exceptions of Jannette Duran at 1-3, quotations at 2-3)

The Camden Board of Education (Board), on the other hand, urges adoption of the Initial Decision in major part but objects to: 1) the ALJ's characterization of respondents as redeemable and perhaps still able to contribute in a teaching setting; 2) his failure to find that respondents' actions constituted insubordination as well as unbecoming conduct; and 3) his failure to find Rosalyn Vinson guilty of neglect of duty, insubordination and unbecoming conduct with respect to the separate charge arising specifically from her role as chairperson of the Wiggins School Leadership Council (SLC).[1] With respect to its first objection, the Board reviews case law addressing the high standard of conduct to be expected of teachers in light of their influence as student role models and cites extensively to specific actions on the part of respondents, as proven in this matter, that demonstrate the Board's contention that they are "unfit to teach and should not return to any situation where they would again have the opportunity to set the kind of destructive example they have put forth to the impressionable children of Camden." (Board's Exceptions at 3-11, quotation at 10) With respect to its charge of insubordination, the Board argues that by virtue of the behavior in which respondents were found to have engaged, they "all committed flagrant acts of insubordination," since "it is axiomatic that purposefully providing untruthful information to supervisors and administrators or refusing to cooperate with an administrator's investigation is 'willful and intentional disregard of the lawful and reasonable directives' of that administrator." The Board holds this behavior to be all the more egregious in a society "plagued by

[1] At various points in the record and Initial Decision, SLCs are incorrectly referred to as School Leadership *Committees*.

corruption, violence and poverty, such as Camden," where it is "especially crucial for teachers to instill a sense of truthfulness and independence and encourage students to stand up for what is just and right." (*Id.* at 11-13, quotations at 11 – citing *State-Operated School District of Paterson v. Long*, decided by the Commissioner October 26, 2006 – and 13) Finally, with respect to respondent Vinson, the Board contends that – as chairperson of an SLC – she must be held to an even higher standard of leadership and integrity, yet she knowingly and repeatedly took actions that facilitated and perpetuated the "concerted plan to defraud the Board." (*Id.* at 13-14, quotation at 13)

Upon review, the Commissioner concurs with the ALJ that the Board has proven its charges against respondents, and that the appropriate penalty in each case is dismissal from tenured employment.

In so holding, the Commissioner notes that the ALJ dismissed neither the charges of insubordination against all three respondents nor the charge against Vinson with respect to her role as SLC chairperson, but rather made no express mention of them in his discussion of law (Initial Decision at 26-27) or final conclusions with respect to each respondent. (*Id.* at 34) Notwithstanding such omission, however, it is abundantly clear from the discussion at 26-33, that the ALJ regarded all charges as proven with respect to all three respondents: In the case of the charge against Vinson, the behavior underlying it is subsumed by the ALJ's general statement (at 34) regarding her attempt to fraudulently obtain money from the Board, and, to the extent that the ALJ was silent on the question of whether respondents' actions constitute insubordination as well as unbecoming conduct and neglect of duty, the Commissioner here clarifies that persistently and knowingly responding in an untruthful, evasive manner to district

administrators attempting to investigate a very serious situation – as respondents herein were found to have done – cannot be viewed as anything other than insubordinate; it is well established that there need not be an overt exhibition of disrespect, or an outright refusal to obey directives or perform duties, in order for insubordination to be found. *In the Matter of the Tenure Hearing of Peter Loria, State-Operated School District of the City of Newark, Essex County,* January 26, 1998 slip. op. at p. 69, *aff'd* State Board August 7, 1998.

Similarly, although respondents Vinson and Duran protest that the ALJ failed to consider sufficiently the extent to which each in her own way was a victim of circumstance, the Commissioner finds that, to the contrary, the ALJ very carefully weighed the situations in which respondents found themselves before concluding that their conduct could not be found to warrant anything less than loss of their tenured employment in the district. (Initial Decision at 35-36)

Finally, with respect to the question of whether respondents should suffer professional consequences over and above the loss of their tenured employment in the Camden school district, the Commissioner does not reach the statements of the ALJ to which the Board takes exception and instead construes them not as facts or conclusions to be adopted or rejected, but as dicta expressing nothing more or less than an honest opinion based upon first-hand observation of respondents over multiple days of hearing. Such opinion notwithstanding, however, conduct of the type proven to have been committed by respondents herein cannot be countenanced in the public schools, and the Commissioner, therefore, would be remiss in meeting her own obligations if she failed to refer respondents to the State Board of Examiners so that that body may, pursuant to

N.J.A.C. 6A:9-17.1 et seq., exercise its exclusive authority to determine whether respondents should be permitted to retain their educational certification.

Accordingly, for the reasons expressed therein as clarified and amplified above, the Initial Decision of the OAL is adopted as the final decision in these matters. Respondents Jannette Duran, Rosalyn Vinson and Janice Jones are dismissed from tenured employment with the Camden Board of Education as of the filing date of this decision, and all three matters are hereby referred to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.6(a)1 for action as that body deems appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/05/07

Date of Mailing: 7/05/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF THE TENURE HEARING OF JANNETTE DURAN, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	OAL DKT. NO. EDU 6754-06S AGENCY DKT. NO. 307-9/06
IN THE MATTER OF THE TENURE HEARING OF ROSALYN VINSON, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	OAL DKT. NO. EDU 6887-06 AGENCY DKT. NO. 305-9/06
IN THE MATTER OF THE TENURE HEARING OF JANICE JONES, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	OAL DKT. NO. EDU 6957-06 AGENCY DKT. NO. 308-9/06

Louis R. Lessig, Esq., (Brown & Connery, attorneys) and **Gregory Johnson,** Esq., (Sumners & George, attorneys) for petitioner City of Camden

Michael T. Barrett, Esq. for respondent Duran (Bergman & Barrett, attorneys)

Cristal Holmes-Bowie, Esq., for respondent Vinson (Michael A. Armstrong, attorney)

Ned P. Rogovoy, Esq., for respondent Jones

Record Closed: May 2, 2007 Decided: May 17, 2007

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

This initial decision involves certified tenure charges brought against three teachers employed by the Board of Education of the City of Camden (Board).[1] The contested cases have been tried together, as the allegations involving each individual teacher stem from the same alleged activities and involve essentially the same alleged violations of their legal obligations as tenured employees. The Board certified the charges against each to the Commissioner of Education, who transferred them to the Office of Administrative Law for hearing. Hearings were held on multiple days in March, April and May 2007 and were completed with closing arguments presented on May 2, 2007.

The charges against each teacher resulted from an investigation conducted by employees of the Board concerning certain requests made for payment of extra compensation to various school employees for their purported attendance at a series of meetings of the School Leadership Committees ("SLC") for the H.B. Wilson ("Wilson") School and the U.S. Wiggins School ("Wiggins") during the 2005-2006 school year. SLCs are a product of the Abbott designation accorded to Camden by case law and statute and are defined at N.J.A.C. 6A:10-1.2 as "a collaborative school-based planning and advisory body established in N.J.A.C. 6A:10A-5.3." A full explanation of the SLC's membership and responsibilities will follow, but it is sufficient here to note that the general gravamen of the complaints about these teacher is that they, along with others, are alleged to have fraudently attempted to receive payment of monies for their supposed attendance at a series of meetings of their respective school's SLC when in fact no such meetings were ever held and then to have attempted to cover up the facts once an investigation had begun, by filing fabricated documents and false information. The Board contends that prior to the investigation, all three teachers had signed their names to multiple SLC sign-in sheets which purported to establish their attendance at meetings when in fact the meetings did not occur and they were not in attendance. Then, after the investigation was launched, each signed and prepared a grid, or matrix, presented to them by the investigators, and falsely represented facts about these meetings and their participation therein on those documents. Further, in the case of Ms. Vinson and Ms. Jones, they each participated in the preparation of massive binders

[1] There were originally five cases that were to be tried together. However, non-tenured employees Valerie Cooke and Aida Guzman, withdrew their respective challenges to the Board's decision not to offer them contracts for the 2006-2007 school year.

which were then submitted to the Board as proof of the meetings, binders which contained phony agendas for the several purported meetings and notes purportedly made at the time of those meetings. Ms. Vinson is charged with seven charges of insubordination, conduct unbecoming and/or neglect of duty for intentionally lying to investigators concerning the SLC investigation and for conspiring with others and using her position as chairperson of the Wiggins SLC to attempt to defraud the district. Ms. Jones, who was an SLC member but not a chairperson, faces six charges of the same nature. Finally, Ms. Duran, an SLC member for whom no binder was submitted, faces five charges of insubordination, misconduct and neglect of duty.

As will be explained, the essential facts regarding the purported meetings, the validity of the signatures of the respondents on sign in sheets and the preparation and submission of the binders are not really in contention. In fact, these respondents do not so much argue that they are guiltless; indeed, they agree that they did wrong. But they attempt to explain their conduct, emphasize that they did work and seek to convince that they should not lose their tenure despite their misconduct. As a result, while the Board sees the issues narrowly and thus the evidence relevant to actually proving guilt as also narrow, the respondents have attempted to at least place their actions within a broader context of issues surrounding the SLCs and the atmosphere and culture of their schools. In some degree, the respondents believe that the work of the SLCs was performed, albeit not at the meetings at issue here, and they may be seen in part as attempting to defend themselves from suggestions that they did nothing at all. But the Board emphasizes that the tenure charges are not about whether SLC work was done, but whether the representations and documentation presented to support the payroll reports were fraudulent and whether these respondents and others were in collusion to try to convince the investigators that what did not actually happen really did happen. Thus, it may be said that to the Board the issue is truthfulness, rather than work.

It is important to note that this matter has been the subject of a State Grand Jury investigation which, during the early days of the hearings in this case, resulted in an indictment against Juanita Worthy, who was the principal at Wiggins, her daughter Keah Worthy, who was a teacher and SLC member at Wilson, Michael Hailey, who was

the principal at Wilson, and Pat Johnson, a literacy coach and SLC member at Wilson, for their actions in regard to the SLCs, as well as other unrelated matters not involving the three respondents. However, the respondents, while initially advised that they were targets of the investigation, each testified before the Grand Jury regarding the SLC matter and were then advised, again just after the issuance of the indictments and early in this hearing, that they were no longer targets.

SCHOOL LEADERSHIP COUNCILS

As this case involves the SLCs, it is important at the start to understand what these are and what their responsibilities are as defined by regulation. They are established pursuant to N.J.A.C. 6A:10A-5.3. The SLC is established

> To facilitate the participation of the school principal, teachers, staff, parents, grandparents or guardians, and the community to develop a culture of cooperation, accountability and commitment, all with a focus on improving student achievement.
>
> [N.J.A.C. 6A:10A-5.3(a)]

The regulations present roles and responsibilities for the SLC. N.J.A.C. 6A:10A-5.3 (a)1 requires that the SLC "shall assist in the development of, and approve, the school two-year report on instructional priorities." However, while the SLC is to "concentrate on the objective of universal mastery of the CCCS [Core Curriculum Content Standards] and helping to create a climate of cooperation and focus on student achievement," it is not to "manage the day-to-day implementation of school policies," a responsibility mandated for the school principal and instructional staff. N.J.A.C. 6A:10A-5.3(a)2. N.J.A.C. 6A:10A-5.4(a) sets out the following as roles and responsibilities:

> collaborative advisory and decision-making body to improve teaching and learning in the school . . .
> 1. Continuously analyze student performance assessment data; and work with the school principal and faculty to identify obstacles to improved performance;
> 2. Review the school-based budget prepared by the school district central office for accuracy and to ensure that the

needs of students, faculty and the school are addressed. The SLC may propose modifications, consistent with the school district budgeting procedures and criteria. The SLC must document its recommendations;
3. Participate in training provided by the school district or Department;
4. If the SLC has completed all school district training to participate in principal selection, the SLC shall recommend three candidates for school principal to the CSA;
5. Collaborate with the CAPA team;
6. Develop the school report on instructional priorities, review its implementation amend it in light of performance data and circumstances, and make it available to the school community and the school district; and
7. Maintain minutes and an agenda for all SLC meetings and make them available to the school community. Copies of the minutes shall be transmitted on a timely basis to the CSA.

[N.J.A.C. 6A:10A-5.4(a)]

SLC membership shall consist of "the school principal, representatives of teachers, of non-instructional support staff, of parents, and of the community," and may include students. N.J.A.C. 6A:10A-5.3(b). A member of the SLC "shall receive no compensation for his or her services except that:" payments may be made to employee members pursuant to a collective bargaining agreement for hours beyond the school work day and for reasonable expenses. N.J.A.C. 6A:10A-5.3(d)3i and ii. Meetings shall be held at least monthly and shall be public and shall be publicized in advance. N.J.A.C. 6A:10A-5.3(d)4.

STIPULATIONS

Both at the start of and later during the hearings, counsel were able to enter into stipulations of fact. These are set forth as to each of the respondents.[2]

Janice Jones

1. Jones was employed by the Camden City Board of Education as a teacher of the handicapped. She was hired on or about February 8, 1988.

[2] In addition to the stipulations received regarding the respondents, a stipulation was admitted regarding Roquetta Reed, a member of the Wilson SLC.

2. During the 2004-2005 school year, Jones was assigned to the U.S. Wiggins Elementary School.

3. During the 2005-2006 school year, Jones was assigned to the U.S. Wiggins Elementary School.

4. Juanita Worthy was the building principal at the U.S. Wiggins Elementary School during the period of September 2004 through June 2006.

5. Jones was a member of the School Leadership Council during both the 2004-2005 and 2005-2006 school years.

6. The following persons were members of the SLC at the U.S. Wiggins Elementary School during the 2004-2005 school year: Juanita Worthy, Albert Campbell, Rosalyn Vinson, Chairperson, Janice Jones, Nancy Ruiz, Valerie Cooke, Kevin Farrington, Aida Guzman, Yvette Torres, parent, and Olga Hernandez, parent.

7. The following persons were members of the SLC at the U.S. Wiggins Elementary School during the 2005-2006 school year: Juanita Worthy, Rosalyn Vinson, Chairperson, Denise Tucker, Janice Jones, Valerie Cooke, Aida Guzman, Javier Roman, and Maribel Leon, parent.

8. Respondent at the start of the 2005-2006 school year, signed the SLC Statement of Understanding on July 1, 2005.

9. On April 27, 2006, as Jones and the several members of the SLC at the U.S. Wiggins Elementary School individually attended a meeting with Dr. Fred Reiss, Assistant Superintendent and Kimberlee Buell-Alvis, Affirmative Action Officer, Respondent was asked to fill out a form regarding the alleged SLC meetings with dates and locations of the same. The respondent signed and dated the document.

10. In the 2004-2005 school year, Jones was compensated for her SLC approved time via direct deposit listed as "Extra Compensation."

11. On August 11, 2006, Jones was served with tenure charges and supporting Statement of Evidence which contained six charges against her.

12. On August 31, 2006, after Jones filed a Written Statement of Position, the board met in closed executive session at a special board meeting to review the merits of the charges against Jones. After evaluating the charges, together with the supporting Statement of Evidence with exhibits, the board voted to certify six tenure charges against Jones.

13. Javier Roman is a Custodian employed by the Camden City Board of Education.

14. During the 2005-2006 school year, Mr. Roman was assigned to the U.S. Wiggins Elementary School.

An additional stipulation was offered with respect to Ms. Jones and the stipulations therein have been renumbered to follow consecutively with the prior stipulations.

15. On or about May 8, 2006, the Camden City Board of Education held a board meeting where it recommended and approved the respondent Jones not be permitted to participate in any school leadership or co-curricular activities in the future, in addition to withholding her increment for the 2006-2007 school year.

16. Respondent Jones was given an opportunity to appear at a Donaldson Hearing on or about July 17, 2006 in regard to the withholding of the increment for the 2006-2007 school year. Jones did not appear at the Donaldson Hearing.

17. On July 17, 2006, the board voted to uphold its decision to withhold the increment for Jones for the 2006-2007 school year.

18. Respondent Jones certified Answers to Interrogatories and served them on Petitioner on or about January 31, 2007.

Jannette Duran

1. Jannette Duran was employed by the Camden City Board of Education as a teacher at the H.B. Wilson Elementary School. Duran was hired by the District on or about September 1, 2001.

2. During the 2004-2005 school year, Duran was assigned to the H.B. Wilson Elementary School.

3. During the 205-2006 school year, Duran was assigned to the H.B. Wilson Elementary School.

4. Michael Hailey was the building principal at the H.B. Wilson Elementary School during the period of September 2004 through June 2006.

5. Duran was appointed as a member of the SLC during both the 2004-2005 and 2005-2006 school years.

6. The following persons were members of the SLC at the H.B. Wilson Elementary School during the 2004-2005 school year: Michael P. Hailey, Patricia Johnson, Alton Booker, Jannette Duran, Sandra Rose-Finger, Roquetta Reed and Keah Worthy.

7. The following persons were member of the SLC at H.B. Wilson Elementary School during the 2005-2006 school year: Michael Hailey, Patricia Johnson, Jannette Duran, Sandra Rose-Finger, Roquetta Reed, Keah Worthy, Alton Booker and Judy Bright, parent.

8. Duran was entitled to compensation on an hourly basis for attending SLC meetings held beyond the school day with prior board approval.

9. Duran at the start of the 2005-2006 school year, signed the SLC Statement of Understanding on July 1, 2005.

10. In the 2004-2005 school year, Duran was compensated for her SLC approved time via direct deposit listed as, "Extra Compensation."

11. On August 11, 2006, Duran was served with tenure charges and supporting Statement of Evidence which contained five (5) charges against her.

12. On August 31, 2006, after Duran filed a Written Statement of Position, the board met in closed executive session at a special board meeting to review the merits of the charges against Duran. After evaluating the charges, together with the supporting Statement of Evidence with exhibits, the board voted to certify five (5) tenure charges against Duran.

An additional stipulation between counsel for the Board and Ms. Duran contains the following stipulations, renumbered herein consecutive to the previous Duran stipulations.

13. On or about May 8, 2006, the Camden City Board of Education held a board meeting where it recommended and approved Respondent Duran not be permitted to participate in any school leadership or co-curricular activities in the future, in addition to withholding her increment for the 2006-2007 school year.

14. Respondent Duran was given an opportunity to appear at a Donaldson Hearing on or about July 17, 2006 in regard to her withholding increment for the 2006-2007 school year. Duran did not appear at the Donaldson Hearing.

15. On or about July 17, 2006, Camden City Board of Education voted to uphold the decision to withhold increment for the Respondent Duran for the 2006-2007 school year.

Rosalyn Vinson

1. Rosalyn Vinson is employed by the Camden Board of Education as a teacher. Ms. Vinson was hired by the District on or about September 1, 1988.

2. During the 2005-2006 school year, Vinson was assigned to the U.S. Wiggins Elementary School. Juanita Worthy was the building principal at Wiggins.

3. The respondent was the Chairperson of the SLC for the 2005-2006 school year.

4. The following persons were members of the SLC at Wiggins School during the 2005-2006 school year: Juanita Worthy, Rosalyn Vinson, Chairperson, Denise Tucker, Janice Jones, Valerie Cooke, Aida Guzman, Javier Roman and Maribel Leon, parent.

5. Respondent printed her name and signature on several forms titled SLC Sign in Sheets which at the time were not dated.

6. On April 27, 2006 the respondent and several members of the SLC at Wiggins attended a meeting with Dr. Fred Reiss, Asst. Supt. and Kimberlee Buell-Alvis, Affirmative Action Officer.

7. On Friday, April 28, 2006, respondent attended a meeting in the Conference Room of the Wiggins School with Principal Worthy and other SLC members to discuss and assemble a binder.

ADDITIONAL FINDINGS OF FACT

Based upon both the testimony and the documents presented at the hearing, a series of additional factual findings can be made on issues that were not disputed.

1. Each member of the SLC signed a "Statement of Understanding" which listed responsibilities of the SLC as to oversee the selection and implementation of a whole-school reform model;

a. Ensure implementation of the model to achieve Core Curriculum Content Standards and three-year operational plan;

b. Develop the school-based budget;

c. Make recommendations for the appointment, transfer or removal of staff;

d. Submit recommendations of three or four names for the appointment of a Principal when a vacancy occurs. (The Superintendent will make the final selections and recommendation to the Board);

e. Develop and submit a school-level technology plan;

f. Provide for cross-content workplace readiness standards.

2. At its meeting in November 2005, the Camden Board of Education approved a recommendation that authorized both the Wiggins and the Wilson SLCs to meet from 3:30 pm to 5:30 pm on November 5 and December 3, 2005, and January 14, February 3, March 4, April 1, May 6 and June 3, 2006. All of these approved days were weekdays. The total cost for the Wiggins SLC was not to exceed $3,000; the total cost for the Wilson SLC was not to exceed $4,000. Administrators, clerical and SLEO personnel were to be compensated from 4:00 to 5:30 only.

3. Regardless of whatever else may have actually been done with respect to any work of the SLC at either Wiggins or Wilson, and regardless of any representations made by any members of the SLC to the contrary, no meetings of the SLC were held on the approved dates by either SLC.

4. While various payroll records were submitted seeking payment for members of each SLC of compensation for alleged attendance at specific SLC meetings purportedly held on the approved dates or on other dates, no compensation was ever paid to any member of either SLC for the 2005-2006 school year.

5. As a result of concerns raised after review of payroll reports submitted beginning on February 9, 2006, (CBOE 3 and 4), claiming that payment should be made to seven members of the Wiggins SLC, each for 64 hours of work at a total of eight meetings held on October 15 and 29, November 12 and 26, December 3 and 17, 2005 and January 7 and 21, 2006, an investigation was begun into the Wiggins and Wilson SLCs. Victoria Pratt, Esq., a compliance officer for the district, noted that the times and dates of meetings for which compensation was sought did not correspond with the officially approved meeting dates as documented in the official Board minutes. The dates for which payment was sought were all Saturdays and payment was sought for meetings on those dates that were listed as lasting from 8:00 am to 4:00 pm. Pratt enlisted Kimberlee Buell-Alvis, Affirmative Action officer employed by the District, to assist her in her investigation.

6. Further analysis of the several "SLC SIGN-IN SHEETS" submitted with the payroll reports showed that there were identical dates and times for the meetings of the two SLCs and that no parental representatives on either SLC were listed as having signed in. Also, sign-in sheets were not submitted within ten days of the SLC meetings as required and as noted specifically on the bottom of the sign-in sheets.

7. When, as a result of the discrepancies noted, further information was requested from the two schools, additional payroll reports (CBOE 52, 53, 54, and 55) were submitted on March 13. These sought payment for meetings supposedly held on dates that had been approved in the Board's November action. Specifically, these dates were November 5 and December 3, 2005 and January 14, February 4 and March 4, 2006. Again, an examination of the supporting documentation showed discrepancies and apparent doctoring of sign-in sheets and agendas.

8. Another set of payroll reports was submitted (CBOE 55 and 56), which duplicated the request for payment for meetings purportedly held on the same eight Saturdays as were listed in the original payroll reports (CBOE 3 and 4).

9. As the investigation proceeded, on April 26, 2006, interviews were held with individuals from both schools at the Board offices. Interviewed were Kevin Farrington, a custodian at Wiggins; Marva Williams, a custodian at Wiggins; Javier Roman, a custodian at Wiggins and member of the SLC; and Alton Booker, Head Custodian at Wilson and a member of its SLC. These persons were queried as to their presence and the presence of other employees and/or SLC members at the respective schools on certain Saturdays when, according to the payroll reports, it was alleged that meetings of the SLC had occurred. In addition, the investigators had secured alarm records that showed entry and exit information for the schools. The result of the interviews confirmed to the investigators that there had been no meetings at the schools, much less meetings lasting for eight hours, on those Saturdays as the payroll reports stated. Indeed, Mr. Roman, in the presence of his union representative, confirmed that he had been directed to sign sign-in sheets by school principal Juanita Worthy, all on the same day. Alton Booker confirmed that he had also been told to sign sign-in sheets.

10. That same afternoon, meetings were held with Michael Hailey, Juanita Worthy and Pat Johnson. When queried by Ms. Pratt as to where Wilson SLC meetings were held, Hailey stated that they were held at homes of various members such as Ms. Vinson's and Juanita Worthy's, and at Rutgers-Camden. He said that he would provide information to support that meetings were held "tomorrow." Worthy also stated that meetings were held at different locations and not everyone attended each meeting, but changed her story when confronted with the sign-in sheets which showed each member who signed having signed each sheet. (There were no signatures for the parent members). Worthy also promised to provide documentation to substantiate meetings and locations. Patricia Johnson similarly provided conflicting information and changed her story when shown documents.

11. As a result of these interviews, the investigators determined that the meetings did not appear to have actually been held at the schools on the Saturdays for which the payroll reports sought payment and that sign-in procedures had apparently been manipulated.

12. After these interviews, the investigation team, also including Dr. Fred Reiss and Mr. Luis Pagan, each an assistant superintendent, arranged to go on April 27th to Wiggins and Wilson in two-person teams for the purpose of meeting with the staff members of the SLCs in order to verify signatures on the sign-in sheets and to obtain information about the alleged meetings. They prepared a grid, referred to in the record mostly as a "matrix," a sample of which is CBOE 337. This matrix listed the several alleged meeting dates, twelve in total, under the heading "Date of SLC Meeting Submitted for Payment." It then had columns entitled "Was an SLC Meeting Held?", "Where Was It Held?", "Did You Attend The Meeting?", and "From When to When?" A box next to each of the twelve dates of the purported meetings was provided for the member to fill in.

13. Jannette Duran was out of work due to illness on April 27th and was not present for the meeting at Wilson where this matrix was presented to the members of that school's SLC.

14. The SLC members at each school were not advised in advance that they were to be summoned to these meetings or told in advance that they would be queried about dates, times and locations of specific meetings. Neither Juanita Worthy nor Michael Hailey was in attendance at these meetings.

15. At Wiggins School, Buell-Alvis and Reiss met with the staff members in the library. A union representative was present, but also had no forewarning of the meeting. Ms. Vinson was present at the outset; Ms. Jones was out of the building. She was summoned to the meeting and arrived part-way through the session. Dr. Reiss discussed the implications of fraudulent documents, the need to verify signatures and the filling out of the matrix. He told those present that there was to be no discussion and they were placed at separate tables. Ms. Denise Tucker objected to the process and wanted to know if there were any legal implications. When Janice Jones arrived she was given the same instructions as the others had received. No one left the room before Jones arrived.

16. Each person present was individually shown a series of sign-in sheets for meetings purportedly held during the 2005-2006 school year and each person confirmed that their signatures on these documents were authentic. As there were several submissions made there were more than one sign in sheet presented for several dates. The sign-in sheets presented for the review of the Wiggins SLC members were dated October 15, October 29, November 5, November 12, November 26, December 3, December 17, 2005, and January 7, January 14, January 21, February 4, and March 4, 2006.

17. The following is the material handwritten upon Janice Jones' matrix. As to each of the twelve dates listed she answered the question as to whether a meeting was held with the word "Yes." She did not fill in anything under the questions as to where held, whether she attended and the times of the meetings. She signed the matrix and dated it and wrote the following on the bottom of the form, "*Mtgs were held and hours were put in and all work was completed. Each task addressed on agenda was accomplished and turned in. Some tasks were done outside mtgs and hours were longer than actually put in."

18. The following is the material handwritten upon Rosalyn Vinson's matrix. As to each of the twelve dates listed she answered the question as to whether a meeting was held with the word "Yes." She did not place anything in the boxes under the "where held" column. She wrote "Yes" under the "did you attend" column for each of the twelve dates. She did not write anything under the "from when to when" column. She signed the form and dated it and wrote the following on the bottom of the form, "Please note: We met at various homes. I can produce whereabouts by looking at notes. I am not comfortable with placing locations w/o first being sure w/o legal representation. P.S. I would like an opportunity to give locations at a later date."

19. Denise Tucker, who had voiced objections to the process, did not fill in any of the boxes under the four columns and wrote at the bottom of her matrix, "I'm sorry I do not recall exact information as to locations." She signed her name under this note.

20. Valerie Cooke filled out most of the boxes on the matrix. She claimed that meetings were held on at least eleven of the twelve dates listed and as to the other wrote, "Yes don't recall." She did not recall some of the locations, but wrote that the October 15, 2005, meeting was held at "home" and the January 21, 2006, meeting was held at "my home mine." The November 12, 2005, meeting was held at "Ms Jones home." All meetings lasted from 8:00 am to 4:00 pm and she wrote, "Yes" as to attending seven of the meetings and did not recall another two, leaving the remaining three blank.

21. Aida Guzman did not fill out the matrix and after apparently first signing and dating the form, crossed out her signature and the date and wrote "refuse to sign."

22. At no time during either the meetings at Wiggins or at Wilson did any of the SLC members present advise that they had pre-signed sign-in sheets or that they had signed them in blank.

23. After this meeting ended, the two investigators met with Juanita Worthy and left her a blank copy of the matrix to complete. She did not fill it out while they were present.

24. Ms. Pratt and Mr. Pagan went to Wilson School at the same time as Buell-Alvis and Reiss went to Wiggins. As noted, Ms. Duran was absent that day.

25. At Wilson, Keah Worthy did not fill in the matrix, but wrote, "We met at people's house/school and went into small groups to discuss our Agenda (District Initiatives)." She signed and dated the form.

26. Roquetta Reed wrote "I don't remember" for the October 15 and 29 dates and "I do not remember" for November 5. She did not fill in any of the information for the other dates or write any notes next to those other dates, signed the form and wrote at the bottom, "I do not remember and I did not know what I was signing."

27. Sandra Rose-Finger did not write anything in the matrix itself and signed the form, adding at the bottom, "I do not remember these meetings. I did not realize that I was signing for specifically."

28. Late in the afternoon of April 28th, a series of blue binders, each containing some four hundred pages of essentially identical material, were delivered to the Board's offices. Each binder presented for a member of the Wiggins SLC had placed on top of it a memorandum to "U.S.Wiggins SLC Members" from J.C. Worthy, dated April 27, 2006 re: Documentation of Meetings." This memo (CBOE 99) read:

> In an effort to cooperate with the investigation we must document our meetings. It is vital that you go through all of your SLC information. We must be able to show that we met. Please check all of your files, notebooks, calendars, etc. Any information you can bring to the meeting on Friday will be helpful. Please try to remember the dates, where you ate, your mode of transportation to the meeting, how much money you spent, the exact state of your health or ANY THING ELSE that may trigger the correct time and dates of the SLC meetings. Please do not include your unscheduled meetings. The documentation is due April 28, 2006.
> All information will be gathered and sent to the Office of Compliance April 28, 2006 at 3 pm.
>
> [Exhibit CBOE 99]

On each of the Wiggins binders the name of one of the listed SLC members was highlighted. In all, nine binders were submitted, for Jones, Cooke, Keah Worthy, Tucker, Vinson, Juanita Worthy, Guzman, Hailey and Johnson.[3]

29. Among other materials, these binders contained meeting agendas dated for the various dates upon which it was apparently represented that meetings had been held. For example, an "Agenda" for a meeting on "November 5, 2005 3:30-5:30 PM" for the Wiggins SLC and typical of the format of the other agendas included in the binder, runs for three pages, includes items such as "welcome," "review budget," "Technology," "Professional Development," Focus Room: Mr. Joe Schechtman, Consultant,"

[3] As stipulated, Roquetta Reed refused to attend the "binder session" and no binder was submitted in her name.

"Committee Reports," "Questions/Comments/Concerns" and "Reminder: Next Meeting December 3, 2005." While the vast majority of the material in the binders was identical, as an example of the slight differences between what each contained when submitted, notes were handwritten on some of the Agendas. For instance, in the binder submitted for Ms. Jones, the Agenda for "October 15, 2005 8-4 PM," has a section devoted to "Expectations for members." The printed page has a bullet point, "Attending at least 80% of all SLC meetings." On the Agenda, which bears the word "Jones" in the upper right hand corner, is handwritten "(must attend all mtgs)," with each word double underlined, and the words "We will try 100% to make it truly workable," with circles around the "100%" and the printed "80% and an arrow from "80%" to the latter note.

30. Despite the existence of these dated Agendas, no meetings were held on the dates represented by the Agendas. As for the handwriting, the notes were written on the Agendas by SLC members during the meeting on April 28th at which the binders were prepared. Directions as to what to write were at least in part provided by Juanita Worthy. No minutes of the meetings for which agendas were included were found in the binders.

31. A report of the findings and recommendations of the investigative team was prepared and submitted to then Superintendent of Schools Annette D. Knox. This report, which bears an April 28th date, was updated to report not only the receipt after 5:00 pm that day of the binders, but also the receipt on May 1 and 2, 2006, of four matrices submitted for Juanita Worthy, Keah Worthy, Michael Hailey and Jannette Duran.

32. Juanita Worthy's matrix is dated 4/28-2006. It is completely filled out. It specifies the location of each of the twelve meetings, including a name of an SLC member in whose home a particular meeting was held and the town where that home is located (i.e., 10/15/05 J.C. Worthy Evesham). The times vary, such that some meetings are listed as from "8-400" and others "330-530." The November 5 and January 14 meetings are listed as having occurred at Rutgers Camden, the February 4 and March 4, 2006, at Wiggins from 3:30 to 5:30.

33. As for the matrices submitted for Pat Johnson, Michael Hailey, Keah Worthy and Jannette Duran, each is on a pre-printed form with the words "Wiggins School" printed on top, crossed out, and the words "HB Wilson" or "HB Wilson School" handwritten in place of Wiggins. Each of these four matrices exactly matches that submitted by Juanita Worthy. Each bears a signature, and Ms. Duran acknowledges that she prepared and signed her matrix. Additional information as to how she came to do this will be addressed later in this opinion.

34. Dr. Reiss formulated, and the investigation report contained, recommendations to the Superintendent that increments be withheld and tenure charges be brought against Juanita Worthy, Michael Hailey and Patricia Johnson for initiating acts of fraud and perpetuating a cover up against the district; increments be withheld and letters of reprimand be issued against Rosalyn Vinson, Denise Tucker and Janice Jones, all tenure teachers, for failing to provide accurate and honest information to the Board and participating in the cover-up; that non-renewal of employment be instituted for Aida Guzman and Keah Worthy for failing to provide accurate and honest information to the Board and participating in the cover-up; and that Sondra Rose-Finger, Roquette Reed, Alton Booker and Javier Roman, employees who assisted in the investigation, be issued a letter of reprimand, which would include their understanding that they were barred from participation in an SLC or any similar body during their employment because they placed their signature on documents showing that they participated in Board activities without actual participation. The report did not contain any recommendation concerning Jannette Duran. It appears that there was some confusion over whether she was a tenured employee.

35. In early May 2006, both Michael Hailey and Juanita Worthy were removed from their positions as principals and Dr. Reiss was placed temporarily in charge of Wilson School. During an inspection of Mr. Hailey's office at Wilson after he was replaced, Ms. Pratt discovered twelve signed, but undated sign-in sheets in an SLC binder. These also did not have any times listed. Several of these had blank spaces within the column of signatures, leaving room for an additional name to be added. The

order of the names varied from sheet to sheet. Ms. Duran stipulates that her signature is on each of these sign-in sheets.

36. The payroll reports submitted, seeking payment to the members of the Wiggins and Wilson SLCs, were neither prepared nor submitted by any of the three respondents.

37. The investigator never determined who placed the dates and times on the various sign-in sheets. The three respondents denied that these items were on the sheets when they signed them.

38. The district held a training session for the school principals and chairpersons of the SLC in January 2006, at which a Power Point presentation was made concerning the SLC. Neither Ms. Jones nor Ms. Duran was invited to or in attendance at this meeting. Principals were responsible to disseminate information about Abbott requirements back to their schools.

39. Documentation shows that in the 2004-2005 school year, the Board approved specific meeting dates for the Wiggins and the Wilson SLCs and payroll reports requesting payment of extra compensation for the members of the SLCs were submitted. Ms. Vinson and Ms. Jones were members of the Wiggins SLC; Ms. Duran was a member of the Wilson SLC. Ms. Duran's name and signature appear on numerous sign-in sheets submitted for meetings purportedly held in 2004-2005.

40. Juanita Worthy had a reputation for doing things her own way.

41. Both Wiggins and Wilson Schools had reputations as exemplary schools in the District.

TESTIMONY

Sandra Rose-Finger, a teacher for twenty-six years, claimed that she was never directly told that she was a member of the SLC and never had any conversations with either Johnson or Hailey about her role as a member or about its activities. She was given the Statement of Understanding (CBOE 365) to sign in September 2005 by Pat Johnson, who told her to date it July 1, 2005. Sometime later, in late January or early February 2005, Hailey told her to sign a stack of papers that were stapled together. One of these is CBOE 105. These had no dates or times on them. The pages contained signatures and printed names of other persons and Hailey directed her to sign on different lines on different sign-in sheets so that they did not all look the same. She realized what the form was and what its purpose was. It was obvious to her that it was to be used to obtain "payment for something." She never attended any SLC meetings. After she attended the meeting on April 27th with Ms. Pratt and Mr. Pagan, Mr. Hailey questioned her about what had happened at that meeting. He continued to question her the April 28th as to what was said and by whom. He called her while she was on her way to work and told her that Mr. Booker had "ran and said there were no meetings and we have to have a meeting and get our stories straight." Despite Hailey's continued harassment she did not attend the "binder" meeting." She did not return to school for three weeks, by which time Hailey, who she described as a very vindictive person, had been replaced.

Janice Jones has a Masters degree from Arcadia University and twenty-seven graduate credits in Educational Administration from Cheney State. She has been certificated since 1984 in Special Education and employed by the Camden Board of Education since 1988. She began teaching at Wiggins Elementary School in September 1984. During the summer of 2004 she was asked to serve on the SLC by Juanita Worthy. She had previously served both on and as chairperson of the Pupil Assistance Committee, a position that did not involve any additional pay. She described her activities as a member of the SLC as developing tests, helping teachers develop tests, interpreting testing data, performing in-service for parents and attending training sessions. She was sent to meetings concerning new initiatives, such as Dibble

and believed that this occurred due to her SLC membership. She shared what she learned at these sessions with Ms. Worthy. In 2004-2005 there were never any formal meetings of the SLC and she was never provided with any list of any meeting dates, nor was she invited to attend or told of any formal meetings. When issues came up, such as through grade or department level meetings, some SLC members would meet to discuss whatever had come up. For 2004-2005 she was paid $3,500 as "extra compensation," on top of her salary of about $70,000. She believed that she was making a difference in the education being provided at her school as a result of her involvement with the SLC in 2004-2005. She signed documents labeled, "SLC SIGN-IN SHEET," possibly two or three times with a total of perhaps nine or ten sheets, "for the work that was done," and was not herself knowledgeable about the payroll process. These sheets did not contain times or dates when she signed them.

In 2005-2006, Jones was a 5th grade resource teacher and again an SLC member. She recalled that she helped create tests, worked on issues regarding 4th grade writing skills and the Focus Room. She also prepared agendas for the Pupil Assistance Committee. She worked both after school and on weekends. She attended no Saturday meetings in 2005-2006. On April 27th she was at another school in the district for a meeting, but was summoned to return to Wiggins. Worthy told her to report to the library. Worthy told her that there were questions about the SLC and that "they" were going to say that they met at people's homes. Jones testified that she understood that she was being told to lie. At the meeting she was shown sign-in sheets with signatures and acknowledged the presence of her signature on the various sheets. As she did this she did not notice that the sheets contained dates or times. She was given the matrix and told that she had to sign and date it and answer the questions. She was "confused" and "didn't know what to do" so she decided to sign and date the document. She was not told at that meeting that anyone had by then said that there were no meetings. When she handed the matrix back to Dr. Reiss, she had not filled out anything, but had written her statement on the bottom.[4] He told her to "at least answer" the first column, which asked if the meetings took place. She "felt torn," but

[4] "*Mtgs were held and hours were put in and all work was completed. Each task addressed on agenda was accomplished and turned in. Some tasks were done outside mtgs and hours were longer than actually put in."

nevertheless she wrote "yes." However, as it was not true that meetings had been held, she was not going to fill out anything else.

Jones participated in preparing the binders on April 28th, adding comments to the Agendas as directed. Worthy explained that the purpose was to "document our work" and that the binders would be sent downtown. Jones also thought of the binders as the means to show that work was done, and she did not think of them as a means of demonstrating that meetings had been held as represented in the agendas and sign-in sheets. By this time Jones was realizing that the matter "was bigger than [she] had thought," but she believed that they could document their work. In the middle of morning the staff members went to the union office to sign up for attorneys. By then, they were "all in disbelief," but there was no discussion of what was happening. Juanita Worthy gave her a copy of Worthy's own, fully completed matrix to copy. She wanted them to fill the matrix out so that they would all be the same. At first, Jones did so, but she was "uncomfortable" and said that she was not going to turn it in and she tore it up. She also acknowledged at hearing that she should never have turned in the binder. Jones noted that agendas in the format presented in the binders, but without dates and times, had been previously prepared and topics listed on agendas were actually discussed with SLC members, but not at formal meetings, none of which occurred.

Interestingly, Jones explained that at the binder session she asked Juanita Worthy in the presence of "others" why they did not simply say what they had done and how they had done it. Worthy replied that "that would look like fraud." Jones did not see this binder project as "fraud."

Rosalyn Vinson holds a Masters degree in Educational Administration from Cheney State. She has been employed in the district since September 1988 as a teacher of the handicapped. Beginning in 2001 she has acted as a "facilitator" under Juanita Worthy, making sure that there is compliance with the Whole School Model, as a liaison between the principal and the program. She described the "Comer" philosophy, under which parents, teachers and the entire school community should work together. As a facilitator she served on the School Management Team (SMT),

predecessor to the SLC, but "more as an overseer than as a member." When Superintendent Knox came to the district and disbanded the Whole School Reform, she became a literacy coach in 2004, but did much the same work as she had performed as a facilitator. Ms. Worthy was her direct supervisor and they had a good working relationship. Worthy "had her agenda" and "expected you to follow it."

When the SLC replaced the SMT in 2004-2005, there was only a name change, for the SLC functioned in the same manner as had the SMT. The SLC helped to facilitate that which the school needed to achieve, to promote safety, high standards, good relationships with parents and the community. There had earlier been committees that dealt with these areas, such as public relations and espirit d'corps. There were never any full staff meetings of the SLC in either 2004-2005 or 2005-2006. Worthy, who did not like meetings and whose motto was the oft-stated, "we're not consumers, we're producers," would often speak to her about matters between 6:30 and 7:30 am, as they both came to work early. There were grade level and departmental meetings and if one's role on the SLC involved something to be discussed at one of these sessions you would attend. Thus, as she described it, Guzman and Cooke were the parent coordinators; Roman related to the community at fairs, festivals and the like and knew the building and dealt with cleaning issues; Jones dealt with special education; Tucker with technology and Vinson with student achievement and how to prepare teachers to prepare students. Vinson worked on these issues on weekends and at night. In 2005-2006, there was no formal budget committee at Wiggins and she, Tucker and Juanita Worthy prepared the budget, but none of that work was done during school hours as Worthy did not want "non-student work" done during the school day. During the summer, Vinson, who had a ten-month contract, nevertheless worked much of the time, preparing for trips, ordering books, cleaning and redecorating. Worthy always came up with new ideas that had to be addressed.

Vinson testified that when she signed sign-in sheets they did not contain dates or times. Worthy always referred to these as "for work that was done" outside of school

time and this is what Vinson believed she would be paid for. This "was just the way it was done."

When Ms. Worthy was summoned to the District offices on April 26th, Vinson drove her there and remained outside. When Worthy came out she said that "they were saying we didn't do work." Worthy was "very angry." She said that the members had to prove that they had done the work and Vinson felt that they all knew that they had indeed done it. However, she also recalled that while Worthy talked about "proving the work," she also told Vinson that she had told those with whom she had met that day that meetings had been held at various homes. She recalled that at the meeting in the library the next day, Dr. Reiss mentioned allegations of fraud, but did not allow questions or comments. She verified her signatures. When she saw the dates on the matrix, she began to think, "there's more to this." However, at the time Vinson felt that the matter was not about the dates, instead it was all about what was done. To say that they did not meet would be to say that they did not do anything.[5] The next day, Worthy said that they all had to stick together as a team. She was very protective of Guzman and Roman. She told the team members to find any documents that they had worked on as members of the SLC team. Vinson did a lot of typing while she and the others met at Wilson. All the materials gathered or typed were brought into the conference room and the binders prepared. Notes were placed on agendas because Worthy wanted to show we had the meetings. Agendas that Vinson had prepared during the summer, without dates or times, were produced by Pat Johnson with dates and times.

Ms. Worthy gave Vinson a copy of the filled out matrix on the 28th, but Vinson did not copy it to present as her matrix. By this time Vinson was "starting to see where it was going," and it would have been "a big stretch to write down where everyone lived." She said to Worthy that "it was too much to ask." "Worthy was getting very upset by this time." She recalls Jones' comment about why not put down what we actually did.

[5] Her matrix contained the note, "Please note: We met at various homes. I can produce whereabouts by looking at notes. I am not comfortable with placing locations w/o first being sure w/o legal representation. P.S. I would like an opportunity to give locations at a later date."

On cross-examination, Ms. Vinson acknowledged that when she first produced the matrix at the meeting with Dr. Reiss, she knew that there had been no meetings and did not write down anything about the work having been done despite the absence of meetings. She explained that at the time she "was not thinking of any of this" and "why did they have to prove where they met." She had met at times at people's homes. She claimed that she "was really reacting to the whole tone of the room." She also agreed that despite whatever misgivings she may have felt about preparing the matrix in accordance with Juanita Worthy's version, she did not pull her binder from those that she knew were to be delivered to the Board offices, as "at the time her focus was only on the time she spent." Yet, she acknowledged that at that session at Wilson, Worthy made it clear that they had to show that the meetings took place.

Jannette Duran is a graduate of Rowan University and is currently enrolled in a Masters program which she will complete on May 10, 2007. She has been employed by the Camden School District since 2001, working at Wilson Elementary as a teacher in either the 2nd or 3rd grade. Since she started she has put in a lot of extra time, including during the summer. Mr. Hailey appointed her in 2004-2005 as the chair of the Focus Room, an alternative room for students used to determine if they were in need of special education where psychologists, counselors and teachers can observe the student. She set up the classroom, the first in the district, prepared binders about the concept and was sent to other schools to promote the idea. She met regularly with a psychiatrist from Rhode Island to discuss the "Brain Gem" exercise. This work continued in 2005-2006, although she turned down a request that year that she teach in the Focus Room. She did typing for Pat Johnson, but an issue arose between her and Johnson and she "backed away" from working for her in the second half of the year.

Ms. Duran acknowledged signing "lots" of sign-in sheets as she was directed to do by Mr. Hailey. These were not dated and she did not know what they were for. The sheets contained other signatures.

Duran was out sick from April 26 through 28th and returned to work on Tuesday, May 2. On April 27th, Hailey called her at home and said that he had been to the

Administration Building regarding the sign-in sheets. She "knew what he was talking about." Hailey told her that perhaps she should get a lawyer, as she might be in trouble. Duran testified that at the time she did not know what the SLC was and was never told that she was a member of any such group. She had never been to any SLC meetings. On the 28th, Hailey called her in the morning about her getting an attorney and asked her to come down and sign a paper. When she queried him about what paper he was talking about, he said that "they wanted specific things from him and she had to sign the paper because she had signed the sign-in sheets." She protested that she was sick and not prepared to come to the school, but Hailey kept calling and was getting angry. She went to the school despite being sick, but she had told Hailey that she would not come in to the building, so he sent someone out to her in her car. The paper was the matrix, with "Wilson" written in place of the crossed-out "Wiggins." Otherwise, the form was blank. In addition, she was given someone else's form, all filled out. She copied the information from that form exactly, as Hailey had instructed her that it was very important that she fill out the form. However, she acknowledged that the information she placed on the form was a "lie," at least to the extent that if there were any meetings she did not attend any of them. However, when Hailey pressed her to go to Wiggins to create a binder, she said that she was not feeling well and was going home.

The respondent acknowledged that she had signed the SLC Statement of Understanding at Hailey's direction in September 2005 or at some point during the school year. However, she did not read it when she signed it. She received extra compensation for her work with the Focus Room in the summer of 2004, but not for the 2004-2005 school year. No one ever told her that she was to receive extra compensation for being a member of the SLC.

DISCUSSION

Tenured teachers may not be dismissed or reduced in compensation except for ". . . , unbecoming conduct, or other just cause." N.J.A.C. 18A:6-10. The Board of Education bears the burden of persuasion in the prosecution of tenure charges and

must establish the grounds for action against the employee's tenure status by a preponderance of the credible evidence. Matter of Polk, 90 N.J. 550 (1982). Unfitness to remain as a teacher may be demonstrated by a single incident if it is sufficiently flagrant, although in less serious matters progressive disciplinary measures may be more appropriate. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The term, "neglect," connotes a deviation from normal standards of conduct. Matter of Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). The term "duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955).

"Unbecoming conduct" is broadly defined as "any conduct which adversely affects the morale or efficiency of the [governmental unit] or which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. Karins [v. City of Atlantic City, 152 N.J. 532 (1998)], at 554. (internal quotation and citations omitted). In the Matter of Anthony Nicosia, A-5285-04T5 (App. Div. May 17, 2007). The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye." In re Emmons, 63 N.J. Super. 136,140 (App. Div. 1960). A teacher, as any public employee, owes a duty of honesty towards both her employer and the public on whose behalf the public employer operates and, more specifically, owes that duty in connection with information sought in the course of an investigation of possible wrongdoing. And because a teacher is both a role model and is entrusted with the care and education of minors, the public is entitled to expect that they will fulfill their roles with a high degree of responsibility.

Despite what these respondents and/or others involved in the SLC matters under investigation in the Spring of 2006 may have believed, the focus of the Board's investigation was, and indeed the current charges against these respondents address, not so much a question of whether they did participate in any activities that fell within

the mandate of the SLC in 2005-2006 and not whether they may have even occasionally met in some limited combination and performed some SLC-related work. Instead, it was whether these respondents, along with others, engaged in a series of fraudulent representations intended to establish that they had actually attended group SLC meetings together on specifically identified dates when in fact such meetings never even occurred. It happened that in February 2006, payroll reports and supporting documents were submitted for the purpose of obtaining extra compensation for these individuals, as permitted under the regulations governing the SLC and as authorized by the Board of Education. It is clear enough that none of the three respondents were directly involved in the preparation of the packet of materials submitted as and with the payroll reports, but once suspicions were raised as to the validity of what was being represented by those documents, the further actions of the respondents and others in response to the investigation only added to the picture of a seemingly intentional and collaborative attempt to deceive and defraud the District. The gravamen of the tenure charges is thus not that these teachers did not do any SLC work, but is instead that they lied about when, where and to what extent they did it and compounded these lies with additional falsehood, both on the 27th and 28th in Jones and Vinson's cases and on May 2 in Duran's case. Thus, the essence of the charges is that the respondents were dishonest. In such a scenario, that they did not present the request for payment themselves is not relevant, for they both acted to facilitate the process for payment and then knowingly tried to cover-up the fact that the meetings never occurred.

While the evidence establishes that for both the 2004-2005 school years, the Board of Education formally approved specific dates and times for meetings of the SLC, there is no evidence from which I can conclude that these respondents were made aware of the Board's action or of the approved dates. This is so even with regard to Ms. Vinson, who was the chair of her SLC. No evidence of any notice of the approved dates having been provided by the Board, the central administration or the principals to the members of the Wiggins or Wilson SLC has been produced. Indeed, Dr. Reiss testified that notice was left up to the individual schools. As for Wiggins, given the credible testimony that Ms. Worthy did not like formal meetings and essentially handed out tasks on an ad hoc basis, I see no reason to believe that she would have notified

her SLC members of the dates approved for formal meetings. Further, while there was certainly a January 2006 training session for principals and chairpersons, the evidence does not demonstrate that any of that training was later presented to either the Wiggins or the Wilson SLC members.

The respondents did not deny that they knew they were signing documents marked in capital letters, "SLC SIGN-IN SHEET," which, given the reference to "sign in" would reasonably be understood as representing by their signature that they had attended something. Yet, each of the respondents has claimed that when they signed the many sign-in pages, the sheets did not bear either a date or any reference to the time at which any meeting was held. The Board has not produced any evidence to counter these representations. Whether to credit the respondents' versions of what the sign-in sheets contained when they signed them becomes a matter of credibility. If believed, their testimony means that without asking exactly what or why they were signing these multiple documents and what it was they were representing they had attended, these mature, experienced educators simply signed them, as they claim, as a routine matter and in blank. While it might well be said that by doing so they at a minimum acted foolishly, I am persuaded that in fact they did sign documents that were not dated, as given the nature of what was occurring, I can believe that the necessary material needed to get extra compensation paid to the members of the SLC was simply produced en mass to be utilized when the time came to present the payroll report. This conclusion is supported by the discovery by Ms. Pratt of a stack of undated sign-in sheets in a binder in Mr. Hailey's office.

Both Ms. Vinson and Ms. Jones agreed that in 2005-2006 they were aware that they had been selected for the SLC. Indeed, they had both previously been SLC members and had received extra compensation as SLC members. They had each signed the SLC Statement of Understanding. They had also previously signed a series of sign-in sheets on more than one occasion. It is hard to imagine that they did not at least recognize that what they were signing were documents that were intended to show that they had attended something and that at least might be utilized in support of their receipt of pay for the work done on the SLC. But even if one were to accept that in

signing these the three respondents simply signed their names without even looking at the words "SLC Sign-In Sheet," their culpability for misconduct is established by their own admissions about what they knowingly did after the investigation began and they were confronted with the choice to provide honest information about what had occurred or to foster an impression that the suspect meetings had in fact occurred and they had attended them. Thus, Janice Jones admitted that when Juanita Worthy spoke to her on April 27th before Jones went to the library and told Jones that there were questions about the SLC and that "they" were going to say that they had met at people's homes, she "understood" that she was being asked to lie. And when, according to her own testimony, despite her professed confusion and lack of immediate recognition of the fact that the matrix contained a series of dates in the first column, she was asked by Dr. Reiss to at least answer the question as to whether the meetings took place, she, despite, as she put it, being "torn," nevertheless wrote "yes" next to each date. Thus, knowing that Worthy had asked her to lie, she did so. And the fact that she then did not fill out the details concerning these fictitious meetings, while perhaps a sign of how she was "torn," could also have simply been a reflection of the fact that she really did not know how to fill in the details about such non-existent meetings, particularly since, unlike the case of Duran, no one presented her with a pre-prepared set of lies about those details. Then, when Jones went to the "binder session" on the 28th, already "torn" about the situation and aware of the "lie" and understanding that the matter was "bigger than [she] had thought," she continued to take actions that were meant to prove that not only was work done, but that blatantly attempted to establish that meetings had indeed been held on the dates for which payment had been requested, that these were held to address specific agendas and even that the participants at those meetings had, presumably in the normal course of activity at the meetings, written pertinent notes on their copies of the agendas. According to Jones, when she, who "knew" that something was amiss and that there was something "bigger" going on, suggested to Juanita Worthy that they just tell what they had done, perhaps by that meaning to drop the pretense about the meetings, agendas and note-taking, and Worthy responded "that would look like fraud," Jones then went along with the plot and allowed a binder with her name on it, containing the very agendas and notes that were clearly meant to try to deceive the investigators, to go forth, rather than to stop her participation in what was

just another step in the "fraud," that Worthy, Hailey and the rest of the participants were seeking to perpetrate.

Ms. Vinson's actions also reflect her willingness to continue to take part in the cover-up. Again, while she also claims to have signed the sign-in sheets without really paying attention to what they were, when Juanita Worthy emerged from her meeting at Board offices on the 26th, Vinson was immediately told that Worthy had said that meetings had been held in various homes. She had to be alerted by this that Worthy was lying to the investigators. Then, according to her own testimony, the next day Dr. Reiss mentioned "fraud" at the meeting in the library. She saw the dates on the matrix and thought "there's more to this." Yet, when she had been presented with several circumstances that should have prodded her to be totally truthful, she instead chose to write "yes" to the questions about whether the meetings were held and whether she had attended them. She went along with Worthy's "we met at various homes" story and even went so far as to write that "I can produce whereabouts by looking at notes" and "would like an opportunity to give locations at a later date." Then, at the "binder session," while she, like Jones, seems to have had a least some attack of conscience at the point that she was asked to fill out the matrix with the details provided from the Worthy version, she, like Jones, went along with the preparation and submission of the fraudulent agendas and notes. And it must not be overlooked that while she and Jones both testified that they were focused on the fact that work had been done, according to Vinson, at the session on the 28th, Juanita Worthy said clearly that they had to show that meetings had taken place.

Finally, as to Ms. Duran, who did not originally fill out the matrix due to her absence and also did not attend the binder preparation on the 28th, and who claims that despite having signed the SLC Statement of Understanding, she did not even know that she was a member of the SLC or what it was, she acknowledged that when Hailey called her on the 27th and spoke about sign-in sheets, she knew what he was talking about, knew from his words that he was concerned enough to suggest she obtain a lawyer and certainly knew she had attended no SLC meetings. Yet, she went along with filling out a complete matrix with information supplied to her, on which she blatantly

represented that she had attended each and every meeting for a group she professes she did not even know she was a part of. Even if she relied upon what was represented on Worthy's matrix and from there drew the belief that meetings had taken place and that they had been held at the listed locations on the listed dates and during the listed times, which, by the way, I do not believe she herself believed at that moment, she knew that she was not an attendee at those meetings, and as such, was lying by writing that she attended them and representing the truth of the remainder of the information when she could not have known if it were true or not. When she testified, she acknowledged that she knew that she was lying. Again, pressed to go to the "binder session," she did not, but whether this was because of conscience overwhelming her immediately after she lied in filling out the form is dubious. She was not feeling well and went home.

Each of the respondents has emphasized to some degree that when challenged about their SLC meetings, they, and others, were anxious to prove that they had actually performed work. Each has detailed their work on projects and activities that were, at least in some cases, possibly within the operating authority of the SLCs. This was especially true for Jones and Vinson. Be that as it may, even to the extent that these teachers did do work after hours, on weekends and during the summer, the question they were confronted with when they signed the sign-in sheets, when they were presented with the matrices, when they put binders together and allowed them to be sent forward, was whether to be honest about how whatever they did accomplish occurred or to engage in presenting a false picture. Especially in April 2006, they chose the lie over the truth, the fraud over the facts. Additionally, they have each to some degree suggested that the culture and atmosphere of their school and the personality of the principals, most especially of Juanita Worthy, somehow factored into the decisions they made and the actions they undertook. Ms. Worthy and Mr. Hailey will, given the fact of their indictments, have to answer for their actions in another forum. It is apparent that Ms. Worthy has a forceful personality and likes to do things her own way, that she does not easily brook dissent, that she often "gets her way." But all of that does not excuse these respondents from their own misconduct. Nothing about the facts here supports a view that the will and the conscience of Ms. Jones or Ms. Vinson

was so overwhelmed by Ms. Worthy and they are responsible for their own conduct and their own adherence to the standards that are reasonably expected from public employees and from those who are certified to teach in the public schools. Similarly, Mr. Hailey may have been persistent, insistent and annoying to Ms. Duran, but she cannot elude responsibility for her misconduct because she was bothered by his many phone calls. Each of the respondents could have chosen not to participate in the attempt to convince the investigators that meetings were held as represented by payroll reports and supported by fraudulent sign-in sheets, matrices, agendas, notes and binders. Each failed when they had the chance to be honest.

As to the set of charges against each respondent involving their "affirmatively attempting to fraudulently obtain money" from the Board by means of signing the various SLC sign-in sheets for the various SLC meetings, each acknowledges the signatures but each suggests that they signed them when asked, or directed to, more or less unconscious of the nature or purpose of what they were signing. One would have expected that when they were presented with a series of documents upon which they were asked to place their signatures that if they did not already at least have some inkling of the purpose to which these would be put, they would have asked what the reason for signing them was. It is not enough for them to suggest that it was to show that the job was done, for if that were the case, why so many signatures and multiple sheets and how would these prove that work was performed? The sheets said what they were; that they did not have dates and times on them did not lessen the import of the label of "SLC SIGN-IN SHEET." Sign-in for what? And since there were several occasions when each signed multiple copies, it seems unlikely that they never saw the title of the document. Thus, I am persuaded that the respondents each were less than candid about exactly what they thought they were signing. They knew that they were entitled to be paid for SLC work, as at least Jones and Vinson had been paid for this the year before. They knew that there were no formal meetings of the SLC. What they were doing was creating a paper trail to show what was done, but a sign-in sheet with a whole series of names connotes meetings, and they knew that there were no such large group meetings. Perhaps it seems better to them to suggest that they only lied when faced with the investigation and not at the earlier stages of the affair. As the

preponderance of the credible evidence suggests that they knew that they were preparing documents that were not true and did not represent reality, I am constrained to **CONCLUDE** that they each did affirmatively attempt to obtain payment under circumstances that involved knowing misrepresentation of the facts. It must be said of course that as members of the SLC, they would have presumably been entitled to the money if they had met when authorized. Despite that being the case, they nevertheless could not misrepresent their activities as a means of securing payment.

I **CONCLUDE** that Janice Jones was guilty of unbecoming conduct for her attempt to fraudulently obtain money from the Board and unbecoming conduct and neglect of duty for her knowing participation in the creation and acquiescence in the presentation of the binders containing false and fabricated materials which were offered to the Board in a conscious attempt to cover up the fraudulent representations concerning the SLC meetings in 2005-2006. I also **CONCLUDE** that she was guilty of unbecoming conduct and neglect of duty for intentionally lying to the investigators on April 27th when she stated on her matrix that the meetings had occurred.

I **CONCLUDE** that Rosalyn Vinson was guilty of unbecoming conduct for her attempt to fraudulently obtain money from the Board and unbecoming conduct and neglect of duty for her knowing participation in the creation and acquiescence in the presentation of the binders containing false and fabricated materials which were offered to the Board in a conscious attempt to cover up the fraudulent representations concerning the SLC meetings in 2005-2006. I also **CONCLUDE** that she was guilty of unbecoming conduct and neglect of duty for intentionally lying to the investigators on April 27th when she stated on her matrix that the meetings had occurred.

I **CONCLUDE** that Jannette Duran was guilty of unbecoming conduct for her attempt to fraudulently obtain money from the Board and for unbecoming conduct and neglect of duty in that she knowingly prepared and acquiesced in the submission of the fraudulent matrix that she prepared on April 27th.

I have not chosen to use against these respondents the fact that after early May they did not come forward and offer any information to the investigators of other District authorities. They obtained counsel and apparently acted on the instructions of counsel not to offer anything. I am loath to criticize them for not ignoring this advice. The respondents' misconduct has been sufficiently established without assessing the significance of any lack of cooperation after the submission of the binders and Ms. Duran's matrix. That they have cooperated with the Grand Jury is a positive point for them, but again their failure to adhere to acceptable standards of conduct is well proven.

PENALTY

Each of these tenured teachers comes to this case with a clear disciplinary record. Ms. Jones and Ms. Vinson are long-term employees, each employed in the District since 1988. Ms. Vinson, while a newer employee, has worked in the District, from which she is herself a graduate, since 2001. The evidence is that each was a good teacher, each a dedicated employee. My distinct impression is that these three were not venal, that while they did sign sheets that I have found they knew misrepresented the facts and then failed to honestly respond when they were confronted with the fact that investigators were questioning the validity of the facts as represented to the District in the payroll reports, they never consciously planned this as a scheme to defraud the District, but truly believed that they were performing significant additional work for the District and its students that incidentally allowed them to receive some extra compensation for their efforts. It is most unfortunate that these respondents find themselves in the predicament facing them. However, it cannot be understated that particularly as to their actions during the investigation; they failed to perform as public employees are expected to. They failed to be honest about what had occurred, produced phony representations of the facts about the purported meetings and, in the case of Vinson and Jones, compounded their error by not only their misrepresentations on the matrices, but also in participating in the creation and presentation of the binders with their trumped-up agendas and notes. Teachers are supposed to be role-models, not only to students, but in a sense to their parents as

well. In every school district, but I suspect possibly even more in a district such as Camden, with its own set of troubling difficulties and challenges, teachers need to be positive examples for their pupils and symbols of achievement for the community in which they teach. These three respondents were perhaps fulfilling such roles, but in this instance they have failed. It is true that they have avoided criminal charges, and no doubt their cooperation with the Grand Jury may have played a role therein. But in the educational employment context, the question that must be answered is whether it is enough to simply reprimand these respondents and withhold increments, or whether, for teachers proven to be dishonest and unwilling when called to account to assist the district in establishing the truth but instead willing to knowingly compound the false picture, such is a sufficient sanction. Because they violated the trust of their employer and the public and provided such a negative example when instead the situation cried out for them to be honest and forthright, I **CONCLUDE** that these teachers should be deprived of the special status that tenure provides. But I hasten to add that I am not at all convinced that they are not redeemable. In fact, to the contrary, I strongly suspect that they are. It is ultimately for the Commissioner to determine if additional steps are necessary with regard to their status as certificated educators. I believe that Ms. Jones, Ms. Vinson and Ms. Duran can still be useful and effective teachers in some circumstance, but their claim to the special statutory status that tenure affords them in the Camden school district has been eviscerated by their actions. It is therefore **ORDERED** that the tenure status of Rosalyn Vinson, Janice Jones and Jannette Duran be **REMOVED**.

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

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

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

May 17, 2007
DATE

Jeff S. Masin
JEFF S. MASIN, ALJ

Date Received at Agency:

MAY 22 2007

May 21, 2007
Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

JOINT FINAL EXHIBIT LIST

Exhibit	Document	Bates No.
CBOE 3	2/8/06 Payroll Report – Wilson	JD004
CBOE 4	2/9/06 Payroll Report – Wiggins	JJ004
CBOE 5	10/15/05 SLC Sign In Sheet – Wilson	JD005
CBOE 6	10/15/05 SLC Sign In Sheet – Wiggins	JJ005
CBOE 7	10/15/05 Agenda – Wilson	JD006-JD008
CBOE 8	10/15/05 Agenda – Wiggins	JJ006-JJ008
CBOE 9	10/29/05 SLC Sign In Sheet – Wilson	JD009
CBOE 10	10/29/05 SLC Sign In Sheet – Wiggins	JJ009
CBOE 11	10/29/05 Agenda – Wilson	JD0010-JD0011
CBOE 12	10/29/05 Agenda – Wiggins	JJ0010-JJ0011
CBOE 13	11/5/05 SLC Sign In Sheet – Wilson	JD0036
CBOE 14	11/5/05 SLC Sign In Sheet – Wiggins	JJ0036
CBOE 15	11/5/05 Agenda – Wilson	JD0037-JD0039
CBOE 16	11/5/05 Agenda – Wiggins	JJ0037-JJ0039
CBOE 17	11/12/05 SLC Sign In Sheet – Wilson	JD012
CBOE 18	11/12/05 SLC Sign In Sheet – Wiggins	JJ0012
CBOE 19	11/12/05 Agenda – Wilson	JD0013-JD0014
CBOE 20	11/12/05 Agenda – Wiggins	JJ0013-JJ0014
CBOE 21	11/26/05 SLC Sign In Sheet – Wilson	JD0015
CBOE 22	11/26/05 SLC Sign In Sheet – Wiggins	JJ0015
CBOE 23	11/26/05 Agenda – Wilson	JD0016-JD0018
CBOE 24	11/26/05 Agenda – Wiggins	JJ0016-JJ0018
CBOE 25	12/3/05 SLC Sign In Sheet – Wilson	JD019
CBOE 26	12/3/05 SLC Sign In Sheet – Wiggins	JJ0019
CBOE 27	12/3/05 Agenda – Wilson	JD0020-JJ0022
CBOE 28	12/3/05 Agenda – Wiggins	JJ0020-JD0022
CBOE 29	12/17/05 SLC Sign In Sheet – Wilson	JD0023
CBOE 30	12/17/05 SLC Sign In Sheet – Wiggins	JJ0023
CBOE 31	12/17/05 Agenda – Wilson	JD0024-JJ0025
CBOE 32	12/17/05 Agenda – Wiggins	JJ00024-JD0025
CBOE 33	1/7/06 SLC Sign In Sheet – Wilson	JD0026
CBOE 34	1/7/06 SLC Sign In Sheet – Wiggins	JJ0026
CBOE 35	1/7/06 Agenda – Wilson	JD0027-JJ0029
CBOE 36	1/7/06 Agenda – Wiggins	JJ0027-JD0029
CBOE 37	1/14/06 SLC Sign In Sheet – Wilson	JD0044
CBOE 38	1/14/06 SLC Sign In Sheet – Wiggins	JJ0044
CBOE 39	1/14/06 Agenda – Wilson	JD0045-JJ0047
CBOE 40	1/14/06 Agenda – Wiggins	JJ0045-JD0047
CBOE 41	1/21/06 SLC Sign In Sheet – Wilson	JD0030
CBOE 42	1/21/06 SLC Sign In Sheet – Wiggins	JJ0030

Exhibit	Document	Bates No.
CBOE 43	1/21/06 Agenda – Wilson	JD0031-JJ0033
CBOE 44	1/21/06 Agenda – Wiggins	JJ0031-JD0033
CBOE 45	2/4/06 SLC Sign In Sheet – Wilson	JD0051
CBOE 46	2/4/06 SLC Sign In Sheet – Wiggins	JJ0051
CBOE 47	2/4/06 Agenda – Wilson	JD0049-JD0050
CBOE 48	2/4/06 Agenda – Wiggins	JJ0049-JJ0050
CBOE 51	3/13/06 Payroll Report	JD0035
CBOE 52	3/13/06 Payroll Report	JJ0035
CBOE 53	3/13/06 Payroll Report	JD0048
CBOE 54	3/13/06 Payroll Report	JJ0048
CBOE 55	Payroll Report	JD0061
CBOE 56	Payroll Report	JJ0061
CBOE 57	3/4/06 SLC Sign In Sheet – Wiggins	JD0054
CBOE 58	3/4/06 SLC Sign In Sheet – Wilson	JJ0054
CBOE 59	3/4/06 Agenda – Wilson	JD00052-JD0053
CBOE 60	3/4/06 Agenda – Wiggins	JJ0052-JJ0053
CBOE 61	12/3/05 SLC Sign In Sheet – Wilson	JD0040
CBOE 62	12/3/05 SLC Sign In Sheet - Wiggins	JJ0040
CBOE 63	12/3/05 Agenda – Wilson	JD0041-JD0043
CBOE 64	12/3/05 Agenda – Wiggins	JJ0041-JJ0043
CBOE 65	10/15/05 Agenda – Wilson	JD0062-JJ0064
CBOE 66	10/15/05 Agenda – Wiggins	JJ0062-JJ0064
CBOE 67	10/15/05 SLC Sign In Sheet – Wilson	JD0065
CBOE 68	10/15/05 SLC Sign In Sheet – Wiggins	JJ0065
CBOE 69	10/29/05 Agenda – Wilson	JD0066-JD0067
CBOE 70	10/29/05 Agenda – Wiggins	JJ0066-JJ0067
CBOE 71	10/29/05 SLC Sign In Sheet – Wilson	JD0068
CBOE 72	10/29/05 SLC Sign In Sheet – Wiggins	JJ0068
CBOE 73	11/12/05 Agenda – Wilson	JD0069-JD0070
CBOE 74	11/12/05 Agenda – Wiggins	JJ0069-JJ0070
CBOE 75	11/12/05 SLC Sign In Sheet – Wilson	JD0071
CBOE 76	11/12/05 SLC Sign In Sheet – Wiggins	JJ0071
CBOE 77	11/26/05 Agenda – Wilson	JD0072-JD0074
CBOE 78	11/26/05 Agenda – Wiggins	JJ0072-JJ0074
CBOE 79	11/26/05 SLC Sign In Sheet – Wilson	JD0075
CBOE 80	11/26/05 SLC Sign In Sheet – Wiggins	JJ0075
CBOE 81	12/3/05 Agenda – Wilson	JD0076-JD0078
CBOE 82	12/3/05 Agenda – Wiggins	JJ0076-JJ0078
CBOE 83	12/3/05 SLC Sign In Sheet – Wilson	JD0079
CBOE 84	12/3/05 SLC Sign In Sheet – Wiggins	JJ0079
CBOE 85	12/17/05 Agenda – Wilson	JD0080-JD0081
CBOE 86	12/17/05 Agenda – Wiggins	JJ0080-JJ0081
CBOE 87	12/17/05 SLC Sign In Sheet – Wilson	JD0082
CBOE 88	12/17/05 SLC Sign In Sheet – Wiggins	JJ0082

Exhibit	Document	Bates No.
CBOE 89	1/7/06 Agenda – Wilson	JD0083-JD0085
CBOE 90	1/7/06 Agenda – Wiggins	JJ0083-JJ0085
CBOE 91	1/7/06 SLC Sign In Sheet – Wilson	JD0086
CBOE 92	1/7/06 SLC Sign In Sheet – Wiggins	JJ0086
CBOE 93	1/21/06 Agenda – Wilson	JD0087-JD0089
CBOE 94	1/21/06 Agenda – Wiggins	JJ0087-JJ0089
CBOE 95	1/21/06 SLC Sign In Sheet – Wilson	JD0090
CBOE 96	1/21/06 SLC Sign In Sheet – Wiggins	JJ0090
CBOE 97	Camden Board of Education Official Report November 2005 (pages 1, 41)	JD001-JD002
CBOE 99	Janice Jones Binder	JJ0091-JJ00499
CBOE 101	Rosalyn Vinson Binder	RV091-RV0563
CBOE 109	SLC Statement of Understanding (R. Reed)	RV00605
CBOE 113	SLC Statement of Understanding (J. Duran)	JD0091
CBOE 114	SLC Statement of Understanding (J. Jones)	JJ00500
CBOE 116	SLC Statement of Understanding (R. Vinson)	RV00564
CBOE 118	Guidance on the Formation of School Leadership Councils – Revised June 2005	RV2215-RV2230
CBOE 157	11/3/05 Memorandum	RV2373
CBOE 158	10/28/05 Memorandum	RV2374
CBOE 159	3/17/05 Memorandum	RV2375-RV2376
CBOE 160	4/3/06 Memorandum	RV2377
CBOE 161	4/27/06 Memorandum	RV2378
CBOE 162	4/27/06 Memorandum re: Internal Investigation	RV2379
CBOE 163	Investigation Steps	RV2380
CBOE 164	Wiggins Meeting Grid	RV2381
CBOE 165	4/28/06 Memorandum re: Findings and Recommendation from the Investigation of Wiggins and Wilson Schools	RV2382-RV2391
CBOE 182	3/3/05 Agenda - Wiggins	RV2506
CBOE 183	3/3/05 SLC Sign in Sheet – Wiggins	RV2507
CBOE 184	3/10/05 Agenda – Wiggins	RV2508
CBOE 185	3/10/05 SLC Sign In Sheet – Wiggins	RV2509
CBOE 186	3/17/05 Agenda – Wiggins	RV2510-RV2511
CBOE 187	3/17/05 SLC Sign In Sheet – Wiggins	RV2512
CBOE 188	3/19/05 Agenda– Wiggins	RV2513
CBOE 189	3/19/05 SLC Sign In Sheet– Wiggins	RV2514
CBOE 190	3/26/05 Agenda– Wiggins	RV2515
CBOE 191	3/26/05 SLC Sign In Sheet– Wiggins	RV2516
CBOE 192	4/7/05 Agenda– Wiggins	RV2517

Exhibit	Document	Bates No.
CBOE 193	4/7/05 SLC Sign In Sheet– Wiggins	RV2518
CBOE 194	4/13/05 Agenda– Wiggins	RV2519
CBOE 195	4/13/05 SLC Sign In Sheet– Wiggins	RV2520
CBOE 196	4/16/05 Agenda– Wiggins	RV2521
CBOE 197	4/16/05 SLC Sign In Sheet– Wiggins	RV2522
CBOE 198	4/23/05 Agenda– Wiggins	RV2523-RV2324
CBOE 199	4/23/05 SLC Sign In Sheet– Wiggins	RV2525
CBOE 200	4/28/05 Agenda– Wiggins	RV2526-RV2528
CBOE 201	4/28/05 SLC Sign In Sheet– Wiggins	RV2529
CBOE 202	5/5/05 Agenda– Wiggins	RV2530
CBOE 203	5/5/05 SLC Sign In Sheet– Wiggins	RV2531
CBOE 204	5/7/05 Agenda– Wiggins	RV2532
CBOE 205	5/7/05 SLC Sign In Sheet– Wiggins	RV2533
CBOE 206	5/12/05 Agenda– Wiggins	RV2534
CBOE 207	5/12/05 SLC Sign In Sheet– Wiggins	RV2535
CBOE 208	5/14/05 Agenda– Wiggins	RV2536-RV2537
CBOE 209	5/14/05 SLC Sign In Sheet– Wiggins	RV2538
CBOE 210	5/19/05 Agenda – Wiggins	RV2539
CBOE 211	5/19/05 SLC Sign In Sheet – Wiggins	RV2540
CBOE 212	5/28/05 Agenda – Wiggins	RV2541
CBOE 213	5/28/05 SLC Sign In Sheet– Wiggins	RV2542
CBOE 214	6/1/05 Agenda– Wiggins	RV2543-RV2544
CBOE 215	6/1/05 SLC Sign In Sheet– Wiggins	RV2545
CBOE 216	6/4/05 Agenda– Wiggins	RV2546
CBOE 217	6/4/05 SLC Sign In Sheet– Wiggins	RV2547
CBOE 218	6/11/05 Agenda– Wiggins	RV2548
CBOE 219	6/11/05 SLC Sign In Sheet– Wiggins	RV2549
CBOE 220	6/18/05 Agenda– Wiggins	RV2550-2552
CBOE 221	Payroll Report – Wilson	RV2553
CBOE 222	9/9/04 Agenda– Wiggins	RV2554
CBOE 223	SLC Sign In Sheet– Wiggins	RV2555
CBOE 224	9/14/04 Agenda– Wiggins	RV2556
CBOE 225	SLC Sign In Sheet– Wiggins	RV2557
CBOE 226	9/23/04 Agenda– Wiggins	RV2558
CBOE 227	SLC Sign In Sheet– Wiggins	RV2559
CBOE 228	9/30/04 Agenda– Wiggins	RV2560
CBOE 229	SLC Sign In Sheet– Wiggins	RV2561
CBOE 230	10/7/04 Agenda– Wiggins	RV2562
CBOE 231	SLC Sign In Sheet– Wiggins	RV2563
CBOE 232	10/14/04 Agenda– Wiggins	RV2564
CBOE 233	SLC Sign In Sheet– Wiggins	RV2565
CBOE 234	10/21/04 Agenda– Wiggins	RV2566
CBOE 235	SLC Sign In Sheet– Wiggins	RV2567
CBOE 236	10/28/04 Agenda– Wiggins	RV2568

Exhibit	Document	Bates No.
CBOE 237	SLC Sign In Sheet– Wiggins	RV2569
CBOE 238	11/9/04 Agenda– Wiggins	RV2570
CBOE 239	SLC Sign In Sheet– Wiggins	RV2571
CBOE 240	11/18/04 Agenda– Wiggins	RV2572
CBOE 241	SLC Sign In Sheet– Wiggins	RV2573
CBOE 242	11/23/04 Agenda– Wiggins	RV2574-2575
CBOE 243	SLC Sign In Sheet– Wiggins	RV2576
CBOE 244	11/30/04 Agenda– Wiggins	RV2577
CBOE 245	SLC Sign In Sheet– Wiggins	RV2578
CBOE 246	12/2/04 Agenda– Wiggins	RV2579-2580
CBOE 247	SLC Sign In Sheet– Wiggins	RV2581
CBOE 248	12/6/04 Agenda– Wiggins	RV2582
CBOE 249	SLC Sign In Sheet– Wiggins	RV2583
CBOE 250	12/9/04 Agenda– Wiggins	RV2584
CBOE 251	SLC Sign In Sheet– Wiggins	RV2585
CBOE 252	12/14/04 Agenda– Wiggins	RV2586
CBOE 253	SLC Sign In Sheet– Wiggins	RV2587
CBOE 255	4/7/06 Memorandum from V. Pratt to Dr. F. Reiss	RV0567-0568
CBOE 256	SLC Incident/Investigation at H.B. Wilson School	RV0586-0591
CBOE 257	Handwritten Statement of J. Roman	RV0592
CBOE 258	Handwritten Statement of A. Booker	RV0593
CBOE 259	Handwritten Statement of R. Reed	RV0594
CBOE 260	Handwritten Statement of K. Farrington	RV0595
CBOE 261	Handwritten Statement of M. Williams	RV0596
CBOE 262	Investigation Document (M. Williams)	RV0598
CBOE 263	Investigation Document (J. Roman)	RV0599-RV0600
CBOE 264	Investigation Document (A. Booker)	RV0601-RV0602
CBOE 305	Respondent's Answers to Interrogatories (Duran)	RV2716-RV2718
CBOE 306	Petitioner's Interrogatories to Respondent Jannette Duran	RV2719-RV2729
CBOE 307	H.B. Wilson – signed, but not dated and without time – SLC sign in sheets	RV2730- RV2741
CBOE 308	U.S. Wiggins Agenda 10/15/05 8-4 p.m. (from H.B. Wilson binder)	RV2742-RV2744
CBOE 309	U.S. Wiggins SLC Sign In Sheet – 10/15/05 (from H.B. Wilson binder)	RV2745
CBOE 310	U.S. Wiggins SLC Sign In Sheet – 10/29/05 (from H.B. Wilson binder)	RV2746
CBOE 311	U.S. Wiggins SLC Sign In Sheet – 11/12/05 (from H.B. Wilson binder)	RV2747
CBOE 312	U.S. Wiggins SLC Sign In Sheet – 11/26/05 (from	RV2748

Exhibit	Document	Bates No.
	H.B. Wilson binder)	
CBOE 313	U.S. Wiggins SLC Sign In Sheet – 12/3/05 (from H.B. Wilson binder)	RV2749
CBOE 314	U.S. Wiggins SLC Sign In Sheet – 12/17/05 (from H.B. Wilson binder)	RV2750
CBOE 315	U.S. Wiggins SLC Sign In Sheet – 1/7/06 (from H.B. Wilson binder)	RV2751
CBOE 316	U.S. Wiggins SLC Sign In Sheet – 1/21/06 (from H.B. Wilson binder)	RV2752
CBOE 319	U.S. Wiggins – signed Payroll Report form (3rd submission) – from H.B. Wilson binder	RV2756
CBOE 320	U.S. Wiggins Agenda - 2/4/06 (from H.B. Wilson binder)	RV2757-RV2758
CBOE 321	U.S. Wiggins SLC Sign In Sheet - 1/4/06 (from H.B. Wilson binder)	RV2759
CBOE 322	U.S. Wiggins Agenda - 3/4/06 (from H.B. Wilson binder)	RV2760-RV2761
CBOE 323	U.S. Wiggins SLC Sign In Sheet - 3/4/06 (from H.B. Wilson binder)	RV2762
CBOE 324	U.S. Wiggins Payroll Report (original) 2nd submission (from H.B. Wilson binder)	RV2763
CBOE 325	U.S. Wiggins Agenda - 11/5/05 (from H.B. Wilson binder)	RV2764-RV2766
CBOE 326	U.S. Wiggins Payroll Report (original) 3rd submission (from H.B. Wilson binder)	RV2767
CBOE 327	U.S. Wiggins Agenda - 2/4/06 (from H.B. Wilson binder)	RV2768-RV2769
CBOE 328	U.S. Wiggins SLC Sign In Sheet - 2/4/06 (from H.B. Wilson binder)	RV2770
CBOE 329	U.S. Wiggins Agenda - 3/4/06 (from H.B. Wilson binder)	RV2771-RV2772
CBOE 330	U.S. Wiggins SLC Sign In Sheet - 3/4/06 (from H.B. Wilson binder)	RV2773
CBOE 331	Camden City School District SLC Guidelines – Revised January 2006	RV2774-RV2789
CBOE 333	Alarm Documents (U.S. Wiggins)	RV02850-RV02862
CBOE 334	Alarm Documents (H.B. Wilson)	RV02863-RV02872
CBOE 335	March 17, 2006 Lt. to J. Worthy from V. Pratt	RV 02874
CBOE 336	April 27, 2006 Memo to M. Hailey re: Investigation	RV 02875
CBOE 337	HB Wilson Blank Meeting Grid	RV 02876
CBOE 338	Memo to V. Pratt from J. Worthy re: SLC Meetings	RV 02890
CBOE 339	SLC Cover-Up Notebooks Info	RV 02891
CBOE 340	Meeting Grid (V. Cooke)	RV 0624
CBOE 341	Meeting Grid (J. Jones)	RV 0625

Exhibit	Document	Bates No.
CBOE 342	Meeting Grid (D. Tucker)	RV 0626
CBOE 343	Meeting Grid (A. Guzman)	RV 0627
CBOE 344	Meeting Grid (R. Vinson)	RV 0628
CBOE 345	Meeting Grid (J. Worthy)	RV 0629
CBOE 346	Meeting Grid (K. Worthy) Version #1	RV 0630
CBOE 347	Meeting Grid (R. Reed)	RV 0631
CBOE 348	Meeting Grid (S. Rose-Finger)	RV 0632
CBOE 349	Meeting Grid (P. Johnson)	RV 0633
CBOE 350	Meeting Grid (M. Hailey)	RV 0634
CBOE 351	Meeting Grid (K. Worthy) Version #2	RV 0635
CBOE 352	Meeting Grid (J. Duran)	RV 0636
CBOE 353	District SLC – Minutes June 1, 2005	RV 2898
CBOE 354	District SLC – Agenda Oct. 19, 2005	RV 2899
CBOE 355	District SLC – Minutes Oct. 19, 2005	RV 2900-RV2901
CBOE 356	District SLC – Minutes Nov. 21, 2005	RV 2902
CBOE 357	District SLC – Agenda Dec. 19, 2005	RV 2903
CBOE 358	Letter to Worthy from Knox Apr. 27, 2006	RV 2924
CBOE 359	Dec. 2005 – Superintendent's Report re: Training	RV 2925
CBOE 360	1st Submission for Wilson	RV 2926
CBOE 361	Medical Note – Rose-Finger	RV 2990
CBOE 365	SLC Statement of Understanding (Rose-Finger)	RV 2887
CBOE 366	SLC Statement of Understanding (Reed)	RV 2888
CBOE 367	Email to Pagan from SRF	RV 616
CBOE 368	SLC Statement of Understanding (Roman)	
CBOE 369	SLC School Call Sheet	
CBOE 370	1st Submission for Wiggins	
CBOE 371	2nd Submission for Wilson	
CBOE 372	2nd Submission for Wiggins	
CBOE 373	3rd Submission for Wilson	
CBOE 374	3rd Submission for Wiggins	
CBOE 375	4th Submission for Wilson	
CBOE 376	4th Submission for Wiggins	
CBOE 377	4/28/06 Memo to V. Pratt from R. Vinson	
CBOE 378	Sup. Report 2004-2005 (Dec.)	RV 30009-RV 30010
CBOE 381	HB Wilson Payroll Report Documents September 2004-December 2004	RV 30013-RV 30047
CBOE 382	HB Wilson Payroll Report Documents December 2004-February 2005	RV 30048-RV 30076
CBOE 383	HB Wilson Payroll Report Documents March 2005-June 2005	RV 30076-RV 30124
CBOE 384	2004-2005 Payroll Data Chart	
CBOE 385	Supplemental Answers to Interrogatories	
J1	Stipulation of Facts (Jones)	

Exhibit	Document	Bates No.
J2	Stipulation of Facts (Duran)	
J3	Supplemental Stipulation of Facts (with attachments)	
J4	Stipulation of Facts (Vinson)	
J-5	Stipulation of Facts (Jones)(with attachments)	

275-07

THE TITUSVILLE ACADEMY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning private school, which receives special education placements from public school districts, appealed the Department's determination to disallow the cost of seventy days during the 2003-2004 school year when Titusville Academy did not provide the minimum four hours of instruction required to qualify the day as a full-day program and thus eligible for tuition payments under *N.J.A.C.* 6A:23-4.1 to 4.16. The Department argued that the determination to disallow $66,000 from the school's tuition reimbursement was not arbitrary, capricious or unreasonable, and should be upheld.

The ALJ found that in the 2003-2004 school year, petitioner failed to provide the mandated four hours of instruction required to support tuition reimbursement, and concluded that the Department properly determined that Titusville Academy had non-allowable expenses due to its failure to provide the mandated four hours of instructional time on Wednesdays when half-day sessions were held and on other designated half-days. Accordingly, the ALJ determined that $66,000 constitutes the non-allowable cost expense related to this failure

The Commissioner concurred with the ALJ's analysis and conclusions; adopted the Initial Decision of the OAL for the reasons clearly stated therein; and dismissed the instant petition.

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

July 6, 2007

OAL DKT. NO. EDU 651-06
AGENCY DKT. NO. 36-1/06

THE TITUSVILLE ACADEMY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Department's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in her determination of this matter.

Petitioner's exceptions essentially recast and reiterate its arguments advanced below. In that the Commissioner finds that these were considered and addressed in the Administrative Law Judge's decision, they will not be revisited herein.

Upon full and independent review of the record, which included transcripts of the hearing held at the OAL on March 30, 2007, the Commissioner – according due deference to the Administrative Law Judge's (ALJ) credibility determinations[1] – concurs with his conclusion that Titusville Academy failed to sustain its burden of establishing that the Department's determination regarding 70 days during the 2003-04 school year when the school did not provide

[1] The Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner provides no cause for modification or rejection in this regard.

the minimum 4 hours of instruction required to qualify the day as a full-day program, and thus eligible for tuition payments pursuant to *N.J.A.C.* 6A:23-4.1 to 4.16, was arbitrary, capricious or unreasonable. Consequently, the Department's $66,000 non-allowable expense charge for this failure is sustained.

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/06/07

Date of Mailing: 7/06/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00651-06S

AGENCY DKT. NO. 36-1/06

THE TITUSVILLE ACADEMY, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

David B. Rubin, Esq., for petitioner

Carolyn Grace Labin, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: April 30, 2007 Decided: May 21, 2007

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

The Titusville Academy, Inc., operates a private school known as Titusville Academy ("Titusville"), which educates children in need of special education. The school is approved by the State Department of Education ("DOE") to receive placements from public school districts. It maintains self-contained classes for grades one through eight and a high school for grades nine through twelve in which the classes

are departmentalized. On February 1, 2006, Titusville filed a Verified Petition of Appeal with the DOE, challenging a determination of the DOE's Division of Finance ("Division") that certain expenses incurred by Titusville were "non-allowable" for the 2003-2004 school year. The crux of the issue revolves around a determination made by the Division that on seventy days during that school year Titusville did not provide the minimum four hours of instruction required to qualify the day as a full-day and thus eligible for tuition payments under the regulations governing DOE payments to private schools. N.J.A.C. 6A:23-4.1 to -4.16. DOE answers that the Division's decision was not arbitrary, capricious or unreasonable and should therefore be upheld.

The contested case was forwarded to OAL and tried before this judge on March 30, 2007. The record closed on April 30, 2007, after receipt of briefs filed by the attorneys.

The parties jointly offered as evidence J-1, a Special Education Receiving School Monitoring Report filed by a monitoring team consisting of four members of the Division staff, which concluded, after an on-site inspection conducted on March 8 and 9, 2004, that one of the "areas of need" at Titusville was that a review of the school calendar, the master schedule and staff interviews had revealed that on certain scheduled half-days, the school did not provide the minimum four hours of instruction required by N.J.A.C. 6A:32-8.3.

> (a) For purposes of school attendance, a day in session shall be a day on which the school is open and students are under the guidance and direction of a teacher or teachers engaged in the teaching process. Days on which school is closed for such reasons as holidays, teachers' institutes and inclement weather shall not be considered as days in session.
>
> (b) A school day shall consist of not less than four hours of actual instruction, except that in an approved kindergarten one continuous session of 2 1/2 hours may be considered as a full day.
>
> [N.J.A.C. 6A:32-8.3]

The report noted that the school calendar designated every Wednesday as a half-day, with the session lasting from 8:00 am to 12:20 pm. However, the master schedule showed that instruction was actually provided from 8:15 am until 12:00 pm, less than the required four hours. Further, the calendar also indicated that on all other half-days school was in session from 8:00 am to 12:20 pm, but the master schedule listed instruction as occurring from 8:17 am until 12:10 pm. Of 180 instructional days, 70 did not meet the four hour instructional floor and were therefore disqualified for tuition payments pursuant to N.J.A.C. 6A:23-4.2.

> (a) The board of directors of an approved private school for students with disabilities located in New Jersey shall determine the final tuition rate charged to be an amount less than or equal to the certified actual cost per student. The board of directors shall identify the certified actual cost per student and final tuition rate charged in the audited financial statements submitted to the Department pursuant to N.J.A.C. 6A:23-4.9.
>
> . . . .
>
> 6. For programs in operation less than the minimum of 180 days of instruction (September 1 through June 30) the approved private school for students with disabilities shall calculate total costs minus 1/180 for each day less than the 180-day requirement to determine actual allowable costs.
>
> [N.J.A.C. 6A:23-4.2]

As explained by James Wilson Verner, Section Supervisor for New Jersey-approved private schools for students with disabilities, the Division determined that while the regulation could be read to require that the total school day for each of the seventy days with less than four hours of instruction be disqualified for payment, a total of over one million dollars, the Division decided that a more equitable manner of dealing with the deficiency was to only eliminate from eligibility for tuition payments the actual fifteen minute shortage for each of the seventy days, which amounted to 4.37 days, equivalent to $66,000.

Titusville argues that in fact it did provide the required four hours of instruction on the seventy days in question.

EVIDENCE

Carmen Fanucci, who holds certifications as a reading specialist, learning consultant, principal and superintendent, is employed currently with the county office of education and served as the team leader of the monitoring team sent to Titusville for DOE, testified that the required four hours of instruction could not include lunch time. Instruction time must be provided based upon the goals and objectives for the individual children. The half-day schedule, J-3, listed homeroom from 8:00 am to 8:15 am and lunch from 12:12 pm to 12:20 pm. Thus, as neither homeroom, which is used for arrival and attendance time, nor lunch is an instructional period, the instructional day fell short of four hours. Likewise, the Wednesday schedule listed homeroom form 8:00 am to 8:15 am and lunch from 12:02 pm to 12:20 pm, again short of four hours of instructional time. Calculation of the number of such "short" days for the school year was made from the school calendar, J-4. Ms. Fanucci did not recall that she had any conversation about "lunch" with the school's principal, Charles Cunningham, but they did discuss the designation on the schedules marked "activity," which he clarified as being a part of the behavior modification system in use at the school and which was determined to qualify as instructional time. She did not observe lunch and cannot say if any other members of the team did. She was not told if the behavior modification program was also being carried out during lunch.

In response to the issuance of the monitoring report, Titusville filed an "Improvement Plan," submitted on August 5, 2004, to Barbara Gantwerk, then the Director of the Office of Special Education Programs at DOE, J-6. The first page of that Plan responded directly to the shortage of instructional time determined to exist on the half-days by providing that "Titusville . . . will revise the scheduled hours on half-days to ensure that students receive a minimum of four hours of instruction per day for a minimum of 180 school days per year as required."

Deborah Zerbib, Director of the Titusville School, is in charge of implementing policy and procedure. Among the school's programs is a behavior management program called Guided Group Interaction or "GGI," which involves positive peer

pressure and interaction. All students are required to participate in this system. During the school year in question, a scheduled portion of this program was a group activity known as "Force Fields," which was held at the end of the school day prior to dismissal. Students returned to their homerooms for self-assessments, conducting within a group and recorded by the homeroom teacher. Zerbib explained that this activity took place during the period marked on the calendars as lunch, and she believed that there was also some time in that period for lunch to be eaten.

Ms. Zerbib was present at the "exit" conference held with the monitoring team and thinks that Ms. Fanucci had previously interviewed her. She claimed that there was no concern expressed during the exit meeting about the length of the school day. She took handwritten notes at that meeting and nothing therein suggests any expression of any such concern. As such a concern would have suggested serious financial consequences, had there been any mention of the length of the day she surely would have recorded such in her notes. Since she did not, she can state with certainty that the subject was not brought up. Additionally, had it been raised, she and Mr. Cunningham would have explained "Force Fields." The staff at the school did not mention that the monitoring team had expressed any concern about the length of the half days either.

Ms. Zerbib was asked about revised schedules for the half-days, submitted with the Improvement Plan. The schedule for Wednesday half-days lists homeroom running from 8:00 am to 8:10 am, instruction from 8:10 am through 12:10 pm, lunch from 12:11 to 12:20 and dismissal at 12:20. This schedule contains four hours of instruction time. The half-day schedule for other half-days shows homeroom from 8:00 am to 8:09 am, instructional periods from 8:10 to 12:10, lunch from 12:11 to 12:20 and dismissal at 12:20. Again, this has a four hour instructional day. Each revised schedule is compliant with the regulations. According to Zerbib, these schedules were changed to re-label lunch to show what was going on. It was believed that the DOE's concerns were addressed by these revisions. However, sometime after the issuance of the report it was learned that the Office of Fiscal Policy and Planning was raising concerns

with the school's auditor. Zerbib confirmed that the school never appealed the monitoring report.

Dr. Charles Cunningham, the school's principal, testified about the behavior management system adopted from the Glen Mills Model. On full days in 2003-2004, the Force Fields portion of the program occurred after the activity period at 2:05-2:10 pm. Then the students returned to their homerooms and the Force Fields process began. The lunch period on these days was simply for eating lunch. As for the half-day schedules for Wednesdays and for other days, which the witness said were for snow or for testing and were "rare occasions," Force Fields" was held at lunch time, for the entire lunch period, as the children eat. Students self-assessed and peers discussed how fellow students saw the student that day.

Before the monitoring process, Cunningham believed that the school provided four hours of instruction on the half-days. He recalls that he was interviewed during the monitoring, but cannot recall by whom. He recalls being asked about whether the school ran an extended school year program, but not about the length of the school day. However, he recalled that sometime prior to the exit conference he had a conversation with Carmen Fanucci in which he attempted to clarify what the "activity" period was and what GGI and Force Fields were. She told him that he needed to label the schedules so as to allow others to understand what was going on, as in its then current form they could be misleading. He understood this conversation as a "heads up" regarding the schedules. He immediately explained to the secretaries the need to revise the schedule to clarify the matter and schedules were reprinted with these changes and given to everyone. However, in reality this change in the written schedule did not change anything about what was really happening.

Dr. Cunningham was involved in drafting the August 5, 2004, response to the report's findings. He thought that Ms. Fanucci must have misunderstood the process. Preprinted schedules, P-21, were created for the 2004-2005 school year, but these were not provided as a part of the corrective action plan. However, Dr. Cunningham claimed that he had shown a typed version, similar in content to P-21, to Ms. Fanucci

prior to the exit conference and she said that it was "fine." He was at the exit conference and recalls no discussion about the length of the school day, leading him to believe that the issue was resolved. Although Exhibit P-21 has a handwritten note in the upper right hand corner that says "created 7/26/2005 for 05/06 by Sarah Molino TTA admin secretary IN-USE CURRENTLY," Dr. Cunningham testified that P-21 itself was created in May 2004 to make the schedule "aesthetically nicer," but was not sent to the DOE prior to the monitoring report being filed. Also, unlike the schedule on P-21, the schedules actually submitted with the response to the monitoring report, J-6, on August 5, 2004, did not contain the labels contained on P-21 that designate "Period 8," from 12:11 to 12:20 pm, as "Vocab/Force Fields." Instead, the Wednesday schedule presented in the response, J-6, labels the 12:11 to 12:20 pm time as "Lunch." Cunningham's explanation for this discrepancy was that he "took the labels off because they had not avoided being cited." Yet, he claimed that he had shown Fanucci the schedule with the label "Vocab/Force Fields."

The record contains a written record of the interview between Dr. Cunningham and interviewers Elaine Lerner and Cecelia Downey, held on March 8, 2004. Cunningham was asked about arrival and departure times for students. According to Ms. Lerner, the recorded responses, which are not in Cunningham's handwriting, but apparently that of one of the interviewers, reflect answers to follow-up questions. There is a note, "Wed 2:30 shortened period 12:10 lunch in homeroom." "Activity time earned/homework club, yearbook," followed by an unreadable word. But there is no apparent reference to Force Fields or what occurs during "lunch in homeroom." Lerner testified that had there been a reference to "Force Fields," it would have been in the notes.

Called by the DOE as its witness, Carmen Fanucci recalled a conversation with Dr. Cunningham in the upper hallway in which she remarked that the schedule should show specifically what the "activity period" entailed. However, she was not shown any revised schedule with any reference to Force Fields prior to the exit conference. Had she been shown any such document she would have requested a copy to document compliance. If she had seen any such revision clarifying the schedule so as to support

a four hour instructional day she would never have placed any comment about a shortage of instructional time on the half-days into the report. She denied any recollection of telling Dr. Cunningham that a revised schedule looked "fine," and, when pressed on cross-examination as to the issue of whether she was shown a revised schedule, she stated that she could say "flat out" that it did not happen.

On rebuttal, Dr. Cunningham clarified that the schedules in question only applied to the high school, whereas the self-contained classes did not follow the bell schedule.

DISCUSSION

The DOE contends that based upon the information it had available to it when its personnel prepared the monitoring report, it correctly determined that Titusville was not providing four hours of instruction on the many half-days scheduled during the school year. It rejects Titusville's attempt to claim that its decision was based upon a misunderstanding by Ms. Fanucci and her team about what was actually occurring during the time designated on schedules for "lunch." In essence, Titusville's position is that Fanucci misunderstood and that when she made it evident to Dr. Cunningham during their informal discussion in the hallway, he promptly had revised schedules prepared in a typed format with contents similar to P-21and showed them to Fanucci, who agreed that they satisfied her concern. Thus, it was a complete shock to Cunningham and Zerbib to see the reference in the monitoring report to a lack of instructional time on Wednesdays and scheduled half-days and, thinking that they had already cleared up the problem, Titusville did not bother to appeal the monitoring report. It was only when the auditing process led to financial penalties that Titusville filed for a hearing to try and set the record straight.

There is no question that the schedules for Wednesday and half-days initially shown to the team did not indicate that a four full hours of instruction was being provided. The half-day schedule, with homeroom and lunch eliminated, showed three hours and fifty-three minutes; the Wednesday schedule three hours and forty-five minutes. Neither showed that the period designated for lunch was anything other than

a time for eating lunch. There is also no question but that the revised schedules submitted with the improvement plan, J-6, did show four hours of instruction both for Wednesday and other scheduled half-days. But these revised schedules again show a "lunch" period, without any suggestion that anything but eating was scheduled for that time. The change made in the revised schedules involved a rearrangement of the breakdown of time for the homeroom, periods one through eight, the "activity" period and lunch so that the instructional time ran from 8:10 to !2:10. Lunch was not shown to be part of the instructional day, but a separate period. Thus, if one looks at the original and the revised schedules submitted with the improvement plan by Titusville, it seems readily apparent that Titusville was simply rearranging times to make certain it scheduled four hours instructional time for each of these days. However, this simple explanation of what occurred is not what Titusville claims happened.

According to Dr. Cunningham, he had a conversation in the hallway and immediately had the existing schedules which had been reviewed by Fanucci's team revised. He then showed these revisions to Fanucci. These revisions were, he claims, essentially what is shown on P-21, which he claimed was a pre-printed format later put together for aesthetic reasons. Yet Fanucci recalls nothing about any such revised schedules and quite surprisingly, when Titusville put together its response to the monitoring report in August 2004, it did not include anything that appeared like the schedule as written on P-21. Instead it provided a schedule that affirmatively adjusted the times to show that four hours of instruction was occurring, but that format preserved a time for "lunch" that did not include any reference to Vocab/Force Fields. One is left to wonder why, if something looking like the schedule contained in P-21 had been prepared well before August 2004, in fact, at the very time of the monitoring in March, 2004, why it was not used in the August response, either in the form as prepared in March or in the more aesthetically pleasing form which Cunningham testified was prepared in May 2004 (which is noted to leave out any reference to a Period six)? It is of course curious that P-21 itself is labeled as having been "created on July 26, 2005 for the 2005-2006" school year. No version of this document labeled as created for or applying to the 2004-2005 school year has been produced.

Based upon the evidence presented and the credible testimony of Ms. Fanucci, I am persuaded that at the time of the monitoring she pointed out that there was a problem with the schedules for half-days and in response, when Titusville addressed the monitoring report in August it simply presented a revised set of half-day schedules that shuffled the times so as to include four hours of instruction plus both homeroom and lunch. At the time it may well be that since the report did not speak to the financial consequences, that Titusville recognized that it had not been providing the four hours of instruction and believed that the revision supplied with its response would resolve the issue. Indeed, its failure to challenge the report suggests just this conclusion. Then, when the auditing process made clear that the result of the monitoring report could have dramatic financial impact, Titusville decided to mount a defense. But, with all due respect, I cannot credit Dr. Cunningham's testimony about the alleged revision of the schedule that he insists was shown to Fanucci in March 2004. I cannot understand its absence from the August response and the note on the pre-printed schedule offered as P-21 is quite mysterious if that format was supposedly created in May 2004. Therefore, I **FIND** that in the 2003-2004 school year, Titusville failed to provide the mandated four hours of instruction required to support tuition reimbursement. As explained by Mr. Verner, the DOE eventually "wrote down" the amount of money that Titusville would lose since it felt that it was fairer not to penalize for the instruction time actually offered, but instead to only deny reimbursement for the missing instructional time. This certainly seems to be a reasonable procedure.

I **CONCLUDE** that the DOE properly determined that Titusville had non-allowable expenses due to its failure to provide the mandated four hours of instructional time on Wednesdays when half-day sessions were held and on other designated half-days. As a result, $66,000 constitutes the non-allowable expense related to this failure. Titusville's challenge to the decision of the Division of Finance is **DISMISSED**.

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

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

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

May 21, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

May 22, 2007

Mailed to Parties:

MAY 24 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Special Education Receiving School Monitoring for Titusville Academy, March 8 & 9, 2004

J-2 Monitoring Areas of Focus – checklist

J-3 Half-day schedule

J-4 Not in evidence

J-5 Classroom Observation Form

J-6 Revised Improvement Plan submitted 8/5/04 by Deborah Zerbib

J-7a Letter dated 12/13/05 from Jim Verner to Deborah Zerbib

J-7b Letter dated 8/16/05 from Jim Verner to Deborah Zerbib

J-7c Letter dated 7/6/05 from Jim Verner to Matthew Graglia

FOR THE PETITIONER:

P-1 Titusville Academy Staff & Student Handbook (Excerpt)

P-2 Field Systems, Inc., "Guidelines for Starting a Guided Group Interaction Group"

P-3 Memo re: "Staff GGI Non-Negotiables," Etc.

P-4 Monitoring Schedule

P-5 D. Zerbib, Handwritten Notes of 3/9/04 Exit Interview

P-6 to 13 Not in evidence

P-14 Letter from J. Verner to M. Graglia, dated 7/6/05

P-15 Letter from D. Rubin to B. Gantwerk, dated 9/9/05

P-16 Not in evidence

P-17 Letter from D. Rubin to B. Gantwerk, dated 10/24/05

P-18 Letter from C. Downey to D. Rubin, dated 10/28/05

P-19 Letter from D. Rubin to C. Downey, dated 12/6/05

P-20 Not in evidence

P-21 Daily Schedule

P-22 Not in evidence

P-23 Not in evidence

P-24 Not in evidence

P-25 Letter from C. Cunningham to Titusville Academy, dated 12/24/97, enclosing curriculum vitae

FOR THE RESPONDENT:

None

276-07

OAL DKT. NO. EDU 2691-06
AGENCY DKT. NO. 138-4/06

MYRA NIEVES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/06/07

Date of Mailing: 7/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2691-06
AGENCY DKT. NO. 138-4/06

RUTH NIEVES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,
Respondent.

Robert J. Haws, Esq., for petitioner

Philip E. Stern, Esq., for respondent (Sills, Cummins, Epstein & Gross, attorneys)

Record Closed: May 17, 2007 Decided: May 18, 2007

BEFORE **JOSEPH F. MARTONE**, ALJ:

Petitioner, Myra Nieves, appeals the Perth Amboy Board of Education's refusal to reimburse her for legal fees pursuant to N.J.S.A. 18A:16-6.1. This matter was transmitted to the Office of Administrative Law on May 2, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for a telephone prehearing on June 15, 2006, at which time counsel advised that they were negotiating a settlement. Several status telephone conferences were scheduled thereafter and by letter dated October 30, 2006, counsel

for the Board of Education advised that the matter had been settled with Board approval and an executed settlement would be forthcoming.

On May 17, 2007, an executed Separation Agreement/Release was received, together with the Board Resolution adopting the settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the parent's signature and the execution thereof by the president and secretary of the Board of Education and the submission of a certified and sealed copy of the minutes of the Board of Education approving the settlement as required by N.J.A.C. 6A:3-1.13(d).

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

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

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

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

May 18, 2007
DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency:

5/21/2007

MAY 22 2007
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

mph

AGREEMENT/RELEASE

RECEIVED
2007 MAY 17 P 1:17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Agreement and Release ("Agreement") is made this day of October, 2006, by and between Myra Nieves ("Ms. Nieves") and the Board of Education of the City of Perth Amboy ("Board").

RECITALS

WHEREAS, Ms. Nieves is an employee of the Board; and

WHEREAS, Ms. Nieves was compelled to defend a legal claim against her while Ms. Nieves was acting within the scope of her duties as a Board employee; and

WHEREAS, Ms. Nieves incurred legal fees in the amount of four thousand two hundred ($4,200.00) dollars; and

WHEREAS, pursuant to N.J.S.A. 18A: 16-6 *et seq.*, the Board is required to indemnify Ms. Nieves for her legal fees.

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Ms. Nieves and the Board agree as follows:

ARTICLE I
Release

1. Mutual Releases – In return for their obligations pursuant to this Agreement, Ms. Nieves and the Board hereby release and discharge each other as well as any and all of their former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators, from liability on or for all claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which they may have had, now as or may hereafter have for any reason whatsoever on account or arising out of or in consequence of Ms. Nieves' legal matter in which she incurred attorneys' fees, including, but not limited to:

A. Any pending litigation, including, but not limited to Myra Nieves v. Perth Amboy Board of Education, Office of Administrative Law Docket Number EDUOA 02691-2006S, Agency Reference Number 138-4/06 which the parties agree will be withdrawn and dismissed, with prejudice upon execution of this Agreement..

B. Any claims arising out the incident giving rise to Ms. Nieves' need to defend herself in court and incur the aforementioned attorneys' fees

C. Any and all claims for attorney's fees, costs, disbursements or the like which they ever had, or have or hereafter can, shall or may have against each other for, upon or by reason of any act, omission, transaction or occurrence up to and including the effective date of this Agreement, excepting the attorney's fees at issue.

Ms. Nieves does not release any claims that she may have brought under the New Jersey Workers' Compensation law.

Terms of Settlement

2 Consideration - As consideration for Ms. Nieves's Release as set forth herein, the Board agrees to the following:

a.) Within ten (10) days of the parties' ratification and signing of this Agreement, the Board shall remit the sum of four thousand two hundred ($4,200.00), payable to Robert J. Haws, Esq.

Ms. Nieves expressly acknowledges and represents that she will neither seek nor be entitled to any further consideration from the Board in connection with this Agreement other than the consideration as detailed in this subsection.

ARTICLE III
Miscellaneous

3.1. Entire Agreement – This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except as set

forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

3.2. No Admissions – Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.3 Binding Effect – This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.4 Governing Law and Choice of Forum – This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.5 Captions – The captions set forth in this Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Agreement.

3.6 Signature in Counterpart – This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.7 Authorization – The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Agreement on the Board's behalf.

3.8 Acknowledgments – The parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-

disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

3.9 Construction and Enforcement – The terms of this Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

MYRA NIEVES 10/4/06

CITY OF PERTH AMBOY BOARD OF EDUCATION

AUSTIN GUMBS, PRESIDENT

12. Recommendations of the Superintendent of Schools

D. Personnel Committee – Mr. Raymond Geneske, Chairperson (continued)

14). Appointment of the following certificated teaching staff, effective September 1, 2006 to June 30, 2007:

a). Marette A. Moore, Teacher, Perth Amboy High School, (Step 1-BA), $40,000.00, effective on or about December 1, 2006, COE English (pending). (Replacing – Christopher Cruz-Cullari)

b). Matthew Wechter, Teacher, Robert N. Wilentz School, (Step 1-BA), $40,000.00 prorated, effective September 18, 2006 to December 1, 2006, COE Elementary. (Replacing – Gloria O'Connell)

c). Jesse Prokopczyk, Teacher, Adult School, (Step 1-BA), $40,000.00, effective October 1, 2006, Teacher of Business. (Replacing – Pat Stone)

Geneske	Pabon	
Motion	Seconded	ROLL CALL - ALL AYE

15). Approval to enter into a settlement agreement with Robert J. Haws for the payment of legal fees totaling $4,200.00.

Geneske	Pabon	
Motion	Seconded	ROLL CALL - ALL AYE

16). Transfer of the following Reading Specialists for the balance of the 2006-2007 school year:

a. Carol Richardson from Samuel E. Shull School to 5th grade Samuel E. Shull School/William C. McGinnis School.

b. Janet Borchardt from Samuel E. Shull School to 6th grade Samuel E. Shull School/William C. McGinnis School.

c. Mary Guba from William C. McGinnis School to 7th grade [illegible] School/William C. McGinnis School.

d. Patricia M[illegible] Shull S[illegible]

Geneske
Motion

17). Geneske/Motion

I HEREBY certify that the foregoing is [illegible]ue and exact as adopted by the Perth [illegible]mboy Board of Education, County of [illegible]iddlesex, at its regular meeting held [illegible]n OCT 19 2006

Derek J. Jess
Secretary/School Business Admin.

12. Recommendations of the Superintendent of Schools

D. Personnel Committee – Mr. Raymond Geneske, Chairperson (continued)

14). Appointment of the following certificated teaching staff, effective September 1, 2006 to June 30, 2007:

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Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

15). Approval to enter into a settlement agreement with Robert J. Haws for the payment of legal fees totaling $4,200.00.

Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

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a. Carol Richardson from Samuel E. Shull School to 5th grade Samuel E. Shull School/William C. McGinnis School.

b. Janet Borchardt from Samuel E. Shull School to 6th grade Samuel E. Shull School/William C. McGinnis School.

c. Mary Guba from William C. McGinnis School to 7th grade Samuel E. Shull School/William C. McGinnis School.

d. Patricia MacMillan from William C. McGinnis School to 8th grade Samuel E. Shull School/William C. McGinnis School.

Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

17). Assignment of Carol Blumhof as Math Specialist at Perth Amboy High School for 3 periods daily for the balance of the 2006-2007 school year.

Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

18). Appointment of Iliana Perez as a Paraprofessional, Samuel E. Shull School, effective September 15, 2006 for the balance of the 2006-2007 school year at an annual 10 month salary of $34,570.00 prorated.

Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

19). Appointment of Rafael Velasquez as a Custodian A 2nd shift, Perth Amboy High School, effective October 19, 2006 at an annual 12 month salary of $24,730.00 for the balance of the 2006-2007 school year.

Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

20). Appointment of Jacobo Abreu as a Custodian B 2nd shift, Perth Amboy High School, effective retroactive February 13, 2006 at an annual 12 month salary of $23,760.00 for the balance of the 2006-2007 school year.

Geneske Motion | Pabon Seconded | ROLL CALL - ALL AYE

HEREBY certify that the foregoing is
ue and exact as adopted by the Perth
mboy Board of Education, County of
iddlesex, at its regular meeting held
n OCT 19 2006

Derek J. Jess
Secretary/School Business Admin.

277-07

OAL DKT. NO. EDU 5967-04
AGENCY DKT. NO. 124-4/04

LUIS CASTILLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/06/07

Date of Mailing: 7/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05967-04
AGENCY DKT. NO. 124-4/04

LUIS CASTILLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm)

Record Closed: May 18, 2007 Decided: May 18, 2007

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

This matter was transmitted to the Office of Administrative Law on June 23, 2004 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By letter dated May 16, 2007, counsel for respondent that the matter was settled and forwarded the enclosed Settlement Agreement indicating the terms of settlement.

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

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

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

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

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

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

5-18-07
DATE

J. HOWARD SOLOMON ALJ

Date Received at Agency: 5-23-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 23 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

The Murray Law Firm, LLC
3 Revmont Drive
Suite 318
Shrewsbury, New Jersey 07702
Attorneys for Respondent Elizabeth Board of Education

LUIS CASTILLO, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF ELIZABETH, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO.: EDUOR 05967-2004N AGENCY DKT. NO.: 124-4/04 SETTLEMENT AGREEMENT

2004 MAY 6 A 9:46

SETTLEMENT AGREEMENT

Petitioner **LUIS CASTILLO** (L.C.) hereby agrees, with the Respondent, the **BOARD OF EDUCATION OF THE CITY OF ELIZABETH** (the "Board"), to settle the above-referenced matter as follows:

1. Respondent shall reinstated to Petitioner, L.C., a total of twelve (12) sick days for sick days utilized on February 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26 and 27, 2004.

2. The parties agree that this settlement shall not constitute any admissions relative to this case by either party.

3. Petitioner, L.C., agrees that this Settlement resolves any and all claims that he had, or may have had against Respondent relative to any issue raised in or related to this matter.

4. Petitioner, L.C., agrees to waive any rights he had or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education; Division of Worker's Compensation; Office of Administrative Law; the Public Employment Relations Commission, etc., relative to any issues or potential issues that arose or could have arisen during the time period that Petitioner incurred and was treated for the injuries that occurred in January 2004.

5. Petitioner, L.C., hereby waives any claims for compensatory damages, interest, attorney fees, costs of suit and/or any other forms of relief in relation to the injuries that occurred in January 2004.

6. Petitioner, L.C., agrees that he has entered into this Settlement Agreement voluntarily and without coercion.

7. Petitioner, L.C., agrees that he has been fully and fairly represented by legal counsel throughout this proceeding.

8. All parties mutually agree and enter into the terms contained in this Settlement.

9. This agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education.

10. All parties agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein.

11. This Settlement Agreement may only be modified in writing signed by all the parties.

12. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

ELIZABETH BOARD OF EDUCATION

Karen A. Murray, Esquire
Counsel for Respondent,
Board of Education
Date: 5/3/07

LUIS CASTILLO

Luis Castillo, Petitioner
Date:

OXFELD & COHEN, P.C.

Nancy I. Oxfeld, Esquire
Counsel for Petitioner
Date: 4/27/07

C
O
P
Y

BOARD OF EDUCATION

RESOLUTION

OAL Docket No.: EUDOR-5967-2004N
Settlement Agreement

WHEREAS, the Elizabeth Board of Education and Petitioner, Luis Castillo, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOR-5967-2004N and Agency Docket Number 124-4/04, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED that the Board hereby agrees to accept the confidential Settlement Agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MAY 10, 2007

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

278-07

#278-07R

OAL DKT. NO. EDU 5371-07
(EDU 10994-06 on remand)
AGENCY DKT. NO. 349-9/06

K.J. on behalf of minor child, Y.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Initial Decision, Stipulation of Settlement and resolution by the respondent board of education have been reviewed. The Commissioner is now satisfied that the respondent board approves of the agreement and regards the board secretary's signature as proper authorization of the board's consent to same. The settlement terms are also deemed consistent with the law and dispositive of all the issues in controversy.

Accordingly, the Commissioner agrees with the Office of Administrative Law (OAL) that the agreement conforms to *N.J.A.C.* 1:1-19.1. The settlement is approved, the Initial Decision is adopted as the final decision, and the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/06/07

Date of Mailing: 7/06/07

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5371-07

AGENCY DKT. NO. 349-9/06

K.J. ON BEHALF OF Y.W.,

Petitioner,

v.

BOARD OF EDUCATION OF NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

ON REMAND

OAL DKT. NO. EDU 10994-06

Joseph A. Raia, Esq., for petitioner

Linda Ganz Ott, Esq., for respondent

Record Closed: May 31, 2007 Decided: June 5, 2007

BEFORE **JOSEPH A. PAONE**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 9, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on December 12, 2006. Prior to the hearing the parties settled the matter and a Settlement Agreement was prepared and executed. Raymond R. Jacobus, the Board Secretary, signed the agreement on behalf of respondent Board of Education of Northern Valley Regional High School District, Bergen County (Board). In an Initial Decision dated March 26, 2007, I approved the settlement and ordered that the parties comply with its terms. Upon review of the Initial Decision, the Commissioner observed that neither the record, nor the stipulation, included a copy of the Board's resolution approving the settlement and designating the Board Secretary to sign the agreement. Therefore, the Commissioner remanded the matter to the OAL for revision of the Settlement Agreement or supplementation of the record. On May 21, 2007, the Board approved the settlement and authorized the Board Secretary to enter into and execute the Stipulation of Settlement. A copy of that resolution is attached herewith. I **CONCLUDE** that the Board has approved the settlement in this matter and designated the Board Secretary to sign the Settlement Agreement. Accordingly, I again approve the settlement and **ORDER** that the parties comply with its terms.

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

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

June 5, 2007
DATE

JOSEPH A. PAONE, ALJ

lr

Date Received at Agency: 6-7-07

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN 7 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

Northern Valley
Regional High School District
Raymond R. Jacobus
Business Administrator/Board Secretary

Administrative Offices • 162 Knickerbocker Road • P.O. Box 270 • Demarest, New Jersey 07627
Telephone 201-768-2200 x2110 • Fax: 201-768-7356 • e-mail: jacobus@nvnet.org

May 23, 2007

RECEIVED
STATE OF NEW JERSEY
2007 MAY 32 P 15

The Northern Valley Regional High School District Board of Education at its Regular Meeting of May 21, 2007 approved the following Resolution:

A7. Settlement
That the Board of Education approves the following settlement:

WHEREAS, there is currently pending a matter before the New Jersey Office of Administrative Law, K.J. o/b/o Y.W. v. Board of Education of Northern Valley Regional High School District; OAL Dkt. No. EDU 10994-06 and

WHEREAS, a proposed Stipulation of Settlement has been negotiated between counsel for the Board of Education of Northern Valley Regional High School District and counsel for K.J. o/b/o Y.W. that fully resolves all outstanding claims, issues and disputes involving the parties; and

WHEREAS, the proposed Stipulation of Settlement would avoid a significant expenditure of time and resources on the part of the Board and its officials that would be necessary for the continuation of the pending litigation;

NOW, THEREFORE BE IT RESOLVED that the Board approves the Stipulation of Settlement and authorizes the Secretary of the Board's execution of the written Stipulation of Settlement.

I hereby Certify the above to be a true copy of Resolution from the Regular Meeting of the Northern Valley Regional High School District Board of Education of May 21, 2007.

Raymond R Jacobus

Raymond R. Jacobus
Business Administrator/Board Secretary
RRJ/sp

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Respondent
Northern Valley Regional Board of Education

RECEIVED
2007 MAR 20 A 8:56
OFFICE OF ADMIN. LAW
STATE OF N.J.

K.J. o/b/o Y.W.,	:	STATE OF NEW JERSEY
	:	COMMISSIONER OF EDUCATION
Petitioners,	:	
	:	
v.	:	OAL Docket No.: EDU 10994-2006N
	:	Agency Ref. No.: 349-9/06
NORTHERN VALLEY REGIONAL BOARD OF EDUCATION,	:	
	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

The parties in the above-captioned matter, having agreed to resolve all issues in dispute between them in this matter, hereby agree to the settlement of this case pursuant to the following terms:

1. The Petitioners hereby dismiss their Petition of Appeal in this matter with prejudice.

2. The parties agree that, effective January 2, 2007, Y.W.'s parents shall be legal residents with the environs of the Northern Valley school district. As such, Y.W. will be entitled to a tuition-free education in the school district so long as she remains domiciled in the school district.

3. In full settlement of the district's claim for tuition against the Petitioners, the sum of $2,426.00 shall be paid by Petitioners to the Northern Valley Regional School District. This payment shall be made in the form of a check, made payable to "Northern Valley

LAW OFFICES
APRUZZESE, McDERMOTT,
MASTRO & MURPHY
A PROFESSIONAL CORPORATION
25 INDEPENDENCE BOULEVARD
P.O. BOX 112
LIBERTY CORNER, N.J. 07938
(908) 580-1776

Regional High School Board of Education", and shall be forwarded, prior to the submission of this Stipulation to OAL, to the Board's attorney, who shall hold the check in escrow pending the acceptance of this Stipulation as a Final Decision by the New Jersey Commissioner of Education.

4. The parties hereby release and waive against each other any claims, lawsuits, or causes of action they have or may have arising out of the facts which formed the basis of the Petition of Appeal and the Board's claim for tuition against Petitioners.

5. The parties hereby agree that they have entered into this Settlement voluntarily and willingly, and without being under any coercion or duress. They further aver that they had the opportunity to consult with respective counsel concerning the terms of this Settlement, and they acknowledge by their signatures below that they are satisfied with the representation provided to them by their respective attorneys.

KYUNG JEESONG

Dated:

HUI WANG

왕 희찬

Dated:

KYANG WANG

Dated:

NORTHERN VALLEY BOE

BY: Raymond C Jacobus

Dated: 3/14/07

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1776

279-07

#279-07

IN THE MATTER OF THE USE OF	:	
ABBOTT FUNDS BY THE BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	

SYNOPSIS

Following investigation by the Department of Education, the Elizabeth Board of Education was ordered to show cause before the Commissioner why $88,373 should not be deducted from its 2006-07 school budget as a result of the Board having improperly expended that sum on political advertising presenting incomplete information and advocating only one side of a controversial question regarding the purchase of two parcels of land.

Following hearing at the Office of Administrative Law, the ALJ concluded that the Board communications in question, consisting of a color brochure and four television spots, presented incomplete information and were exhortative and one-sided in violation of *Citizens to Protect Public Funds,* 13 *N.J.* 172 (1953). The ALJ further concluded that the Commissioner had correctly determined the Board's expenditure to constitute an ineffective and inefficient use of State money, and that a budget deduction was warranted in light of the heightened scrutiny of Abbott district expenditures required by the Legislature and State Board of Education.

The Deputy Commissioner to whom the matter was delegated for hearing pursuant to *N.J.S.A.* 18A:4-33 adopted the Initial Decision of the ALJ and directed the Department of Education to take the steps necessary to effectuate an $88,373 deduction from the Board's 2006-07 school budget.

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

July 6, 2007

OAL DKT. NO. EDU 10747-06
AGENCY DKT. NO. 369-10/06

IN THE MATTER OF THE USE OF	:	
ABBOTT FUNDS BY THE BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE CITY OF	:	DECISION
ELIZABETH, UNION COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, as have the Elizabeth Board of Education's (Board) exceptions and the State's reply submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred in concluding that: 1) the Board's communications did not present both sides of the issue and encouraged citizens to pressure or persuade politicians with a different point of view, and 2) withholding of State aid is an appropriate penalty if the Board is, in fact, found to have acted improperly. (Board's Exceptions at 1-7)

On the first point, the Board claims that its communications plainly reference the potential loss of $750,000 in tax revenue, the only justification shown on record to have been offered by city officials for their position; and that, even if the commercial appearing to be of greatest concern to the State did, in fact, air – the record on this point being inconclusive – there is nothing improper, inefficient or ineffective about a board of education urging citizens to become politically involved in school matters and express their opinions to public officials, where the matters in question are

not the subject of an impending referendum and citizens are not specifically told what to say. Therefore, according to the Board, adoption of the ALJ's decision would place on local district boards of education the "impractical" and "absurd" obligation to "affirmatively seek out alternate positions on issues, or attempt to guess or present 'Devil's Advocate' arguments" in its communications with the public; it would also set a precedent that "any time a school board mentions any subject that involves local government officials, even tangentially, it runs the risk of being found to have spent money in a manner that was not efficient or effective," thus creating a "slippery slope that will chill, rather than encourage public debate, discussion and communication about issues affecting schools." (Board's Exceptions at 2-5, quotations at 4-5) Moreover, the Board contends – since the State's witness admitted that the Board did not violate any published rule or regulation concerning spending – the ALJ's "shocking" decision would "require school boards to act, not based on any objective written standards, but by guessing as to what any particular commissioner of education will consider to be efficient and effective spending for communications with the public" – a result that is "patently unfair and will have the further effect of chilling any communication with residents who will be at greater danger of becoming misinformed and alienated from their school system." (*Id.* at 5-6)

On its second point, the Board claims that the ALJ offered no convincing explanation of why the penalty in its case should be more severe than that imposed by the Commissioner in *Schettino, supra*; according to the Board, reliance on Elizabeth's status as an Abbott district is flawed because such status reflects nothing more than a difference in the percentage of State aid received – which has "nothing to do with whether the

proposed penalty***is just and proper." The Board urges instead that this penalty be found "draconian," "drastic," unfair, and unreasonable, since the Board violated no objective standards and its actions "by all accounts, were altruistic," with not even an allegation that it was attempting to confer a benefit on any individual or group. (Board's Exceptions at 6-7)

In reply, the State counters that the ALJ's conclusion regarding the one-sidedness of the Board's communications was not based solely on alleged tax consequences, but more significantly on the Board's omission of crucial information in its possession regarding lack of State funding and site approval for the land parcels in question (Reply Exceptions at 2-5), and on its blatant espousal – in clear contravention of *Citizens to Protect Public Funds, supra* – of one side of a local political controversy. (*Id.* at 5-9) The point of *Citizens*, according to the State, is that public funds may not be used for advocacy; therefore, if the Board was, in fact, prevented by city officials' silence from presenting full and fair information about their position – as it contends on exception – then it should have "exercised the restraint discussed in *Citizens* and not spent $88,373 in public funds," particularly where cost-free mechanisms for communicating with the public were readily available. (*Id.* at 9-10)

Likewise unpersuasive, the State contends, is the Board's assertion that its commercial urging contact with local politicians "to tell them to start working for the children" does not say *how* elected officials should be urged to act – given that the immediately preceding footage contrasts the mayor's willingness to sell the proposed school site to his "developer friend" with his demand for a price nearly ten times as great if the land is to be purchased by the Board "for your children." Moreover, the State

observes, the Board's suggestion that the offending commercial may not have actually aired is irrelevant in view of the fact that public monies were expended to make it, and, indeed, non-airing of the completed commercial would render the expenditures for its development ineffective and inefficient as well as contrary to the precepts of *Citizens*. (*Id.* at 11-12)

The State additionally posits that no import should be attached to a Department of Education auditor's inability to identify any one specific rule or regulation violated by the Board, or to the Board's contention that its Abbott status does not place it in a distinct posture with respect to use of State funds. To the contrary, the State avers, *N.J.A.C.* 6A:10A-7.1 and the FY 2007 Appropriations Act (P.L. 2006, c. 45) expressly charge the Commissioner with ensuring – through careful scrutiny of district expenditures – that the very substantial amount of State funding received by Abbott districts is expended in a lawful, efficient and effective manner, and to take any affirmative action necessary to achieve this end. (Reply Exceptions at 12-14)

Upon her own independent review, the Deputy Commissioner concurs with the ALJ that the Board did, in fact, improperly expend $88,373 to produce communications violating the precepts of *Citizens to Protect Public Funds, supra,* and that this amount is, therefore, appropriately deducted from the Board's 2006-07 school budget. In so holding, the Deputy Commissioner is unpersuaded by the Board's exceptions, finding instead that the Initial Decision fully and fairly considers the communications themselves, the circumstances under which they were produced, the positions of the parties, and the appropriateness of the proposed penalty as well as the Commissioner's authority to impose it.

As set forth at length by the ALJ, the proscriptions of *Citizens, supra*, clearly apply in this situation, notwithstanding that the land purchase in question was not itself the subject of an impending referendum. Moreover, the Board's communications – whether taken alone or in context – cannot remotely be viewed as informational, dispassionate or even-handed; rather, as recognized by the ALJ, they plainly represent a one-sided, emotionally charged exhortation to public action on the side of the Board in a local political controversy – a violation of *Citizens* unmitigated by the fact that the subject in question is of clear interest and importance to the school district. Although the Board consistently maintains that its communications 1) did not pertain to a referendum, 2) presented both sides of the tax impact issue, and 3) did not tell citizens precisely what to say when contacting public officials; the manifest reality is that such communications 1) were prepared and disseminated in the context of a contentious municipal primary where the disputed land purchase was a central issue, 2) omitted crucial but potentially detrimental information or referenced it in a misleading manner, and 3) presented the opposing view in an unmistakably negative manner, leaving any reasonable person to conclude that the city administration's position was a self-serving patronage deal while the Board's was an investment in the city's children.

The Deputy Commissioner finds it similarly disingenuous for the Board to evoke the State's purported inability to identify a specific statute or rule violated by the Board's actions, when the parameters of *Citizens, supra*, are both longstanding and well known, and the obligation of Abbott districts to use the significant additional funding they receive from the State in a lawful, effective and efficient manner – and the Commissioner's obligation to ensure that they do so – is beyond dispute. The Deputy

Commissioner, therefore, concurs that the heightened scrutiny of Abbott district expenditures demanded by the Legislature and State Board would be rendered a nullity if, in a matter of this type, the Commissioner failed to impose a meaningful fiscal consequence for unlawful, wasteful spending in addition to putting the Board on notice of the need for prospective compliance.

Accordingly, the Initial Decision of the OAL is adopted for the reasons well and thoroughly expressed therein.[1] The Elizabeth Board of Education is deemed, after full and fair hearing, to have failed to show cause why $88,373 should not be deducted from its 2006-07 school budget, and the Department of Education is directed forthwith to take the steps necessary to effectuate such deduction.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 7/06/07

Date of Mailing: 7/06/07

[1] It is noted in the interest of technical accuracy that the Initial Decision (at 9) inadvertently identifies *N.J.S.A.* 18A:7F-3 as part of the Quality Education Act of 1990 rather than the Comprehensive Educational Improvement and Financing Act of 1996, and that the number of districts meeting the statutory definition of "Abbott district" is 31 rather than 28.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10747-06
AGENCY DKT. NO. 369-10/06

IN THE MATTER OF THE USE OF ABBOTT FUNDS BY THE BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Francis A. Kirk, Esq., appearing for Elizabeth Board of Education (McCarter & English, attorneys)

Carolyn Grace Labin Deputy Attorney General, appearing for the Commissioner of Education (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: May 4, 2007 Decided: May 22, 2007

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Elizabeth Board of Education ("Board") expended $88,373 in State funds during Fiscal Year 2005-06 to pay for certain print and television communications to members of the public. The Commissioner of the Department of Education ("Commissioner") asserts that this was an inappropriate expenditure in that it constituted political advertising presenting incomplete information and advocated only one side of a controversial question regarding the purchase of two parcels of land.

By letter of September 19, 2006, deemed an Order to Show Cause, the Commissioner advised the Board that these expenditures would be deducted from the Board's Fiscal Year 2006-07 school year budget. The Board answered on September 21, 2006 that the publication and television commercials where not political advertisements but rather communications directed at taxpayers and users of the school system over subjects of the utmost concern. At issue is whether these communications constituted an improper expenditure of State Funds.

On October 25, 2006 the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, where it was filed for determination as a contested case. I heard the matter on March 20, 2007 and closed the record on May 4, 2007 upon the receipt of briefs.

FACTUAL DISCUSSION

The following facts are not in dispute, and I **FIND** them to be **FACTS** of this matter:

The Elizabeth School District is an "Abbott" district which receives public state funds. Due to an expanding school population in Elizabeth, the Board has undertaken an aggressive campaign in recent years to build many new schools. Eleven have been or are under construction, all funded by the State of New Jersey through the School Construction Corporation (SCC).

Before 2005 the Board's Long Range Facilities Plan identified several sites as possible locations for a new vocational high school. They included sites identified as the United Gunite property and the New Jersey Transit Property.

The Board budgets each year for communications with the public and allocated $300,000 for 2005-2006. Typically these communications are in the form of mailed printed materials, press releases, television spots run on local cable channels, and communications posted on the Board's website.

The Board decided to communicate with Elizabeth residents regarding the status of new school construction because of a sense that taxpayers were questioning why the Board would be spending money. Board members were aware of public comments made by City officials in the fall of 2005 that new school construction and land acquisition would adversely affect taxes. More specifically, the Board was concerned about City Council members appearing at a Board meeting and alleging that, if the Board were permitted to acquire a piece of property then owned by the City, and which was slated to be sold to a developer, the City would lose $750,000 per year in tax revenues. It wanted to disclaim this notion.

The Board's comptroller conducted an analysis, which concluded that the benefits of construction of a new vocational high school, the cost of which would be borne by the State under State law regarding Abbott districts, would offset the loss of tax revenue that would be generated from a private developer. The comptroller's power point analysis was first presented at an open cable-televised Board meeting in October 2005, and revisions and additions to the presentation were made and shared with members of the public in other forums and media, such as through the Board's website. The Board decided to refine the presentation into a written form, which would be mailed to members of the general public.

Between February and May 2006, the Board created a written format, translated it into Spanish, and selected a vendor through a competitive bid process to print a color newsletter or brochure, which the Board mailed to Elizabeth residents in or about the second week of May 2006. The newsletter was entitled "Focus On Our Schools- The Greatest Ratable." The mailing followed the Board of Education election and preceded the City Council primary by about two weeks.

With the assistance of a hired outside consultant, the Board prepared four television spots three of which aired at various times from April 2006 through May 2006 on a basket of cable stations such as CNN. Assistant to Board Secretary Donald Goncalves was not certain which spot did not air.

The Board spent $21,606 in Abbott funds on the "Focus" newsletter and $66,767 in Abbott funds for the television spots, for a total expenditure of $88,373.

The newsletter is twenty pages long with most split between English and a Spanish translation and with the pages containing the following words or graphics:

1. Elizabeth Board of Education—Focus on our schools—The Greatest Ratable is from the investment in our children's future. ...building new schools is good for Elizabeth! The Effects of Constructing New Schools in the City of Elizabeth

2. Lesson 1—The facts. "The Elizabeth Board of Education has a responsibility to ensure that all Elizabeth residents are advised of the key issues related to the future of our children. That is my promise to you." Pablo Munoz, Acting Superintendent of Schools

3. Lesson 2—The Elizabeth Board of Education has opened 4 new schools in the last few years. The Board of Education is also building 2 new schools which will open in 2006... and construction will also begin on 3 additional schools within the next 12 months. 9 new schools in total.

4. Lesson 3—Leadership [photographs of each Board member]—As a result of the funding crisis for school facilities financed by State of NJ, our Board of Education has already taken action instead of waiting for the city or the state to address the lack of identified available properties for the construction of new schools. It requires tough choices.

5. Lesson 4—New Construction, requires new schools. The Elizabeth Board of Education policy is one based on reality. The amount of home and commercial related construction in the City of Elizabeth, continues to deplete the amount of properties available for schools and is increasing the population of our schools in the process. Investing in our children's future is our best option.

6. Lesson 5—The Elizabeth Board of Education takes action. Two key sites have been proposed in Elizabeth for the construction of a new vocational high school & physical education complex. One of the properties is located at Division and Trumbell Street, once targeted by United Gunite and the City of Elizabeth for development. Amazingly, the City of Elizabeth has in the past stopped the Board of Education from acquiring this property for a new school. We don't know why. It started 7 years ago, when the City and a developer promised to develop that very site. The land is still vacant...while our children attend an overcrowded high

school. WE CAN ASK OUR CITY TO WORK WITH THE BOARD OF ED.

7. Lesson 6—The New Jersey Transit Property—The City owns a property sold to them by NJ Transit for $520,000. The city wanted to sell that property to a private developer for the same price. It is the same developer already in control of the United Gunite property. The sale price of $520,000 to this individual is drastically less then [sic] the appraisal of $5.1 Million Dollars. Wouldn't the best interest of the public be served with the acquisition of that property by the Board of Education for a new school and physical education complex. THE BOARD OF EDUCATION CAN PURCHASE THE PROPERTY FROM THE CITY OF ELIZABETH, FOR THE CHILDREN. Both properties have been appraised by ARD Associates, a reputable appraisal company. United Gunite has been appraissed [sic] at $4.9 Million Dollars and NJ Transit at 4.1 Million Dollars.

8. New Jersey Transit property 7 years later! [photograph of vacant land with a fence around it]. This could be the site of a brand new VOCATIONAL HIGH SCHOOL. The United Gunite property 7 years later! [photograph of vacant land.] This could be the site of a brand new PHYSICAL EDUCATION COMPLEX.

9. Lesson 7—From a financial perspective... After 7 years of inactivity, a City of Elizabeth official was quoted in the Star Ledger saying that the development projects located at the NJ Transit and United Gunite properties were to now move forward. It was also stated that the city stood to gain $750,000 and that the construction of new schools would create a loss in tax ratables. That is not so. What has happened in 7 years is that housing construction in Elizabeth has increased dramatically resulting in increased overcrowding throughout the school district. Now, something needs to be done. The Board of Education proposes to bring a school to that site and is moving to acquire both properties for the good of the city. Bottom line: The funding received from the construction of a new school far outweighs the proposed tax benefits from any private developer.

10. Lesson 8—It is a WIN/WIN for the Citizens of Elizabeth—Since the inception of the Schools Construction Corporation, Elizabeth Public Schools have received $206,895,607—Money which is given to the taxpayers of Elizabeth for the construction of new schools, totally exempt of any costs, interest or reimbursement to the State of NJ.

11. Lesson 9—Taxpayers reap the benefit... If citizens of Elizabeth had to finance that amount, it would cost taxpayers $6,883,289 per year in direct property tax relief

12. Lesson 10—Our schools bring real Tax Relief. The average benefit to the Elizabeth taxpayer is $246.92 per household with the construction of just one new school versus the $26.94 per household that the City of Elizabeth is claiming to lose as a result of that school. BUILDING SCHOOLS PUTS US AHEAD OF THE GAME.

13. The Elizabeth Board of Education, a record of keeping taxes stable. [what follows on the page is a graph entitled "Elizabeth BOE v. City of Elizabeth Resident Tax Levy."]

14. Lesson 11—How can we say NO??? There is the financial benefit to the tune of $60,000,000 ... the approximate cost of building one new school. 60 MILLION DOLLARS FREE OF ANY REIMBURSEMENT TO THE STATE OF NJ.

15. Lesson 12—Long term savings with new schools... If citizens of Elizabeth had to finance 60 Million Dollars, it would cost the taxpayers $1,993,605 per year in debt service! WE GIVE UP THAT AMOUNT OF FUNDING IF WE SAY NO TO ONE NEW SCHOOL.

16. Plus there are also other benefits... JOBS! A new school generates $8 Million Dollars into the local economy from the construction of just one new school. SCHOOL CONSTRUCTION + HIGH PAYING JOBS = ECONOMIC DEVELOPMENT

17. The conclusion is pretty obvious... People want to live, work and invest in a city with a strong educational system. It is an investment in the future. BUILD NEW SCHOOLS + IMPROVE EDUCATION = HIGHER HOUSING VALUES

18. If you put value in our youth, you value education. That is why we say... The Greatest Ratable is from the investment in our children's future. Elizabeth can't afford to say no to new schools

19. NEWS UPDATE School District Successful in Stopping Sale To Private Developer—As a result of the efforts of the Elizabeth Board of Education (EBOE) the City of Elizabeth has now withdrawn a proposal to sell a 4.1 acre site to a private developer for the bottom basement price of only $520,000.00. The EBOE appraised of the former NJ Transit garage located at Division Street for the amount of $5.1 million. The City of Elizabeth originally purchased the State of New Jersey property from NJ Transit for only $520,000 in 2001. The President of the Elizabeth Board of Education, Rafael Fajardo, said that the need for a new high school is considerable. Elizabeth High School is the largest high school in the country with 5,300 students. "This has created a difficult environment for the education of our children, let alone their safety." Fajardo stated that the court action and the subsequent withdrawal by the City of

Elizabeth was a huge victory for taxpayers all over the State of New Jersey. The fight is not over. The City of Elizabeth continues to propose more expensive options for the sitings of a new school, with the Mayor stating his desire to sell this very property to the Board of Education for the amount of $5.1 Million Dollars... close to ten times the cost that the City was to sell it to a private developer. The Bollwage administration continues to support the same contractor in his efforts to develop an additional property across the street at Division and Trumbull. This site was also identified by the Board of Education as a critical piece in the high school project.

20. [This is the mailing page of the newsletter with an identifying photograph of each member of the Elizabeth Board of Education.]

The description and the dialogue of the four television spots are as follows:

1. [Carlos Cedeno, Member of the Board and Rafael Fajardo, President of the Board are on screen and introduce themselves]. Cedeno: "Elizabeth High School was built for 3,000 students but now houses 5,300. The Board has tried for years to find a solution for overcrowding." Fajardo: "The City wants to sell this site at Trumbell and Division to a private developer. We want to build a high school for your children instead."

2. [Rafael Fajardo on screen with vacant property behind him]. Fajardo: "I am Rafael Fajardo. The property you see behind me was sold to the City for $520,000. The Mayor tried to sell this land to his developer friend for that same amount, but we went to court and put a stop to that. We need this site for a new high school, but he wants us to pay $5.1 million. $520,000 for a friend, but $5.1 million for your children? Call the Mayor and State Senator Ray Lesniak, and tell them to start working for the children of Elizabeth."

3. [Principal of Elizabeth High School on screen in hallway of School, followed by a parent, student and two Board members]. Principal: "One of our greatest challenges is the overcrowding of our school not only between classes but in the cafeteria. And of course many of my students eat lunch right here in the hallway." Unidentified parent: "I'm a parent and I'm concerned about the safety of my child. The City needs to cooperate with the Board of Education on this overcrowding issue." Unidentified student: "I want to go to a high school where I can learn in a safe environment to be a success in life." Board Member Bud Whalen: "This property owned by the City is a perfect location to build a new high school. Our Mayor wants to sell this land to his friend for only $520,000." But he wants the Board of Education to pay $5.1 million. That's unfair to the kids and the taxpayers." Board President Fajardo: "We agree. Ask our City to give the property to the Board of Education

for the construction of the new school. After all, the greatest ratable of all is investing in our children's future."

4. [Board President Fajardo on screen speaking in Spanish] Fajardo: "My name is Raphael Fajardo, and I am President of the Elizabeth Board of Education. The most important investment that we can make is in the future of our children. For this reason the Board of Education of Elizabeth is constructing new schools to reduce the number of students in the classrooms and to assure a safe environment for our children and to show them necessary skills to achieve success. The best investment we can make is for our children."

Board Member Carlos Cedeno appears in two of the television spots. His photograph also appears in the brochure. He also ran in the City Counsel primary scheduled for June 6, 2006. Prior to that election, a campaign flier appeared on behalf of Cedeno, which indicated, "Last year, local politicians attempted to sell a piece of property for 10% of its value. That would have cost you millions in tax relief. And the person they wanted to sell it to was a political contributor who had given them over $30,000 in campaign contributions. It's corrupt, outrageous and wrong. This year you can fight back." There is no contention that this piece of campaign literature was paid for by the Board. The reference in it is to the same property, which is the subject of the Board's brochure and commercials.

The SCC, by letter of April 6, 2006 to Councilwoman Patricia Perkins-Auguste, advised that it had adopted a Capital Plan, which identified fifty-nine school facility projects to be undertaken with the agency's remaining Abbott funding. The Plan did not include the vocational high school for Elizabeth, and, accordingly, the agency did not have the funding to build the school or acquire the site. The letter further advised that it is the SCC's policy not to "land bank" parcels for projects that are not included in the Capital Plan. Finally, it indicated that there are outstanding questions that remain as to the appropriateness of site for a new high school. An environmental study would need to be conducted before any final determination is made on the suitability of the site for a school. The SCC, by letter to Board President Fajardo that same day, reiterated that its plans do not include a new vocational high school; that it does not have the funding to build this school or acquire the land; and that school siting is a complex issue that must

be decided locally by the Board of Education and City officials. Additionally, a January 9, 2002 letter from the DOE Office of School Facilities Financing to the former Elizabeth Superintendent of Schools requested that the Board submit an alternative site for a proposed elementary school on the United Gunite site because the New Jersey Economic Development Authority ("NJEDA") did not approve the site since it was not suitable for school use. It disapproved the site for reasons that included that the previous industrial use of the site indicates that there is extensive contamination, and the cost to remediate the site for school use would be cost prohibitive.

The Board has not received approval from DOE for the acquisition of either the NJ Transit or United Gunite sites and has not secured funding for the construction of schools at those locations.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Legislature created Abbott districts in response to the New Jersey Supreme Court's decision in Abbott v. Burke, 119 N.J. 287, 394 (1990) ("Abbott II). They are 28 urban districts classified as special needs districts under the Quality Education Act of 1990. N.J.S.A. 18A:7F-3. Because Abbott districts do not have the local resources to provide their students with a thorough and efficient education ("T&E"), the State must assure that funding adequately provides for the unique educational needs of the districts. Abbott II, supra, 119 N.J. at 295. Since the Abbott districts receive public State funds, the Department of Education has a duty to scrutinize how they spend these monies to ensure that they are spent in accordance with their intended purpose. Board of Educ. of the City of Vineland v. N.J. Dep't of Educ., EDU660-05, (March 24, 2005), adopted in part and rejected in part, Comm'r (April 15, 2005). http://lawlibrary.rutgers.edu/oal/html/initial/edu00660-05_1.html.

The Abbott districts are obligated to "ensure economies and efficiencies are being attained in the delivery of programs and services." Former N.J.A.C. 6A:10A-

7.1(b).[1] Each Abbott district shall document that it "operates in an efficient and economical manner as demonstrated by its adherence to practices and standards." N.J.A.C. 6A:10A-7.1(c). The Commissioner has the authority to "take any affirmative action as is necessary to ensure the effective and efficient expenditure of funds for the implementation of all Abbott v. Burke programs, reforms and remedies." Appropriations Act, FY 2007, P.L. 2006, c. 45. The Commissioner is also authorized to "establish any additional condition on the disbursement of Education Opportunity Aid that the [C]ommissioner deems appropriate to ensure the effective and efficient spending in the "Abbott districts.'" Ibid. Additionally, the Commissioner may direct the State treasurer to withhold funds payable by the State from any district, which fails to obey the law or the rules or directions of the Commissioner. N.J.S.A. 18A:55-2 and N.J.A.C. 6A:26A-6.1. Clearly, the Legislature has vested in the Commissioner the authority to oversee spending within the Abbott districts.

I **CONCLUDE** that the Commissioner, in the exercise of her authority, correctly determined that the Board's expenditure of public funds to produce the brochure and television spots constituted an ineffective and inefficient use of State money.

The primary reference regarding the propriety of expenditures in the manner engaged by the Board is found in Citizens to Protect Public Funds v. Bd. of Educ. of Township of Parsippany-Troy Hills, 13 N.J. 172 (1953). The board of education in Citizens proposed to issue bonds to finance a school expansion. It spent public monies to print and circulate a booklet, which illustrated the growth of the school population, the lack of existing space, the expansion plans, the costs, and the effects on taxes. The booklet also contained pages on which appeared "Vote YES" and one which set forth several negative consequences as to "What Will Happen if You Don't Vote Yes." Id. at 175. The Court recognized that, implicit in the authority of the board to provide for the furnishing of schoolhouses, is the authority to make reasonable expenditures "for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal." Id. at 179. It continued,

[1] N.J.A.C. 6A:10A-7.2 is now located at N.J.A.C. 6A:10A-7.1. The regulations were adopted by the Department on October 24, 2006.

> The need for full disclosure of all relevant facts is obvious, and the board of education is well qualified to supply the facts. But a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences as may be foreseen. If the presentation is fair in that sense, the power to make reasonable expenditure for the purpose may fairly be implied as within the purview of the poser, indeed duty, of the board of education to formulate the construction program in the first instance. ...The booklet under attack here, in 17 of its 18 pages, fairly presented the facts ... and if it stopped there, none could fairly complain that the reasonable expenditure made for its preparation and distribution was without the scope of implied power.
>
> But the defendant board was not content simply to present the facts. The exhortation "Vote YES" is repeated on three pages, and the dire consequences of the failure so to do are over-dramatized... In that manner the board made use of public funds to advocate only one side of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature [citations omitted] [emphasis supplied].
>
> Id. at 180-181.

Although the Board here correctly points out the factual distinction from Citizens in that no voter referendum for acquiring land for a new high school was pending, the concerns expressed in Citizens are no less applicable. The Board failed to disclose all the relevant facts in its brochure and television spots. Also, the Board clearly sought to persuade Elizabeth residents that only its position had merit and, just as importantly, to activate the Elizabeth residents, not to vote, but to contact the Mayor, City Council members and State Senator Raymond Lesniak. The brochure and television spots espouse a viewpoint, which criticizes the Mayor's proposed sale of the NJ Transit site to a private developer for less than its appraised value. Simply put, they became political advertisements. The heart of Citizens' concerns was the use of public funds for advocacy, and that is what occurred here.

Both the television spots and the brochure discuss how the Board wants to acquire the two parcels of land for the construction of a new high school and physical education complex while criticizing the Mayor for wanting "...to sell this land to his friend for only $520,000." Lessons 3 and 6 in the brochure advise that, as a result of the funding crisis for school facilities financed by the State, the Board had already taken action instead of waiting for the City or State to address the lack of identified available properties for the construction of new schools by proposing two key sites for the construction of a new vocational high school and physical education complex. Lesson 7 suggests that the best interest of the public would be served by the Board's acquisition of the property for a new school rather than to sell it to a developer. It adds that, "the Board of Education can purchase the property from the City of Elizabeth for the children". Lesson 8 shows the two vacant sites and advises the public that they could be the sites of the new facilities. Lessons 10 and 14 give the public the perception that the State Schools Construction Corporation will finance the building of the facilities at these locations at no cost to the taxpayers. Board member Whalen, in one of the television spots, describes the New Jersey Transit site as "a perfect location to build a new high school."

The Board however does not have either the State approval to acquire or the approval to construct schools on the two properties and was specifically so informed by the SCC. Moreover, the United Gunite site was rejected as a possible site for an elementary school because of the State's belief of contamination at that location and the high cost of remediation. The N.J. Transit site had not been approved as a possible site. The Board never revealed any of this information to the residents in its publicity. By indicating that the two sites have been proposed for construction of a new vocational high school and physical education complex, the Board leaves the residents with the false impression that it had secured State approval, particularly since the brochure emphasizes that such construction would be financed by the State. The Board makes a material misrepresentation when it boasts that it can purchase the property from the City for the children, since it could not make such a purchase without the missing State approval. Similarly, the claim that the New Jersey Transit property "could be the site of a brand new vocational high school" and is "a perfect location to build a new high school" is inaccurate in the absence of State approval and in view of the State's

expression of environmental concerns. It is irrelevant whether the land was actually contaminated, a contention with which the Board takes issue. What is critical is that the State was withholding approval for the school construction project for that and other reasons, and the Board, through letters of January 9, 2002 and April 6, 2006, knew that. The public deserved to know that as well.

I disagree with the Board's contention that it made no misrepresentations since it never specified or implied a time frame in which a new vocational high school could be constructed. A fully informed public might be influenced by the fact that a piece of property could be generating taxes rather than lying barren and unproductive for an indeterminable period of time during which no school construction could occur. Neither the Board's brochure nor television spots provides the requisite full disclosure to the public, as required by Citizens, that its case for the acquisition of the two properties is qualified, tenuous or non-existent due to funding and environmental issues. Nor does it present any of the Mayor's reasons for wanting to sell the land to a developer.

It is of no moment that the tax and cost calculations presented in the Board's publicity are accurate when they are not accompanied by a full presentation of the facts. Because of material missing information, this matter is clearly distinguishable from Shoen v. Bd. of Educ. of Twp. of Edison, 97 N.J.A.R.2d(EDU) 491, upon which the Board relies, where the Commissioner found no evidence that the information provided in a pre-bond issue mailing was deliberately incomplete, inaccurate, or selectively biased. A failure to present all of the important facts is as flawed as presenting false or inaccurate facts.

The information disseminated by the Board is perversely one-sided. The brochure and the television spots make it crystal clear that the issue of the Mayor's effort to sell the land to a private developer rather than to acquiesce to the Board's preference to preserve it for school construction is a contentious, hostile, controversial and adversarial dispute among local politicians. The level of controversy is evident from the description in the newsletter's Lesson 19 of the Board's successful lawsuit against the City to stop the sale of the disputed property to a private developer. The outcome is called a victory. The Board's narratives criticize the City's proposed action regarding

the two parcels and boast of stopping the sale to the Mayor's "developer friend" for a "bottom basement price" "drastically less than the appraisal of $5.1 Million Dollars." They note that, "the fight is not over."

Notwithstanding that the Board's motives in preserving city land for future school construction may be genuinely in the public interest and altruistic, the brochure and television spots improperly present a decidedly one-sided point of view of the local political controversy. They emphasize the claim that the proposed sale by the City to a developer is below the appraised value. They argue that the benefit of "free construction" to alleviate school overcrowding outweighs the tax benefits from a private developer. There is no even-handed explanation of the potential tax benefits for the City if a private developer built on the land, why the City proposed to sell the land to a private developer, or what the developer intended to do with the land.

The Board's claim is unpersuasive that its brochure and television spots are purely informational. It is true that there was no referendum pending as in Citizens and no plea to "vote yes" in a referendum or to vote for particular candidates in either Board or City elections. However, there certainly was a call for residents to take action in support of the Board's position as evidenced by, "we can ask our City to work with the Board of Ed.," "Call the Mayor and State Senator Ray Lesniak and tell them to start working for the children of Elizabeth," and "ask our City to give the property to the Board of Education for the construction of the new school." Simply put, the residents are not only implicitly requested to take a particular side in a political controversy. They are also implored to actively lobby those espousing a different view. Consequently, the principles of Citizens are no less applicable than if a vote had been pending and residents were asked to vote a certain way.

Additionally, one cannot ignore or deem coincidental the similar arguments of the Board in its publicity and in Board Member Cedeno's City Council campaign literature of the alleged unfair plan to sell property to a private developer, all occurring shortly before the City Council primary.

The expenditure of Abbott funds to present such a slanted discussion (that the City's sale to a private developer for $520,000 is absurd while the Board's acquisition of the land is the only sensible action) fails the Citizens test for an implied power to reach residents regarding a public issue, and consequently is improper. Nor did the Legislature expressly authorize such action. See, Citizens, supra at 180-181. The Board's arguments were aimed at persuading residents that only one side of the debate had merit. Ibid. Additionally, the communication format financed by the Board did not afford those supporting another point of view an opportunity to present their side. Ibid. Instead, the Board encouraged its audience to contact politicians with another point of view for the obvious purpose of pressuring or convincing them to change their position.

The Board, as did the Mayor and City Counsel, had at its disposal the traditional means of communicating its position to the residents through regular public meetings and traditional media outlets. Indeed, the Board availed itself of such access by making its power point presentation that became the basis for the brochure at an open and televised Board meeting in October 2005. Just as City Council representatives apparently expressed their views at an open and public Board meeting in the fall of 2005, Board representatives surely would have had similar access to the public at Council meetings without the expenditure of State Abbott funds. Those espousing views contrary to those of the Board members did not however have access to Abbott funds to reach the public.

The Board misses the point when it argues in the abstract (1) that its communications were "effective" because they reached the public and inquiries ceased about the effect on taxes of building new schools, and (2) that they were "efficient" because the Board followed all appropriate laws and procedures in bidding the work to outside vendors and the cost was within that part of the budget allocated for publicity. As it was legally flawed, the Board's conduct was not an effective and efficient expenditure of State funds in furtherance of the implementation of Abbott v. Burke programs. See, Appropriations Act, FY 2007, P.L. 2006, c. 45.

The Board contends that the Commissioner's remedy requiring the deduction of the $88,373 from the Elizabeth School District's Fiscal Year 2006-07 school year budget

is oppressive and unfair. In Schettino v. Ridgefield Bd. of Educ., 93 N.J.A.R.2d(EDU) 224, the administrative law judge found that fliers paid for and sent to residents by the board of education in the weeks prior to a contested board-seat election,

> transcend mere recitation of factual information and espouse a partisan point of view, extolling the virtues of the current board, deriding the stewardship of the former board, and accusing opponents of spreading lies and distortions. The general tenor of these documents is adversarial and argumentative, as distinct from nonjudgmental and dispassionate. Any impartial observer would conclude that the fliers amount to campaign literature designed to persuade voters on how they should vote in an upcoming election. Use of public funds for such purpose, however well intentioned and high-minded, is an abuse of trust which cannot be condoned.

Although the board in Schettino improperly used public funds, the judge chose not to impose individual liability on board members who may have been overzealous but were not charged with converting public funds for private financial gain. However, the Commissioner rejected his recommendation that the remedy be a requirement that the board give equal coverage to the views of all candidates in the next school board election. She was concerned that such a remedy would stand for the proposition that partisan literature paid for with public funds is acceptable so long as all sides are accorded equal representation. Instead, she fashioned a remedy whereby board publications pertaining either directly or indirectly to the school budget or election of board members shall be reviewed for compliance by the full board in consultation with the board attorney and approved by the board.

By way of comparison to the Commissioner's remedy in Schettino, the Board here reiterates that the Commissioner's remedy requiring the deduction of the $88,373 from the Elizabeth School District's Fiscal Year 2006-07 school year budget is oppressive and unfair. Instead, it suggests a more gentle approach of developing a remedial plan that corrects the problem and helps to ensure that the objectionable conduct will not recur. The situation however is different from that in Schettino in that Elizabeth is an Abbott district, and the Legislature has specifically charged the Commissioner with the authority to withhold funds when she has determined that such a

district is not operating in an effective and efficient manner and has not spent State funds wisely. FY 2007 Appropriations Act, P.L. 2006, c. 45 and FY 2006 Appropriations Act, P.L. 2005, c. 32. Not only is the Commissioner's proposed remedy consistent with authority granted to her, it furthers the goal of eliminating wasteful spending. Although the Commissioner should not have to micromanage every action of an Abbott district, the improper expenditure of the Board in this matter warrants attention and remedial action. I **CONCLUDE** that a remedy of a reduction $88,373 from the Elizabeth School District's Fiscal Year 2006-07 school year budget is appropriate.

ORDER

The improper expenditure of State funds having been shown, it is hereby **ORDERED** that $88,373 in State funds be deducted from the Fiscal Year 2006-07 school year budget of the School District of the City of Elizabeth, Union County.

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

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

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

May 22, 2007
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 5/22/07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 23 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

For DOE:

Robert Ortley

Thomas Lakavitch

For Respondent:

Donald D. Goncalves

Joint Exhibits

J-1 Copy of Report, (DOE, 1-17)

J-2 Copy of Greatest Ratable Mailing (DOE 20-39)

J-3 Summary of Television Spots (DOE 44)

J-4 Out

J-5 Out

J-6 Out

J-7 Out

J-8 Video Tape of Four Television Spots

J-9 A. Campaign flier (DOE 18)

B. Campaign flier (DOE 19)

280-07

DENIS WILBECK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured vice principal in respondent's school district – alleged that his transfer by the Board from a 12-month position as a high school vice principal to that of elementary school vice principal would result in a lesser salary than he had been receiving prior to transfer, and that such transfer was retaliatory and done in bad faith. Petitioner was advised of his reassignment to the elementary school post in a meeting with the superintendent on August 30, 2006, and he began work in his new assignment the next day.

The ALJ found that: petitioner's appeal, filed in December 2006, is time barred by *N.J.A.C.* 6A:3-1.3(i); the 90-day limitations period for filing began in late August 2006, when petitioner was indisputably aware of the Board's action to reassign him to an elementary school; and petitioner's contention that his transfer from a 12-month to a 10-month position amounts to a reduction in salary is simply not a basis for a contested action. The ALJ concluded that the petition is time-barred and dismissed the petition.

Upon a full and independent review, the Commissioner concurred with the ALJ's determination that the petition was late filed. The Commissioner rejected the petitioner's contention that the 90-day limitation period did not begin until he received his first paycheck for the 2007-2008 school year, stating that since the petitioner had previously served as an elementary vice principal in respondent's district, he was aware in August that his transfer was to a 10-month position and that his future earnings could be affected; further, previous precedent establishes that future increases in salary or salary expectation are not appropriate factors to be considered when determining the validity of a transfer, since tenured employees have no vested right in any future increases in salary. The Commissioner dismissed the petition.

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

July 9, 2007

280-07

OAL DKT. NO. EDU 1360-07
AGENCY DKT. NO 450-12/06

DENIS WILBECK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, which was litigated by way of a motion for summary decision, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed.

The undisputed facts set forth in the parties' affidavits show that although petitioner was advised by letter on August 24, 2006 that the terms and conditions of his employment would be discussed at a board of education meeting on August 29, 2006, he chose not to attend. The respondent board of education (respondent) took action at the meeting to reassign petitioner from the position of high school vice principal, a twelve-month position, to the position of elementary school vice principal, a ten month position. The superintendent met with petitioner on the following day, August 30, 2006, to advise him of his reassignment to serve as Vice Principal of Woodrow Wilson Elementary School.

Petitioner reported for work at the Woodrow Wilson School the next day, August 31, 2006, and on the same date the school's principal distributed a letter to the students' parents welcoming petitioner. On September 5, petitioner was welcomed at a faculty meeting.

Thus, petitioner knew of his reassignment as of August 30, 2006. He filed his petition with the Commissioner on December 6, 2006, ninety-eight days later.

Petitioner argued that the ninety-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i) for bringing petitions before the Commissioner should not be counted from the date upon which he learned of his reassignment. Rather, petitioner maintained that it should be triggered by the date upon which he learned that the reassignment would affect his salary increase expectancies. In his certification he suggested that "the cause of action in this case actually arises as soon as I receive my first paycheck for the 2007-2008 school year and the 90 day period for filing would not end until 90 days from the date that I receive such check." (Certification of Denis Wilbeck dated April 3, 2007, # 10)

The Commissioner rejects that contention on both factual and legal grounds. First, the record indicates that petitioner had, prior to 2006, served as vice principal of an elementary school in respondent's district and could be reasonably deemed to have been aware of the fact that elementary vice principalships are ten month positions. Consequently, he could be reasonably charged on August 30, 2006 with the knowledge of the "existence of the state of facts which might equate in law with a cause of action," *Kaprow v. Board of Education of Berkeley Township*, 131 *N.J. Super.* 572. 589 (1993). That knowledge triggered the limitations period for filing his petition.

Second, the Commissioner agrees with the OAL that previous precedent has established that future increases in salary, or salary expectations, are not appropriate factors to be considered when determining the validity of a transfer, since tenured employees have no vested right in any future increases in salary. *Williams v. Board of Education of Plainfield*, 176 *N.J. Super.* 154, 162 (App. Div. 1980). Further, even if the future salary issue could serve as

a legitimate basis for an appeal, petitioner had the knowledge he needed to bring such a challenge on August 30, 2006. He waited until after the expiration of the period allowed by *N.J.A.C.* 6A:3-1.3(i) for challenges, and that limitations period has been strictly upheld by the Commissioner and the State Board of Education.

Accordingly, for the reasons articulated by the Administrative Law Judge (ALJ), the Commissioner adopts the Initial Decision as the final decision in this case. The petition is dismissed.

IT IS SO ORDERED.[1]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/09/07

Date of Mailing: 7/09/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION TO DISMISS
OAL DKT. NO. EDU 1360-07
AGENCY DKT. NO. 450-12/06

DENIS WILBECK,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

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

Robert J. Merryman, Esq, for respondent, Board of Education of the City of Bayonne, Hudson County, (Appruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: May 22, 2007 Decided: May 23, 2007

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

STATEMENT OF THE CASE

Denis Wilbeck, an employee of the Board of Education of the City of Bayonne, was transferred from Bayonne High School where he was a Vice Principal to Woodrow Wilson Elementary School where he would retain his title as Vice Principal.

Mr. Wilbeck filed a Verified Petition with the Commissioner of Education on December 6, 2006 contending that the position of Elementary School Vice Principal would result in a lesser salary than that which he was receiving as a High School Vice Principal. He also alleged that the transfer from a 12 month position of High School Vice Principal to the 10 month position of Elementary School Principal was done in bad faith and was retaliatory.

The Board of Education of the City of Bayonne moved for dismissal contending that N.J.A.C. 6A:3-1.3(i) mandates that a petition shall be filed no later than the 90th day after receipt of notice, ruling, or other action by the District Board of Education which is the subject of the requested contested case hearing.

UNCONTESTED FACTS

On or about August 24, 2006, a certified letter was sent to Mr. Wilbeck advising him that the terms and conditions of his employment would be discussed at the Bayonne Board of Education meeting on August 29, 2006. The letter, signed by Patricia McGeehan, Superintendent of Schools advised Mr. Wilbeck that he had the right to request that the discussion take place in a private session.

Mr. Wilbeck advised the Board that he wanted the discussion to be private but did not attend the meeting.

A Board resolution dated August 29, 2006 resulted in the transfer of Mr. Wilbeck from Bayonne High School to Woodrow Wilson Elementary School. The transfer was made without change in salary.

Superintendent McGeehan met personally with petitioner on August 30, 2006 and advised him of his reassignment to Woodrow Wilson School for the 2006-2007 school year.

Mr. Wilbeck reported for work at the Woodrow Wilson School on or about August 31, 2006 and a letter was sent to all the parents of the Woodrow Wilson School announcing that Mr. Wilbeck would be the new Vice Principal.

Mr. Wilbeck was in attendance on the first day of school for staff on September 5, 2006.

According to Mr. Wilbeck's certification filed in opposition to the Motion to Dismiss, he contends that he was unaware that the transfer would adversely affect him financially and specifically contended "neither the Board Resolution, nor Dr. McGeehan's discussion with me put me on notice that my pay would be adversely affected, not in the current year, but in future years."

Although Wilbeck contends in his petition that his transfer to the Elementary School Vice Principalship was discriminatory in nature and done in bad faith neither of these arguments were made within the 90-day time line set forth in the Administrative Code. N.J.A.C. 6A:3-1.3(i) reads as follows:

> "The petitioner shall file a petition no later than the 90th day from the date of receipt of the Notice of a Final Order, ruling or other action by the District Board of Education, individual party, or Agency, which is the subject of the requested contested case hearing."

Mr. Wilbeck was undoubtedly on notice of the Board's action in late August, a fact which he does not deny. He does however argue that, although he was aware of the transfer, he was unaware of the repercussions of the transfer from a salary standpoint.

Giving Mr. Wilbeck the benefit of the doubt with respect to his allegations of discrimination and retaliation, if in fact the Board's action was in bad faith, it was incumbent upon Mr. Wilbeck to make that argument within 90-days of the notice of his transfer. He does not unfortunately have the luxury of waiting for all the details to emerge with respect to that transfer before he decides to file his petition. Wilbeck

voiced no opposition to the transfer and did not balk until sometime during the second week of September when the difference between the two positions supposedly crystallized in his mind. Wilbeck does not dispute that the Board has the authority and power to transfer him from one position to another, but he contends that transferring him from a 12 month position to a 10 month position amounts to a reduction in salary. This argument was the subject of an Appellate Division decision entitled Williams v. Board of Education of Plainfield 176 N.J. Super 154, a case in which a school principal challenged the transfer from a high school principal to an elementary school principal essentially an argument on all fours with Wilbeck's petition. The Court stated:

> ". . . future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary.
>
> Turning to the applicable statutes, there is no suggestion much less an expressed statement that future salary increases or adjustments are to be considered in determining validity of a transfer which is otherwise proper. N.J.S.A. 18A:28-5 merely prohibits "reduction in compensation" except for the reason stated and in a manner prescribed therein."

Thus, the transfer of Wilbeck from a 12 month Assistant Vice Principal to a 10 month Assistant Vice Principal though in the future may have some salary repercussions, is simply not a basis for a contested action.

It was thus incumbent upon Wilbeck, if in fact he believed that the Board of Education of Bayonne had acted in bad faith in making the transfer, to make his complaint in his petition in a timely manner. Wilbeck was undisputedly on notice of his transfer in late August and the 90-day period ran in late November. Wilbeck's petition was not filed until early December and was thus untimely.

The Commission has held that even in cases involving discrimination claims, the 90-day limit will be strictly enforced. Ward v. Bridgewater-Raritan School District 93 N.J.A.R.2d (EDU) 435.

The Commissioner of Education and the State Board of Education have uniformly endorsed the proposition that a petition filed in an untimely manner should be dismissed. As stated recently in Cole's et al. v. The Bayonne Board of Education, OAL Dkt. No. 10535-06 (November 2, 2006) adopted Comm'r of Education in December (December 8, 2006), aff'd. State Board of Education, SB-01-07 (April 4, 2007).

> The 90-day rule has been strictly followed, and applied almost without exception. In Dreher v. Jersey City Board of Education, petitioner filed his petition 2 days out of time, and the matter was dismissed as untimely. OAL Dkt. No. EDU 2777-87 (December 18, 1987), adopted by the Comm'r. (February 2, 1988), aff'd. State Board of Education, July 8, 1988). Regardless of whether the Board complies with statutory or administrative requirements, the petitioner is required to file the petition no later than 90-days after receipt of notice. Portee v. Newark Board of Education, 94 N.J.A.R. 2d (EDU) 381, 383.

CONCLUSION

Wilbeck's petition is untimely. He was on notice of his transfer in late August and his petition was filed in December of 2006 more than 90-days after he knew of the transfer.

ORDER

It is **ORDERED** that the petition filed by Denis Wilbeck with the Commissioner of Education against the Board of Education of the City of Bayonne is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAY 23 07
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 5/23/07

Mailed to Parties: DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 24 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

281-07

V.S.-L., on behalf of minor child Z.M.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner contested respondent Board's determination that her daugher, Z.M.M., is ineligible to receive a free public education in its district schools because she is not domiciled in the City of Garfield. By virtue of a court order, residential custody of Z.M.M. is shared by petitioner and her mother, S.S. – the child's grandmother – who is legally domiciled in Garfield. The Board sought reimbursement for tuition for the period of Z.M.M.'s alleged ineligible attendance.

The ALJ found, *inter alia,* that: despite Z.M.M.'s residency with her grandmother during the week, the child is taken frequently to the Clifton home of her mother and stepfather; Z.M.M.'s parents pay property taxes on the home in Clifton, and claimed her as a dependent on their income tax return; there is no evidence to suggest that legal and physical custody of Z.M.M. has been relinquished by her parents. The ALJ distinguished between legal custody and legal guardianship; found that S.S. has shared custody but not legal guardianship of Z.M.M.; and concluded that Z.M.M. is domiciled in the City of Clifton and therefore not eligible to receive a free public education in Garfield schools. He ordered petitioner to pay tuition to the Board for the period of ineligible attendance.

Upon an independent and thorough review of the record, the Commissioner rejected the Initial Decision, finding that: under the circumstances of this case, there is no legitimate basis for distinguishing between "legal guardianship" and "legal custody"; as a result of S.S.'s legal and residential custody of Z.M.M., Z.M.M.'s domicile follows the domicile of her grandmother during the week, which is in Garfield; no competent evidence was presented disputing the child's residency with the grandmother during the week; however, there was evidence – in the form of a court order – that V.S.-L. relinquished legal and physical custody of Z.M.M. during the week. Additionally, for the purposes of this controversy, V.S.-L.'s husband has no legal relationship to Z.M.M, and V.S.-L. was entitled to claim Z.M.M. as a dependent for tax purposes because the child lived with her mother for more than six months. Accordingly, the Commissioner granted petitioner's appeal, noting that while the possibility exists that Z.M.M.'s custody arrangement could have been implemented to take advantage of Garfield's preschool program, speculation cannot serve as the basis for legal determinations.

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

July 9, 2007

OAL DKT. NO. EDU 10879-06
AGENCY DKT. NO. 199-5/06

V.S.-L., on behalf of minor child Z.M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter - including the transcript and the three exhibits from the hearing at the Office of Administrative Law (OAL), the Initial Decision, and the exceptions submitted by petitioner have been reviewed.[1] For the reasons that follow, the Initial Decision is rejected.

BACKGROUND

A review of the evidence submitted to the Commissioner reveals the following facts:

1. Petitioner's daughter, Z.M.M., was born on September 17, 2002. At that time, petitioner and Z.M.M. lived in Garfield in the home of petitioner's parents, E.S. and S.S. Z.M.M.'s father, C. M., had no involvement in Z.M.M.'s life.

2. For the first couple of years of Z.M.M.'s life, petitioner was unemployed. She began teaching in the 2004-2005 school year.

3. In or about the Spring of 2005, petitioner applied for sole legal, physical and residential custody of Z.M.M., *vis a vis* C.M., and on June 1, 2005, she was granted same.

[1] No exceptions were received from respondent.

4. Petitioner married A.L. in August, 2005. On the day of the marriage, the couple closed on a house in Clifton. The seller did not move out until the end of August.

5. According to petitioner's testimony, which was unrebutted by respondent, the couple began having marital problems during the honeymoon. When they returned from the honeymoon, they lived in Garfield with petitioner's parents. About a month later, A.L. left to stay with his parents in Long Island, where he had resided before getting married. At the end of October, 2005, A.L. moved into the home the couple had purchased in Clifton. Petitioner and Z.M.M. stayed in Garfield with petitioner's parents and sister, D.S.

6. Petitioner became pregnant, and the couple resolved – in the Spring of 2006 – to participate in marital counseling and attempt to reconcile. Petitioner decided to join A.L. in their Clifton house, but leave Z.M.M. with her family in Garfield. Accordingly, she and her mother, S.S., applied to the court for joint custody of Z.M.M.

7. On June 15, 2006, the Honorable Deborah Ustas of Bergen County Superior Court, Chancery Division – Family Court, entered a consent order which modified petitioner's sole custody of Z.M.M., as follows:

> joint legal custody to be shared by parties [maternal grandmother and mother]. Residential custody of m/c [minor child] with grandmother during the week and w/ [with] mother on weekends.

8. Both D.S., petitioner's sister – who has always lived with the parents – and petitioner testified that in July 2006, petitioner went to live with A.L., and that Z.M.M. stayed in Garfield with the maternal grandparents and D.S. Petitioner further testified that during the summer of 2006, Z.M.M. stayed with her on weekends and some weekdays.

9. The reasons petitioner gave for leaving her daughter with the grandparents and D.S. were that she did not want to subject Z.M.M. to the conflicts between her and A.L., and did

not want to remove Z.M.M. from the home she had always lived in until she and her husband had worked things out and achieved a better relationship.

10. It is undisputed that Garfield has a preschool program available to all children of preschool age who are domiciled in Garfield. It was argued by respondent that Clifton does not have such a program.

11. There appears to be no dispute that Z.M.M. was enrolled in Garfield's preschool program for the 2005-2006 school year. The evidence suggests that Z.M.M. also participated in the Garfield summer preschool program in 2006 (T32-33). And it is undisputed that Z.M.M. has attended the Garfield preschool program during the 2006-2007 school year.

12. Both petitioner and her sister, D.S., testified that S.S. and D.S. take Z.M.M. to pre-school in the morning. When pre-school ends at 6. p.m., Z.M.M. is picked up by D.S., A.L., or petitioner. If A.L. or petitioner picks up Z.M.M., they either take her to S.S.'s home in Garfield or take her to their home in Clifton to wait for D.S. to arrive from work. D.S. then takes Z.M.M. to Garfield, where she is fed, bathed and put to bed.

13. D.S. and petitioner also both testified that Z.M.M. stays with petitioner and A.L. from Friday evening until Sunday after church.

14. According to petitioner, for 2006, petitioner and A.L. filed separate tax returns. Z.M.M. was listed as a dependent on petitioner's return because petitioner and Z.M.M. lived together for over half of 2006. (T29, 52-53)

15. On May 22, 2006, respondent issued to petitioner a Notice of Initial Determination of Ineligibility of Z.M.M. to attend school in respondent's district. Petitioner appealed this by filing a petition with the Commissioner of Education (Commissioner) on May 31, 2006. The parties were advised that the matter was not ripe for adjudication before the

Commissioner, and would be held in abeyance until respondent issued a Notice of Final Determination of Ineligibility.

16. The Final Notice of Ineligibility issued by respondent bears a date of August 29, 2006. Although there is a letter dated August 30, 2006 in the file from respondent's counsel purporting to transmit the Notice of Final Determination of Ineligibility to petitioner, petitioner alleged that she did not receive the notice until October 3, 2006. On October 6, 2006, the Commissioner received a request from petitioner to reactivate the appeal she had instituted on May 31, 2006. The matter was then transmitted to the OAL.

The Administrative Law Judge (ALJ) concluded that "Z.M.M. is domiciled in the City of Clifton and is not eligible to receive a free public education from the [Garfield] Board [of Education]." His conclusion about domicile was based upon the following assumptions:

1. "There is no specific evidence on the record before [him] that would indicate that either Z.M.M.'s mother or father has affirmatively relinquished physical and legal custody of Z.M.M. or her younger brother."
2. "There is also no evidence presented that any guardianship proceeding and/or order has been entertained by a court."
3. "It is undisputed that Z.M.M. is 'frequently' taken to the Clifton home by her father after school and that she returns to the Clifton home on weekends.
4. "Z.M.M.s parents . . . pay property taxes on the Clifton home and include Z.M.M. as a dependent on their income tax return."

(Initial Decision at 6-7.)

The ALJ also assumed, citing no authority, the existence of a distinction between legal custody and legal guardianship: "While the maternal grandmother shares legal custody and

not legal guardianship with V.S.-L. as a result of a court order, legal and physical control and responsibility remain with Z.M.M.'s parents, both of whom are domiciled in the City of Clifton." (Initial Decision at 7-8)

No credibility determinations were made by the ALJ.

DISCUSSION

The Initial Decision deviates from a long line of decisions of the Commissioner, State Board of Education and Superior Court. The holdings in these cases establish that when a court order is entered awarding custody of a minor to an individual, the minor's domicile is determined by the domicile of that individual. Accordingly, the minor child becomes entitled to a free public education in the district of domicile of the custodial individual.

For example, in *L.D.M., on behalf of minor child, T.D. v. Board of Education of the Township of West Orange, Essex County,* OAL Dkt. No. EDU 3590-00, Agency Dkt. No. 60-2/00, decided by the Commissioner May 11, 2001, L.D.M. had applied for custody of her younger brother, T.D., due to family circumstances. She was granted custody by way of an order of the Superior Court. The West Orange district maintained that it was not required to provide T.D. with a free public education. In determining, to the contrary, that T.D. was entitled to a free public education in West Orange, the Commissioner reasoned as follows:

> As was determined by the Commissioner and affirmed by the State Board of Education in *L.A. v. Board of Education of the Town of West Orange,* 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton,* 97 *N.J.A.R.*2d (EDU) 124 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d 554 (1997),[2] as of the date that a resident of a district takes legal control of a child, entitlement to attend school free of

[2] In *V.H.*, when custody of a child was transferred from his parents to a great grandmother, the child's domicile was changed to the district in which the great grandmother resided and he was deemed to be entitled to a free education in that district as of the effective date of the custody transfer.

> charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision.
>
> Once L.D.M. assumed legal custody of T.D., the only appropriate inquiry for respondent was whether L.D.M. and T.D. were domiciled in the District pursuant to *N.J.S.A.* 18A:38-1(a). Inasmuch as respondent does not dispute that L.D.M. is domiciled in West Orange, and the domicile of the child follows that of the parent or guardian having legal custody over him or her, *Mansfield Twp. Board of Education v. State Board of Education*, 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that T.D. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a), as of the effective date that L.D.M. acquired legal custody of T.D. *See also Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood*, Number 658-97, decided by the Commissioner of Education December 24, 1997. Further, as was held in *L.A.*, and affirmed by the State Board, the motives of the party obtaining a custody order are not determinative. A custody order must be accepted on its face. *See L.A.* at 269. *See also Y.L., supra*

Similarly, in *Board of Education of the City of Absecon, Atlantic County v. M.L.G. and L.G.-P. on behalf of minor child, B.G.,* OAL Dkt. No. EDU 10944-99, Agency Dkt. No. 339-11/99, decided by the Commissioner July 13, 2000, it was determined that once the respondent, M.L.G., assumed legal and physical custody of her grand nephew, B.G., the only appropriate inquiry for the petitioning board of education was to ascertain whether M.L.G. and B.G. were domiciled in the district. The Commissioner concluded that inasmuch as the petitioner did not dispute that M.L.G. was domiciled in Absecon, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, it followed that B.G. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) as of the date M.L.G. acquired legal custody of him.

It should be noted that the above referenced cases refer to "custody" (as opposed to legal guardianship) and "custody orders" in describing the legal bases for the domicile of minors and, in turn, the bases for their entitlements to free public educations. Similarly, in

P.B.K. on behalf of minor child E.Y. v. Board of Education of the Borough of Tenafly, 343 *N.J. Super.* 419, 427 (App. Div. 2001), the Superior Court of New Jersey, Appellate Division, explained that "for purposes of subsection (a) [of *N.J.S.A.* 18A:38-1] the domicile of an unemancipated child is the domicile of the parent, custodian or guardian." (Emphasis added.)[3]

For purposes of determining domicile and entitlement to a public education, the Commissioner can find no distinction in the case law between "guardianship," and "custody." Indeed, as a practical matter, the terms "guardianship" and "custody" both clearly signify positions of authority created to allow legal control of another human being who, because of age, physical or mental condition, cannot take responsibility for him or herself. Accordingly, the Commissioner rejects the ALJ's implication (see Initial Decision at 6,8) that the legal authority bestowed upon an individual by way of a court order granting custody is inferior to a legal guardianship.

A Superior Court order bestowed upon S.S. joint legal custody of Z.M.M. and residential custody of Z.M.M. during the week (as opposed to the weekends). Thus, pursuant to established precedent, Z.M.M.'s domicile follows the domicile of S.S. during the week, and that domicile is indisputably in Garfield. It would serve no constructive purpose, in the context of the present controversy, to attempt to make a distinction between legal custody and legal guardianship.

The Commissioner is aware that there have been cases in which it has been determined that minors were not domiciled in the districts of residence of individuals who had

---

[3] Since a June 1, 2005 court order gave petitioner sole custody of Z.M.M., and since A.L. has no legal relationship to Z.M.M., petitioner's actions regarding Z.M.M. are the actions germane to the legal analysis of Z.M.M.'s status. Petitioner agreed to share her custodial authority with S.S., and a judge of the Superior Court – by virtue of her execution of the order – determined that it was in Z.M.M.'s best interest to approve that custody modification. In light of the resulting court order giving S.S. legal and residential custody of Z.M.M. on weekdays, the Commissioner cannot accept the ALJ's conclusion that there was no evidence that petitioner relinquished physical and legal custody of Z.M.M.

been granted custody of them. *See, e.g., I.B. on behalf of minor child, M.A., III v. Board of Education of the Township of Belleville, Essex County,* State Board Dkt. No. 51-05, decided December 6, 2006; *D.M. on behalf of minor child, B.N. v. Board of Education of the Township of Ewing, Mercer County,* State Board Dkt. No. 20-02, decided November 5, 2003. However, in those cases, the school districts presented overwhelming evidence that the respective children were not actually living with the individual who had been granted custody. By way of contrast, the respondent in this case presented no such evidence. Nor did petitioner's testimony about the evening pick-up arrangements for Z.M.M. establish that the child was not actually living in Garfield during the week.

Applying the above articulated legal principles to the evidence presented in this case, the Commissioner finds that Z.M.M. was eligible for a public education in Garfield. The Commissioner acknowledges that the possibility exists that Z.M.M.'s custody arrangement could have been implemented to take advantage of Garfield's preschool program. However, petitioner presented evidence to the contrary and respondent did not rebut it. Speculation cannot serve as the basis for legal determinations.

In light of the foregoing determination concerning eligibility, the Commissioner need not make any findings concerning tuition.

Petitioner's appeal is granted.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 7/09/07

Date of Mailing: 7/09/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.*18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10879-06
Agency Dkt. No.: 199-5/06

V.S.-L., on behalf of minor child, Z.M.M.,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,
Respondent.

David R. Giles, Esq., for petitioner, V.S.-L.

Toni Belford Damiano, Esq. for respondent

Record Closed: March 8, 2007 Decided: April 18, 2007

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner V.S.-L. appeals the determination of respondent Board of Education of the City of Garfield (Board) that Z.M.M., petitioner's daughter, is ineligible to receive a free public education provided by the Board because the child is not domiciled in the

City of Garfield. The Board is seeking reimbursement from petitioner representing tuition for the number of days of ineligible attendance.

A Notice of Initial Determination of Ineligibility was issued to petitioner on May 22, 2006. On May 31, 2006, petitioner filed a residency appeal with the Bureau of Controversies and Disputes (Bureau). By letter dated July 25, 2006, both parties were advised by the Bureau that the matter is not ripe for consideration as a contested case and that the appeal will be held in abeyance pending the results of a August 28, 2006 Board hearing. A Notice of Final Ineligibility was issued on August 29, 2006. Petitioner, claiming that she did not receive the Board's determination until October 3, 2006, filed an appeal on the same day. On October 6, 2006, the Bureau received petitioner's appeal. On October 31, 2006, the New Jersey Department of Education, Bureau of Controversies and Disputes, transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on March 8, 2007 and the record closed.

EVIDENCE

D.S., sister of petitioner V.S.-L., testified that Z.M.M. has lived at 87 Belmont Avenue, Garfield, New Jersey since the child's birth in 2002. D.S. further indicates that Z.M.M. "lives at the house in Garfield on weekdays". After school, "sometimes the child goes to sister's house in Clifton but is returned to Garfield".

V.S.-L., the mother of two young children, affirmed that she and her husband purchased a house in the City of Clifton in August 2005. V.S.-L. continued living with her parents at 87 Belmont Avenue, Garfield, New Jersey until July 2006 at which time she moved to the Clifton house. Petitioner states that at the time of the move in July 2006, she did not take Z.M.M. to Clifton because "she needed bed rest" and Z.M.M. was being cared for by her parents in Garfield. V.S.-L. insists that it would be difficult for Z.M.M. to live at the Clifton home due to past marital difficulties with her husband. Nevertheless, V.S.-L. does admit that her husband "frequently" picks Z.M.M. up at

school during the week and takes the child to the Clifton home. V.S.-L. testified that she and her husband pay property taxes in the City of Clifton and claim both children as dependents for income tax purposes.

On June 1, 2005, Edward Torack, J.S.C. entered an Order awarding V.S.-L legal, physical and residential custody of Z.M.M. On June 15, 2006, Deborah Ustas, J.S.C. entered an Order by consent providing joint legal custody to the maternal grandmother with residential custody of Z.M.M. to be with the grandmother during the week and with V.S.-L. on weekends.

THE CONCEPT OF DOMICILE

N.J.S.A. 18A:38-1 provides that

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
> b. (1) Any person who is kept in the home of another person domiciled within the school district . . .

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991) (quoting Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944)). Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977). The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. State v. Benny, 20 N.J. 238, 251 (1955). A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Ibid.

Thus, "the concept of 'domicile' may have different content and shades of meaning depending upon the context in which it is used." In re Estate of Gillmore, 101 N.J. Super. 77, 87 (App. Div.), certif. denied, 52 N.J. 175 (1968).

Nonetheless, "(e)very person has a domicile at all times, and no person has more than one domicile at any one time." Id. at 87 (citation omitted). "Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile." Benny, supra, 20 N.J. at 251. A very short period of residence in a given place may be sufficient to acquire domicile. Domicile is established by the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." Lyon v. Glaser, 60 N.J. 259, 264 (1972).

Where a person has more than one residence, the following factors are useful in determining his domicile: "the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." Unanue, supra, 255 N.J. Super. at 376.

The Commissioner of Education commented upon the domicile issue in reviewing the initial decision in F.P., on behalf of N.P.. & S.P. v. Board of Education of Point Pleasant Beach, Ocean County, OAL DKT. NO. EDU 6951-98, Final Decision (Commissioner of Education April 12, 1999),

> Domicile is thus intrinsically identified with the concept of home. As stated by the *Unanue* court, ". . . identification of domicile with the concept of home continues to have vitality in New Jersey '[h]ome is the place where a person dwells and which is the center of his domestic, social and civil life.

'" (*Unanue*, supra at 374) Moreover, the concepts of home and domicile "mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence." (*Id.* at 375).

Establishing a domicile involves an act of volition, *i.e.*, a person has the right to choose his own domicile; moreover, a person's motive in doing so is immaterial "so long as the necessary ingredients for establishment of the new domicile are present." *Lyon v. Glaser,* 60 *N.J.* 259, 264, 288; *Unanue, supra* at 375.

Central to the issue of determining true domicile, particularly when multiple residences are involved in the dispute, is the concept of "indicia of domicile." The *Unanue* Court concluded "[it] is clear that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile. Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that requisite subjective intent be present since domicile is `very much a matter of the mind - of intention.'" (*Unanue, supra* at 376, citing *Lyon, supra*) Such indicia oftentimes are statements relative to domicile in such documents as tax returns, wills, trusts, or other formal documents and statements made by an individual to others as to his/her domicile. The *Unanue* decision indicates that such recitals are evidential of actual domicile but the Court concluded, they are not at all conclusive, rather "[t]hey are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile ." (*Id.* at 377)

As correctly noted by the ALJ, a change in domicile is a matter of intention, *i.e.*,"[a] change of domicile. . . is effected if a person actually moves to a new abode intending to remain there for an indefinite period of time and establishing it as a place of fixed present domicile, notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time." (*Unanue*, *supra* at 378, citations omitted)

The following passage from *Lyon*, *supra*, synthesizes well the concurrence of elements referenced above which one has to consider when determining which particular residence is a person's true domicile.

> Domicil is very much a matter of the mind - of intention. One may be acquired, or changed to a new one, when there is a concurrence of certain elements, i.e., an actual and physical taking up of an abode in a particular State, accompanied by an intention to make his home there permanently or at least indefinitely, and to abandon his old domicil. A person has the right to choose his own domicil, and his motive in doing so is

> immaterial. . . . A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects the change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests. (*Lyon*, supra at 264)

The *Unanue* court identified three elements which must be considered when trying to ascertain if a change of domicile has occurred,

> 1) whether there had been an actual and physical taking up of an abode in a particular state;
>
> 2) whether the subject had an intention to make his home there permanently or at least indefinitely; and
>
> 3) whether the subject had an intention to abandon his old domicile. (*Unanue*, *supra* at 376).

> One must evaluate all of the facts and circumstances of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. (*Id.*, citations omitted) Furthermore, if there are sufficient objective proofs brought to the record to support the actual existence of domicile, a person's choice of domicile must be honored, even when the person has multiple residences. (*Id.*)

V.S.-L. and her husband purchased a home in the City of Clifton in August 2005 and have lived together in the home since July 2006. According to V.S.-L., Z.M.M. and her younger brother are listed as dependents on the parents' respective income tax returns. There is no specific evidence on the record before me that would indicate that either Z.M.M.'s mother or father has affirmatively relinquished physical and legal custody of Z.M.M. or her younger brother. There is also no evidence presented that any guardianship proceeding and/or order has been entertained by a court.

Z.M.M. was enrolled in the City of Garfield public schools for the 2005-2006 school year. A Notice of Initial Determination of Ineligibility was issued to petitioner on May 22, 2006 and a residency appeal was filed with the Bureau on May 31, 2006. The appeal was later "held in abeyance" pending the results of an August 2006 Board hearing. V.S.-L. testified that a second appeal was again filed with the Bureau on October 3, 2006.

The issue in this appeal is not economic or family hardship as provided for in N.J.S.A. 18A:38-1(b), but whether Z.M.M. is a domiciled student in the City of Garfield by virtue of the maternal grandmother being granted joint legal custody by a court, specifically with residential custody provided to her during the week and to V.S.-L. on weekends.

It is undisputed that Z.M.M. is "frequently" taken to the Clifton home by her father after school and that she returns to the Clifton home on weekends. The record is also undisputed that Z.M.M.'s mother and father reside in the Clifton home and that they have not relinquished their physical and legal custody of Z.M.M.

I **FIND** V.S.-L.'s first residency appeal occurred in May 31, 2006. Although prematurely filed, the May 31, 2006 appeal was "held in abeyance" by the Department of Education.

I also **FIND** that despite residing with her maternal grandmother during the week, Z.M.M. is taken "frequently" by her father to the Clifton home after school. Z.M.M. spends weekends with her parents and younger brother at the Clifton home. Z.M.M.'s parents also pay property taxes on the Clifton home and include Z.M.M. as a dependent on their income tax return. All the "indicia of domicile" as discussed by the Unanue court would suggest the Clifton home to be Z.M.M.'s domicile and permanent residence.

I further **FIND** that there is no evidence before me to suggest that legal and physical custody of Z.M.M. has been relinquished by either V.S.-L. or the father. While

the maternal grandmother shares legal custody and not legal guardianship with V.S.-L. as a result of a court order, legal and physical control and responsibility remain with Z.M.M.'s parents, both of whom are domiciled in the City of Clifton.

I **CONCLUDE** that Z.M.M. is domiciled in the City of Clifton and is not eligible to receive a free public education from the Board.

The Board is entitled to recover tuition from a parent of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2) The Notice of Final Ineligibility dated August 29, 2006 calculates the annual tuition as $ 7941.00. The per diem rate is $ 44.11 ($ 7941.00 for one year divided by 180 days pursuant to N.J.A.C. 6a:22-6). There have been 127 days of ineligible attendance. Accordingly, the total due the Board through March 8, 2007, the date of the hearing, is $ 5601.97.

ORDER

I hereby **ORDER** that the Board's decision to remove Z.M.M. from the Garfield School District schools is **AFFIRMED**. I further **ORDER** that pursuant to N.J.S.A.18A:38-1, tuition reimbursement is hereby **GRANTED** in the amount of $5601.97, plus $ 44.11 per day for each day Z.M.M. attends school after March 8, 2007.

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

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

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

April 18, 2007
DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 4/18/07

Mailed to Parties:

APR 20 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESSES

Petitioner

D.S.

V.S.-L.

Respondent

None

EXHIBITS

Petitioner

P-1 Edward Torack, J.S.C. Order dated June 1, 2005

P-2 Deborah Ustas, J.S.C. Order dated June 15, 2006

Respondent

R-1 Affidavit dated April 27, 2005 and signed by V.S.-L.

#285-07

286-06

PATERSON EASTSIDE HIGH SCHOOL PARENT/ALUMNI COMMITTEE AND MYRON BAUGH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, DR. MICHAEL GLASCOE, STATE DISTRICT SUPERINTENDENT, AND TOMMIE PATTERSON,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners claim that the appointment of Tommie Patterson as the head basketball coach for Paterson Eastside High School is not in conformance with the law, alleging that: there were qualified and certified applicants for the position pursuant to *N.J.A.C.* 6A:9-5.19; Patterson is not properly certified; and no application for waiver was made to – or granted by – the State district superintendent to allow his hiring, as is required by *N.J.A.C.* 6A:9-5.19(c).

The ALJ found that: the petitioners have standing to bring the lawsuit; the November 2006 petition was timely filed, as the 90-day limitation period began with the State district superintendent's approval – on August 31, 2006 – of the decision to hire Patterson; Patterson does not hold a New Jersey teaching certificate, and therefore does not meet the first criteria of *N.J.A.C.* 6A:9-5.19; Tony Reed was properly certified and qualified for the position of head basketball coach; therefore the respondent district is prohibited by *N.J.A.C.* 6A:9-5.19 from hiring Patterson over Reed. The ALJ vacated the appointment of Patterson as head basketball coach, and appointed Reed to the position.

The Commissioner concurs with the ALJ that: the petitioners had standing to challenge the hiring of Patterson by virtue of their interest as taxpayers, and parents and alumni actively involved with the student athletes at Eastside High School; the petition was timely filed; Patterson had no New Jersey teaching credentials at the time of his hiring as head coach; Reed possessed all requisite requirements for the head coaching position, as the job description did not expressly require candidates to have previous experience as a head high school coach. Accordingly, the Commissioner vacated the appointment of Patterson to the position of head basketball coach; however, she declined to appoint Reed to the position as part of this decision because he was not a party to this matter, and petitioners did not request his appointment as part of their demand for relief in the petition.

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

July 13, 2007

OAL DKT. NO. EDU 11847-06
AGENCY DKT. NO. 415-11/06

PATERSON EASTSIDE HIGH SCHOOL PARENT/ALUMNI COMMITTEE AND MYRON BAUGH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, DR. MICHAEL GLASCOE, STATE DISTRICT SUPERINTENDENT, AND TOMMIE PATTERSON,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the Initial Decision, and respondent's exceptions have been reviewed.[1]

The facts in this case have been sufficiently set forth by the Administrative Law Judge (ALJ) in the Initial Decision, and need only be summarized. Three individuals, Michael Baker, Tommie Patterson and Tony Reed, applied for the position of head basketball coach in respondent's district. All three candidates had significant experience coaching basketball, but only Reed possessed a standard teaching certification. Baker possessed a certificate of eligibility to seek provisional employment. Patterson had no New Jersey teaching credentials at the time he applied for the coaching position, but received county substitute

[1] According to correspondence between the parties, petitioners received respondents' exceptions on June 8, 2007. Petitioners were thus required – under *N.J.A.C.* 1:1-18.4(d), together with *N.J.A.C.* 1:1-1.4 – to file any reply exceptions with the Commissioner by June 15, 2007, five business days after their receipt of the initial exceptions. However, the Commissioner did not receive petitioners' reply exceptions until June 18, 2007. Because they were untimely, they were not considered.

credentials in August 2006, after being selected by respondent for the job (subject to the approval of the district superintendent).

Petitioners appealed the hiring of Patterson, and respondents moved for summary decision. The ALJ determined that the position should have been awarded to Reed. More specifically, the ALJ reviewed the provisions of *N.J.A.C.* 6A:9-5.19 and found that they allow individuals with substitute teaching credentials to serve as athletic coaches only if there are no qualified and certified applicants. *N.J.A.C.* 6A:9-5.19 (c) provides in pertinent part:

> (c) In the event there is no qualified and certified applicant, the holder of a county substitute credential pursuant to N.J.A.C. 6A:9-6.5 is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position had been advertised; and
>
> ii. There was no qualified applicant based on the written standards of the district board of education;
>
> 2. The district chief school administrator provides a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and
>
> 3. The district board of education obtains the county superintendent's approval prior to such employment. The 20-day limitation noted in N.J.A.C. 6A:9-6.5(b) shall not apply to such coaching situations.
>
> (Emphasis added)

While respondents do not dispute that Reed was the only candidate with standard certification, they contend in their exceptions that Reed was unqualified for the advertised coaching position because he had never served as the head basketball coach in a high school. This argument is, on this record, without merit. Reed had extensive coaching experience. His experience as an assistant coach in college may well have been more significant than

experience as a high school head coach. More important, however, is the fact that the job description did not expressly require candidates to have previous experience as a head high school coach. It required only that the candidate "show evidence of successful experience in the assigned sport."

Two other legal issues required resolution, *i.e.*, respondents' assertion that petitioners' appeal was untimely, and respondent's claim that petitioners were without standing to bring the appeal. As to the first issue, which respondents did not challenge in their exceptions, the Commissioner concurs with the ALJ that petitioners' appeal was timely. It was filed within 90 days of the district superintendent's approval of Patterson's employment. Without that approval, Patterson's employment would not have been secured. *N.J.A.C.* 6A:9-5.19(c)3.

Nor can the Commissioner disagree with the ALJ's conclusion that petitioners had standing to file the appeal. At the outset, the Commissioner agrees with respondents' contention, in their exceptions, that one of the cases upon which petitioners and the ALJ relied, *i.e., Richard Harris and Kenton Garay v. Board of Education of the Hunterdon Central Regional High School District*, 96 *N.J.A.R.* 2d (EDU) 312, is not sufficiently apposite to the present case to support petitioners' arguments about standing. In that case, teachers Harris and Garay were unsuccessful applicants for a coaching job. There can be little doubt that they had direct interests in the propriety of the district's appointment to the coaching position of an individual who did not have standard teaching certification. By way of contrast, the petitioners in the present case cannot allege direct, personal harm from Patterson's employment.

However, the Commissioner cannot agree that *Ridgewood Education Association et al. v. Ridgewood Board of Education*, 284 *N.J. Super.* 427 (App. Div. 1995), another case relied upon by petitioners and the ALJ, is unhelpful to petitioners. In *Ridgewood*, an Education

Association (REA) and two individuals challenged a rule promulgated by the local board of education limiting the employment of supplemental teachers to two consecutive years – barring the accrual of tenure. Because none of the current members of the REA were untenured supplemental teachers, the REA was deemed by the Commissioner not to have a direct interest in the challenged rule and, consequently, not to have standing. Further, the Commissioner agreed with the ALJ that the REA members' status as taxpayers did not provide the REA with standing absence a showing that a public interest was implicated in the challenge.

The State Board of Education affirmed the Commissioner, but the Appellate Division reversed. It observed – citing *Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y.*, 58 *N.J.* 98, 101, 107-11 (1971) – that New Jersey has "a venerable tradition of liberal application of standing criteria," and found that *N.J.S.A.* 52:14B-8,[2] the provision of New Jersey's Administrative Procedure Act permitting any interested person to challenge the applicability of any statute or rule enforced or administered by an agency, is grounded in that tradition. *Ridgewood Education Association, supra,* 284 *N.J. Super.* at 431. It also cited *Bell v. Stafford Tp.*, 110 *N.J.* 384, 390-91 (1988), for the proposition that the liberal application of standing criteria has been particularly applied "to taxpayer suits and the like." *Ridgewood Education Association, supra,* 284 *N.J. Super.* at 431.

In finding that the REA had standing, the Appellate Division referred to the test which is set forth in *New Jersey State Chamber of Commerce v. New Jersey Election Law*

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[2] *N.J.S.A.* 52:14B-8 provides, in pertinent part:

> Subject to the provisions of section 4(b) and 4(e) of Chapter 20, laws of 1944, as amended and supplemented . . .an agency upon the request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court.

Enforcement Comm'n, 82 *N.J.* 57, 68 (1980), that where a plaintiff association has an obvious, albeit indirect, interest in the effect upon others of statutory and administrative regulations, requirements for standing are met. *Ridgewood Education Association, supra,* 284 *N.J. Super.* at 432. In the Appellate Division's view, the REA's relationship to the board policy under attack was "not that of a total stranger or casual interloper." *Ibid.* The REA's interest in the challenged policy would be triggered by future members who were supplemental teachers without tenure.

Finally, relying upon *Silverman v. Board of Ed., Twp. of Millburn,* 134 *N.J. Super.* 253, 257-58 (Law Div.), *aff'd o.b.* 136 *N.J. Super.* 435 (App. Div. 1975), the Appellate Division stated:

> "We see no reason why this State's historic liberal approaches to the issue of standing in general . . . should not apply to taxpayer suits challenging the quasi-legislative actions of local boards of education. . . . The official actions of boards of education are identical in the public interest sense to those of local governing bodies. . . . Although the route of review is different . . . , the principles of standing governing facial challenges to official conduct are the same in either context."
>
> *Ridgewood Education Association, supra,* 284 *N.J. Super.* 433

The Commissioner finds that the foregoing principles are germane to the present case. The record includes a certification by Myron Baugh that he and most of the members of the petitioning organization – which has existed for ten years – are residents and taxpayers of Paterson who have expressed a strong interest in the workings of the high school. (Baugh certification, #2) According to the certification, the organization's members have manifested that interest by supporting the athletic program, by fundraising, by mentoring students, and by generally assisting student athletes in gaining entrance to college. (*Ibid.)* These facts, which were not rebutted by respondent, support the conclusion that petitioners are

taxpayers who have an interest in the respondent district's challenged action and are not strangers or casual interlopers as regards same.

Baugh's certification explained that "the experience and demeanor of a coach is crucial to maximize the opportunities for student athletes." (Baugh certification, #8) He continued as follows:

> "We are familiar with Mr. Patterson's background. He was a coach at a private school and had, unfortunately, what we considered to be significant disciplinary infractions while he was coaching there (he was suspended twice). There were instances of unsportsmanlike conduct known to us. We did not believe it likely that a certified teacher would have those problems."
>
> Baugh certification, #9.

In summary, the petitioners can be reasonably deemed to have a sufficient interest both as taxpayers and persons actively involved with the high school athletes to have standing to challenge respondent's action as a violation of *N.J.A.C.* 6A:9-5.19(c).

Even more significant, however, is the fact that Baugh certified that many of the members of the petitioning organization are parents of students at the high school – as the name of the organization suggests. (Baugh certification, #2) As such, they have an obvious, albeit indirect, interest in the effect upon their children of respondent's action and respondent's adherence, *vel non*, to *N.J.A.C.* 6A:9-5.19(c). Thus, in the context of New Jersey's liberal tradition concerning standing, and in light of the facts of this case, the Commissioner finds that petitioners had standing to challenge the hiring of Patterson.

Accordingly, the appointment of Patterson to the position of head basketball coach at Paterson Eastside High School is vacated. While the evidence in the record suggests that Reed is qualified for the coaching position, Reed is not a party to this matter, and petitioners did not request his appointment as part of their demand for relief in the petition.

The Commissioner consequently declines, as part of this decision, to appoint Reed to the position of head basketball coach of Paterson Eastside High School.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/13/07

Date of Mailing: 7/13/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 11847-06

AGENCY DKT. NO. 415-11/06

PATERSON EASTSIDE HIGH SCHOOL PARENT/ALUMNI COMMITTEE AND MYRON BAUGH,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, DR. MICHAEL GLASCOE, STATE DISTRICT SUPERINTENDENT, AND TOMMIE PATTERSON

Respondents.

Patrick C. English, Esq. appearing on behalf of petitioners (*Dines & English*)

Joanne L. Butler, Esq. appearing on behalf of respondent (*Schenck, Price & King, LLP*)

Record closed: May 21, 2007 Decided: May 30, 2007

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE

Petitioners claim that the appointment of Tommie Patterson as the head basketball coach for Paterson Eastside High School is not in conformance with the law. Specifically they allege that:

a) There are qualified and certified applicants pursuant to N.J.A.C. 6A 9-5.19.

b) Mr. Patterson is not properly certified and

c) No application for waiver has been made to or granted by the county superintendent as would be required by N.J.A.C. 6A: 9-5.19(c)

At the time that the petition was filed petitioner sought emergent relief maintaining that it would be harmful to the students for the season to began with an unqualified coach or for there to be a coaching change during the season. Additionally, petitioners requested that the Commissioner direct that the respondents, follow the requirements of N.J.A.C. 6A: 9-5.19, that Tommy Patterson be declared ineligible for the head basketball position at Patterson Eastside High school and such other relief that may be deemed just and proper. The respondents answered maintaining that the petition should be summarily dismissed, that the petitioner's lacked standing to challenge the district's hiring decision and that the petition should be dismissed as it was not timely filed in accordance with the 90 day rule. (N.J.A.C. 6A:3-1.3(d))

PROCEDURAL HISTORY

On November 6, 2006 Petitioner filed a verified petition with a request for injunctive relief and proof of service before the Commissioner of Education of New Jersey. After receiving a three day extension for filing its answer the respondent filed an answer and counterclaim on December 6, 2006. The Department of Education transmitted the matter to the Office of Administrative Law on December 22, 2006. Between the dates of February 1, 2007 and March 5, 2007 various telephonic conferences were conducted. The parties initially agreed to the simultaneous filing of motions for summary decision and replies. However on April 16, 2007 the parties agreed to an alternate schedule which required the filing of a brief by the Respondent, a response by the petitioner, and a reply to the petitioners' response by the respondent. As a result of a telephone conference conducted on May 21, 2007, it was agreed that the petitioner could file a counter motion.

ISSUES PRESENTED

The issues to be decided in this motion for summary decision are

1. Do the petitioners have the requisite standing to challenge the hiring decisions of the District.
2. Did the filing of this petition comply with the 90 day rule? (N.J.A.C. 6A:3-1.3(d))
3. Did the District appropriately appoint Tommy Patterson as head basketball coach?

STIPULATED FACTS

Respondents stipulate to the following as undisputed facts underlying this matter:

1. In or about June 2006, Respondent State Operated School District of the City of Paterson (the "District") posted a notice of job opportunity for Head Coach of the Boys' Basketball team at Eastside High School for the winter 2006-2007 season. (See Exhibit A, Job Posting).

2. Such posting listed the following qualifications for the position: NJ Teacher's Certification or County Substitute Certification; coaching experience preferred by not required; must be available daily during the sport season; proof of experience required for Substitute Certification holders; must be certified in CPR as per NJSIAA Regulations; and all First Year coaches must be certified in CPR and First Aid as per NJSIAA Regulations. (See Id).

3. The District's Job Description for the job title "Athletic Coach" includes the following qualifications: "hold a New Jersey instructional certificate, or a county substitute certificate;" "show evidence of successful experience in the assigned sport and in working with students or with student athletes;" and "meet such alternative to the above qualifications as the Superintendent may find appropriate and acceptable." (See Exhibit B, Paterson Board of Education Job Description-Athletic Coach).

4. The deadline for filing applications for the position was July 5, 2006. (See Id.).

5. The District received letters of interest, resumes, and other related documents from three (3) individuals seeking the position of Boys' Head Basketball Coach. The three (3) individuals were Michael Baker, Tommie Patterson and Tony Reed.

6. At the time of the application, Mr. Baker held a New Jersey Provisional Certificate of Eligibility in the area "Teacher of Audio/Visual Broadcast Production Technology." (See Exhibit C, Baker's Provisional Certificate).

7. Mr. Baker was employed by the District from January 1998, through December 2002, as a substitute teacher.

8. Mr. Baker left the employ of the District in December 2002, but returned in September 2005 as a substitute teacher.

9. Mr. Baker also served as the District's Boys' Junior Varsity Basketball Coach and Assistant Varsity Coach for the 2005-2006 season.

10. Mr. Baker never served as a head coach for a boys' high school basketball team.

11. Mr. Baker was non-renewed by the District, effective July 1, 2006, for failure to submit official transcripts evidencing the six (6) credits required to hold his Emergency Certificate for the 2005-2006 school year. (See Exhibit D, May 15, 2006, Correspondence to Baker and *Exhibit E*, Personnel Transaction Request& Personnel Action Form, 5/11/2006 and Redacted list of Non-renewals).

12. Mr. Reed was employed by the District in the 1984-1985 school year as a Health & Physical Education Teacher. (See Exhibit F, Reed's Cover Letter and Resume).

13. Mr. Reed was appointed by the District from 1993 through 2006, as an Assistant Basketball Coach at Eastside High School. (See Id.).

14. Mr. Reed has been an Assistant basketball coach at William Paterson College and a coach at the Luis Munoz Marin Middle School, in Newark. (See Id.)

15. Mr. Reed never served as a head coach for a boys' high school basketball team.

16. Mr. Patterson was not employed by the District at the time of his application for the position of Boys' Head Basketball Coach. (See Exhibit G, Patterson's Resume).

17. Mr. Patterson served as the Head Boys' Basketball Coach at Paterson Catholic High School from 1999 through 2006. Prior to serving as Head Coach, Mr. Patterson was the Assistant Boys' Basketball Coach at Paterson Catholic from 1993 through 1999, and also served as a Student Assistant Basketball Coach at William Paterson College, for the 1992-1993 season. (See id.)

18. Mr. Patterson received his County Substitute Teacher's Credentials, which certify Mr. Patterson to act as a substitute teacher for K-12, all subjects, and as a substitute teacher of interscholastic athletics, on August 9 and August 31, 2006, respectively. (See Exhibit H, Patterson's County Substitute Certificates).

19. On July 26, 2006, Messrs. Baker, Patterson, and Reed were interviewed by six (6) District personnel. (See Exhibit I, Interview Schedule).

20. Each interviewer completed a candidate evaluation, which consisted of a series of questions on which the interviewers ranked the candidates on a scale of one to ten.

21. Overall, Mr. Patterson received the highest scores from the six (6) interviewers. The interviewer ranked Mr. Baker second and Mr. Reed third.

22. Following the interviews, Mr. Patterson was selected to fill the position of Boys' Head Basketball Coach. (See Id).

23. On July 27, 2006, Ms. Karen Johnson, Principal of Eastside High School, submitted for approval a Personnel Transaction Request & Personnel Action Form seeking to appoint Mr. Patterson as Head Coach for Boys' Basketball. (See Exhibit J, Personnel Transaction Request & Personnel Action Form, submitted for approval by K. Johnson on 7/27/06 and signed by Dr. Glascoe on 8/31/06).

24. On August 28, 2006, Mr. Luis Rojas, the District's Director of Human Resources/Personnel, submitted to the Office of the County Superintendent an Application for Approval to Hire Athletic Coach Holding Substitute Certification, signed by Dr. Glascoe, along with the required Coaching Experience Approval Form, for approval to hire Mr. Patterson. (See Exhibit K, Application for Approval to Hire and Coaching Experience Approval Form).

25. On August 31, 2006, the County Superintendent approved the District's Application to Hire Athletic Coach Holding Substitute Certification. (See Exhibit L, Application for Approval to Hire, marked "Approved").

26. Also on August 31, 2006, Dr. Glascoe approved the appointment of Mr. Patterson as Head Coach for Boys Basketball. (See Exhibit J).

LEGAL DISCUSSION

The initial issue to be determined is whether petitioners have standing to challenge the hiring decisions of the District. As stated in respondent's brief "standing refers to a petitioner's ability or entitlement to maintain an action before a court or administrative agency." Stubus v. Whitman 339 N.J. Super 38, 47 (App. Div. 2001), cert. den. 171 N.J. 442 (2002)

In order to have standing, a party "must present a sufficient stake in the outcome of the litigation, adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision" In Re Camden County 170 N.J. 439, 449(2002).

As indicated in the petitioner's brief "the Paterson Eastside High School Parent/Alumni Committee has been in existence for over a decade and is composed of parents and alumni and its members donate their time for the improvement of Paterson Eastside High School, including but not limited to the athletics at Paterson Eastside. Among others, the group has many prominent former college and even professional athletes as part of its membership and among its other endeavors it mentors students to facilitate entry into college. It also does fundraising, sponsors a basketball camp run by a former professional basketball player and conducts many other activities. It works closely with the athletic staff in many of these endeavors. While a few of the alumni have moved from Paterson to nearby areas the majority of memberships are from Paterson. Petitioner Myron Baugh is the Chairman of the group and he lives in Paterson."

Point I Do the petitioners have standing?

The question is does this group consisting of residents and/or parents have standing to challenge an alleged violation of a regulation of the New Jersey Administrative Code by a School District.

Petitioners contend that coaching is an aspect of teaching and that N.J.A.C. 6A:9-5.19 is an attempt by the State Board to recognize that fact. Petitioner goes on to sight Harris v. Board of Education of Hunterdon Regional High School District 99 N.J.A.R. 2^d at 312. The facts in that case are almost identical to those encountered here. That is, as stated in Harris:

> Petitioners Richard Harris and Kenton Garry were teaching staff members employed by Respondent Hunterdon Central Regional High School Board of Education. They had applied for the head wrestling coach position in 1991, when the job was given to Steven Gibble, who held a county substitute certificate.
>
> Harris and Garry challenged the appointment, arguing that Gibble should not have been given the position since, as a holder of a County substitute certificate he was authorized to serve as an athletic coach only in the event if there was no qualified or certified applicant from within the district. The petitioners argued that they were both qualified for the position and that Gibble had been illegally selected....
>
> The Board countered that Gibble was the only one of the candidates that had the necessary head coaching experience to perform the job, and that it had obtained special approval from the county superintendent allowing Gibble to be hired.
>
> The ALJ concluded that Gibble had been improperly selected for the head coaching position and ordered that the board select one of the petitioners as its choice for the head coach and pay him the stipend, plus interest, for the 1991-1992 wrestling season.

In support of its position on standing, petitioner cites Ridgewood Education Association v. Ridgewood Board of Education 284 N.J. Super. 427 (App. Div. 1995). In that case the Commissioner of Education, ruling on arguments very similar to those put forth by Respondents in this case, dismissed a petition concluding that petitioners, who challenged the legality of a rule promulgated by the Board of Education, lacked standing, The Appellate Division noted in overruling the Commissioner of Education that:

> (1) The provision of New Jersey's Administrative Procedure Act permitting "any interested person" to challenge the applicability of any statute or rule enforced or administered by an agency N.J.S.A. 52:14b-8 is based upon a venerable tradition of liberal application of standing criteria. Crescent Park Tenants Ass'n v. Realty Equities Corp of N.Y., 58 N.J. 98, 101, 107-11, 275 A.2d(1971), particularly in taxpayer suits and the like ...

Based on all of the above I **FIND** that petitioner's have standing to bring this lawsuit.

Point II Did the Filing of the petition on this matter comply with N.J.A.C. 6A:3-1.3(d). Respondent's contented that the petition was untimely filed. Respondent contends that N.J.A.C. 6A:3-1.3(d) governs the filing of an action arising under the school laws and states in part that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing.

Contrary to the respondent's contention that the 90 days began to run on July 31, 2006 which is the date that the petitioners knew of the district's determination, petitioner maintains that the ninety days did not start until August 31, 2006. This is the date that Tommie Patterson was officially approved by Dr. Michael Glascoe, who is the State District Superintendent for the school system. Dr. Glascoe's approval was the final action necessary to officially hire Tommie Patterson and accordingly, I **FIND** that August 31, 2006 is the date from which the ninety (90) days starts to run. Since the petition in this case was filed on or about November 6, 2006 said date is within 90 days of the August 31, 2006 approval by Dr. Glascoe and therefore complies with the 90 day rule.

Point III Did the District appropriately appoint Tommie Patterson as head basketball coach?

In its brief Respondent maintains that the appointment of Tommie Patterson complies with N.J.A.C. 6A:9-5.19 where it is stated that:

> "when it appointed Mr. Patterson to the position of Head Coach of the Boys Basketball Team of Eastside High School, the District complied with the requirements of that regulation. The district advertised the vacant position and received three (3) applicant's responses. The district interviewed all three (3) applicants, and learned that, of the three, only Mr. Patterson was qualified for the position."

The petitioner maintains that the appointment of Tommie Patterson violated N.J.A.C. 6A:9-5.19 in that Mr. Reed was not only qualified but also is a certified teacher in the district. More particularly, petitioner cites N.J.A.C. 6A:9-5.19 which states as follows:

(b) School districts shall be permitted to employ any holder of a New Jersey Teaching Certificate to work in the interscholastic athletic program provided that the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute credential pursuant to N.J.A.C. 6a:9-6.5 is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1) The district chief school administrator demonstrates to the county superintendent that:

(i) The vacant coaching position had been advertised; and
(ii) There was no qualified applicant based on the written standards of the district board of education;

2) The district chief school administrator provides a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and
3) The district board of education obtains the county superintendent's approval prior to such employment. The 20-day limitation noted in N.J.A.C 6A:9-6.5(b) shall not apply to such coaching situations. (Emphasis added).

To comply with the terms of N.J.A.C 6A:6.5 the first criteria to be considered is whether there was an applicant with a teaching certificate. Since Mr. Reed was the only applicant with a teaching certificate the issue becomes whether he was qualified.

The petitioner maintains that the necessary qualifications for the job are contained in two documents. The first is the job description which states as follows:

The Athletic Coach shall:

1) Hold a New Jersey instructional certificate, or a county substitute certificate (N.J.A.C. 6:29-3.3 and 6.11-4.5).
2) Hold and maintain first aid certification and CPR certification.
3) Hold a valid driver's license with no serious violations.
4) Show evidence of successful experience in the assigned sport and in working with students or with student athletes.
5) Have the ability to demonstrate the physical skills required of the sports, and be able to explain the rules and regulations governing the sport.
6) Have excellent integrity and demonstrate good moral character and initiative.
7) Exhibit a personality that demonstrates interpersonal skills to relate well with students, staff, administration, parents and the community.
8) Demonstrate the ability to communicate effectively in English, both orally and in writing, using proper grammar and vocabulary.
9) Provide proof of U.S. citizenship or legal resident alien status by completely Federal Form 1-9 in compliance with the Immigration Reform and Control Act of 1986.
10) Provide evidence that a criminal record history check has been conducted and clearance has been given by the Department of Education. During the initial six month period provide a sworn statement that the individual has not been convicted of a crime or disorderly person's offense in accordance with 18A:6-7.1.

11) Provide evidence that health is adequate to fulfill job functions and responsibilities with reasonable accommodation pursuant to 42 U.S.C. 12101 and in accordance with N.J.A.C. 6:3-4A.4.
12) Pass the State required Manitou Intradermal Tuberculin Test as required by N.J.A.C. 6:3-4A.4.
13) Met such alternatives to the above qualification as the Superintendent may find appropriate and acceptable.

The second set of qualifications is contained in the posting for the job which states as follows:

- NJ Teacher's Certification or County Substitute Certification coaching experience preferred but not required
- Must be available daily during the sports season
- Proof of experience required for Substitute Certification holders
- Must be certified in CPR as per NJSIAA Regulations
- All **First Year** coaches must be certified in **CPR** and **First Aid** as per NJSIAA Regulations

In regard to the written criteria for the position, Mr. Reed fulfilled all requirements. More particularly, "Mr. Reed was the assistant basketball coach at Paterson Eastside from 1993 until this school year, some 13 years. He has had seven years head coaching experience (albeit in another sport) at Passaic County Technical and Vocational High School, and served for eight years as an assistant basketball coach at William Paterson University. He also coached basketball as head coach at the middle school level."

Although respondent concedes that Mr. Reed "clearly has experience coaching basketball" respondent still maintains that since Mr. Reed never served as a head coach of a boys High School basketball team he was unqualified to fill the position.

There was nothing in the written qualifications that require an applicant to be a head coach at a high school. In fact, the written criteria stated that "coaching experience preferred but not required". Mr. Reed had 13 years as an assistant head basketball coach at Paterson Eastside, 8 years as an assistant head basketball coach at William Patterson University, 7 years as a head coach in another sport at Passaic County Technical and Vocational High School and he was in fact, a head basketball

coach at a middle school. Although Mr. Reed had not held the position of head coach at a high school he clearly had very impressive coaching experience. Additionally, although most of Mr. Reed's coaching experience has been as an assistant coach, the responsibilities and hands on obligations of a high school assistant coach are just as demanding as the overall managerial responsibilities of a head coach. If the only acceptable preparation for becoming a head coach is that one must have previous head coaching experience, it would unfairly limit the choice of potential candidates to those who are already head coaches. Accordingly, I disagree with the respondent and **FIND** that Mr. Reed had the requisite experience to be the head basketball coach at Paterson Eastside High School.

CONCLUSION AND ORDER

Since Mr. Reed was both certified (whereas Mr. Paterson was not) and qualified, N.J.A.C. 6A:9-5.19 prohibited the district from hiring Mr. Paterson over Mr. Reed. Therefore, the appointment of Mr. Patterson as head basketball coach at Paterson Eastside High School is vacated. As agreed to by the parties there are no genuine issues as to any material facts. Accordingly pursuant to N.J.A.C. 1:1-12.5 all substantive issues are being decided in this order. Further, since Mr. Reed was the only certified and qualified candidate Mr. Reed is hereby appointed as the head basketball coach at Paterson Eastside High School.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 2007
DATE

Walter M Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: May 30, 2007

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 31 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

291-07

L.A. AND C.A., ON BEHALF OF MINOR, CHILD, P.M.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners allege that the Board has jeopardized the welfare of their son by permitting a woman they do not like to serve as a class parent for parties and class trips during the 2006-2007 school year. Petitioners requested emergent relief, but failed to file the requisite motion. Respondent Board filed a motion for sanctions pursuant to *N.J.A.C.* 1:1-14.14(a) after petitioners failed to provide required discovery.

The ALJ noted that this complaint is the sixth petition filed between the parties since 2004, five of these filed by petitioner L.A., and that – based on prior discovery problems between the parties – he imposed a specific discovery schedule in a Prehearing Order dated February 7, 2007. He further noted that petitioners failed to provide the requisite discovery, despite the specific deadlines and a telephone conference on April 18, 2007, during which the ALJ admonished L.A. to resubmit answers to discovery which the petitioner claimed were previously sent but never received by the respondent Board. The ALJ found that: L.A.'s assertion that she returned the discovery to the Board's attorney – but did not maintain a copy for her records – is both incredible and unbelievable; petitioners ignored his instructions to resubmit the discovery responses; and petitioners' violation of the Prehearing Order is wanton and willful. Accordingly, the ALJ granted the Board's motion for sanctions, and determined that the appropriate remedy in this matter is suppression of the petitioners' claim, and dismissal of the petition.

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

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

July 18, 2007

OAL DKT. NO. EDU 12031-06
AGENCY DKT. NO. 398-11/06

L.A. AND C.A., ON BEHALF OF MINOR, CHILD, P.M.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons fully set forth in the Initial Decision, that suppression of petitioners' claims and dismissal of the Petition of Appeal is the appropriate resolution of this matter.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille Eday
COMMISSIONER OF EDUCATION

Date of Decision: 7/18/07
Date of Mailing: 7/18/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12031-06
AGENCY DKT. NO. 398-11/06

L.A. AND C.A. ON BEHALF OF
MINOR CHILD, R.M.A.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF PORT REPUBLIC,
ATLANTIC COUNTY,
Respondent.

C.A. and L.A., petitioners, pro se

Clement F. Lisitski, Esq., for respondent

Record Closed: June 7, 2007 Decided: June 8, 2007

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter comes before me on respondent Board of Education's (Board) motion for sanctions for failure to provide discovery. The case concerns petitioners' allegation that the Board has jeopardized her son's welfare by permitting a woman they do not like to serve as class parent during the 2006-2007 school year for parties and

class trips. Petitioners requested emergent relief, but failed to file the requisite motion. As a result, the Division of Controversies and Disputes transmitted the matter to the Office of Administrative Law for regular disposition.

The matter was transmitted to the OAL on December 8, 2006, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

DISCUSSION

This is the sixth petition filed between these parties since 2004 (five filed by petitioner L.A., Docket Nos. EDU 317-04, EDU 4308-05, EDU 6599-05, GRC 6816-05 and EDU 12031-06; and one by the Board, Docket No. EDU 4154-06). Based upon prior discovery problems during the lengthy and contentious relationship between the parties, I imposed a specific discovery schedule in the Prehearing Order dated February 7, 2007. The Order provided in pertinent part:

> B. The parties shall, by no later than March 15, 2007, exchange lists of the names and addresses of all persons who may be called to testify as witnesses at the hearing. Except for good cause shown, the undersigned will not permit any witnesses to testify whose name does not appear on these lists. This restriction will not apply to rebuttal witnesses whose testimony cannot be reasonably anticipated.
>
> C. The parties shall, by no later than March 15, 2007, exchange copies of all documents, which may be relied upon at the hearing, including any expert reports. Failure to timely exchange expert reports may preclude such expert from testifying.
>
> D. Pursuant to N.J.A.C. 1:1-10.4, **all discovery shall be completed no later June 1, 2007.**
>
> E. The time limits for discovery will be strictly imposed unless it is found to be impracticable.
>
> F. In the event the parties wish to propound interrogatories, all such interrogatories must be propounded

no later than February 15, 2007, and must be answered no later than March 15, 2007.

Both parties were admonished during the Prehearing Conference that the discovery schedule would be strictly enforced.

In accordance with that Order, on February 15, 2007, the Board served upon petitioners interrogatories and a request for production of documents. Petitioners were required to respond by March 15, 2007. They failed to do so.

Pursuant to N.J.A.C. 1:1-10.4(d), the Board attorney scheduled a telephone conference with me on April 5, 2007. Petitioners could not be contacted on that date. Consequently, I rescheduled to telephone conference for April 18, 2007.

Petitioner L.A. appeared telephonically on April 18. The telephone conference was conducted on the record. At that time, L.A. acknowledged receiving the discovery from the Board. She claimed she sent the required discovery back to the Board's counsel. She stated she did not keep copies of the discovery, but "threw them away." Counsel for the Board denied receiving the discovery response. I found counsel's statement to be credible and believable. I then instructed L.A. to reprovide to the Board the answers to discovery.

Despite my admonition, to date petitioners have still not provided the requisite discovery. The deadline of June 1, 2007 set forth in the Prehearing Order for completion of all discovery has now passed. The board moves for sanctions pursuant to N.J.A.C. 1:1-14.14(a).

Petitioners have filed no opposition to this motion

I reiterate that although petitioners appear here pro se, this action represents the fifth petition L.A. has filed with the Commissioner of Education since 2004 and the sixth matter in which she has been a litigant. She has appeared before me in five of those

matters, both with and without counsel. During those cases, discovery issues have repeatedly arisen. Based upon those experiences, I am satisfied that petitioner's failure to provide discovery is not the result of a failure to understand what the regulations require. Further, I find L.A.'s assertion that she returned the discovery to the Board's attorney but did not maintain a copy incredible and unbelievable.

Finally, petitioners have ignored my instruction of April 18, 2007, to resubmit the discovery responses. Given those facts, I have no alternative but to conclude that petitioners' violation of the Prehearing Order is wanton and willful.

Accordingly, the Board's motion for sanctions must be **GRANTED.**

The remaining issue becomes, what sanction is appropriate? The issue of sanctions is dealt with in N.J.A.C. 1:1-14.14(a), which states in pertinent part:

> (a) For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:
>
> 1. Dismiss or grant the motion or application;
>
> 2. Suppress a defense or claim;
>
> 3. Exclude evidence;
>
> 4. Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or
>
> 5. Take other appropriate case-related action.

The purpose of discovery is to reveal to the opposing party the information which the litigant intends to place into evidence. Accordingly, the normal remedy would be exclusion of the evidence that petitioners failed to disclose in their responses to the discovery requests.

However, a comparison of the petition with the discovery requests attached to the Board's moving papers leads me to conclude that the discovery requests encompass all aspects of the petition. If petitioners are precluded from introducing this evidence, nothing will remain of their case. Accordingly, a trial will serve no purpose. Therefore, I conclude that the proper remedy in this matter is suppression of petitioners' claim. Consequently, the petition must be **DISMISSED.**

I note that this matter was listed for trial for July 24, 2007. In its brief, the Board references the fact that the school year will end in June, and the issue before me will be moot by that date.

ORDER

I **ORDER** that the claim set forth in petitioners' petition be **SUPPRESSED,** and that the petition herein be **DISMISSED.**

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

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

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

June 8, 2007
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: June 8, 2007

Mailed to Parties:

JUN 14 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

DOCUMENTS CONSIDERED

For Petitioner:

None

For Respondent:

Motion to Suppress and/or Dismiss, with supporting documentation

#289-07

OAL DKT. NO. EDU 7360-06
AGENCY DKT. NO. 144-4/06

ELIZABETH EDUCATION ASSOCIATION AND ANITA CHAMPAGNE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Day
COMMISSIONER OF EDUCATION

Date of Decision: 7/18/07
Date of Mailing: 7/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07360-06

AGENCY DKT. NO. 144-4/06

ELIZABETH EDUCATION ASSOCIATION AND ANITA CHAMPAGNE,

Petitioner,

v.

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

Respondent.

Richard Friedman, Esq. for petitioner Elizabeth Education Association and Anita Champagne (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Karen A. Murray, Esq. for respondent Board of Education of the City of Elizabeth, Union County (The Murray Law Firm, LLC)

Record Closed: June 6, 2007 Decided: June 6, 2007

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 6, 2006 for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement. I further note that the parties have agreed to waive the right to file exceptions and cross exceptions.

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

1. The parties have agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 6, 2007
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency:

6-8-07

Mailed to Parties:

JUN 11 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tbj

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
609-392-8172
Attorneys for Petitioners

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ELIZABETH EDUCATION ASSOCIATION, On Behalf of Itself, its members, and of ANITA CHAMPAGNE, and ANITA CHAMPAGNE, Individually Petitioners, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDUOT 07360-2006N **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to this matter, the Elizabeth Education Association, Anita Champagne, and the Elizabeth Board of Education, having reached agreement to resolve the within matter amicably, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, that in such event, neither parties' position in relation to the petition of appeal shall be prejudiced, and that the matter shall be returned to the Office of Administrative Law for hearings.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner shall withdraw the petition of appeal.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

3. The parties agree that the district's procedure and policy in relation to when a physician's certificate is required for an employee who is absent due to illness or disability shall be governed by the procedures set forth in the attached document, entitled *Instructions for Use of the District Medical Certificate*, and *Medical Certificate* (attached as Exhibit A), which will constitute district practice and policy for all such absences.

4. The parties agree that nothing in this agreement shall preclude any employee or the Elizabeth Education Association from filing grievances or other actions in administrative forums or courts relating to the application of this procedure or policy to any employee or group of employees.

Anita Champagne

Dated: 5/31/07

Elizabeth Education Association

By: Rose Caretto

Rose Caretto, President

Dated: 5/23/07

Elizabeth Board of Education

By: Kara Murray

~~President~~

On behalf of the Elizabeth Board of Education

Dated: May 15, 2007

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Please refer to the directions on the reverse side of this form.

Exhibit 4151-B
Revised March 26, 2007

ELIZABETH PUBLIC SCHOOLS
THINK•LEARN•ACHIEVE•CARE

MEDICAL CERTIFICATE

_____
(Employee Signature) – Authorization to provide the following information

_____ is a patient under my care. He/she has the following medical condition(s):
(Print Name)

(Please state the nature of the illness):

_____
_____
_____

and needs to be absent from _____ to _____

He/she can return to work **without** restrictions on _____
He/she can return to work **with** restrictions on _____
If able to return with restrictions, please list these restrictions and attach to this confidential form.

He/she cannot return to work (explain)

_____
_____
_____

The information contained in this report is confidential and will be so maintained by the Elizabeth Board of Education.
This information should be submitted directly to the Superintendent of Schools. (See directions on the reverse side.)

_____ _____
(Physician's Signature) (Date)

_____ _____
(Print Name) (Physician's Telephone Number)

_____ _____
(Physician's Address) (Physician's Fax Number)

This information is necessary for the determination of the employee's right to use sick leave.
Failure to submit this form may result in non-payment of days taken, or disciplinary action for an unexcused absence.
This form will only be accepted if signed, not stamped, and dated by the attending physician.

Please return this top portion of the form to the Superintendent of Schools, in a sealed envelope marked: "Confidential – Medical Certificate Enclosed," when returning from an illness of 3 or more days.

Physician's Signature _____ Date of return without restrictions: _____

_____ _____
(Employee's Signature) (School)

I, _____, have submitted the District Medical Certificate for my absences on the following
(Print Name)

Dates absent:_____ Submitted to:_____ on_____
(Name of Administrator) (Date Submitted)

Please return this portion of the form to your immediate administrator, upon returning from an illness of 3 or more days.

Exhibit A

ELIZABETH PUBLIC SCHOOLS

THINK•LEARN•ACHIEVE•CARE

Instructions for Use of the District Medical Certificate

In order to be compliant with the HIPPA Privacy Rule, the Elizabeth Public Schools has set the following guidelines for our employees regarding the use of our District Medical Certificates:

- After being absent for three (3) or more consecutive sick days, employees are to submit an original 2-sided District Medical Certificate, which must be completed and signed by their physician (no stamp signatures will be accepted). The information on the certificate should be specific as to the nature of the absence.

- **The employee is responsible** for submitting the bottom tear-off portion of the medical certificate, verifying that he/she is able to return to his/her full duties, with **no** restrictions, to his/her administrator for the school/department records. It is the **employee's responsibility** to complete **all** sections of this portion of the form before submitting it.

- **The employee is responsible** for assuring the confidential information contained in the top portion of the medical certificate is sent to the Superintendent of Schools in a sealed envelope, marked **"CONFIDENTIAL, MEDICAL CERTIFICATE ENCLOSED."** Any restrictions should be included in the same envelope.

- **Under no circumstances should the confidential portion of this medical certificate be submitted to anyone but the Superintendent of Schools, following the procedures contained in the bullet above.**

- **Before** returning to their work location, employees released from the doctor to return to work **with restrictions**, should report to the Office of Human Resources to determine their ability to return to their assigned position.

- The Superintendent of Schools shall ensure the certificate is handled appropriately by his/her designee and placed in the employee's medical file.

- Failure to adhere to the above procedures will result in the employee not being able to use sick days for the time he/she was absent. These days will be marked as "Unexcused Absences." However, this standing will be changed once the employee produces the proper documentation required by the District.

- **Please note**: This medical certificate will be required by the District for employees returning from an illness of three (3) days or more and/or for employees applying for a leave of absence requiring medical documentation.

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BOARD OF EDUCATION

RESOLUTION

OAL Docket No.: EUDOT-7360-2006N
Settlement Agreement

WHEREAS the Elizabeth Board of Education and Petitioners, Elizabeth Education Association, on behalf of its members, including Anita Champagne, have discussed the resolution of a dispute before the Commissioner of Education and Office of Administrative Law (OAL) under OAL Docket Number EUDOT-7360-2006N and Agency Docket Number 144-4/06, in lieu of a hearing, and;

WHEREAS, in the interest of cost effectiveness and judicial economy, the parties have amicably agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED that the Board hereby agrees to accept the confidential Settlement Agreement on file in the Office of the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MAY 10, 2007

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

06-267

286-07

#286-07

IN THE MATTER OF THE TENURE HEARING OF IESHA MCCAIN, BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION

SYNOPSIS

Petitioning school district certified a tenure charge of conduct unbecoming against respondent – a tenured secretary – for actions which included, *inter alia*: habitual and repeated absence from work, failure to maintain regular working hours, use of disrespectful and profane language, and failure to cease the sale of commercial items on school premises during working hours.

The ALJ found insufficient proofs to sustain the charges involving respondent's absences and irregular work hours, but found as fact that: the respondent continued to sell commercial items after she was informed that it violated Board policy and was instructed to cease; and respondent did engage in verbal disputes with a supervisor, constituting inappropriate behavior that adversely affected the workplace. The ALJ concluded that the charge of unbecoming conduct is sustained; and that a suspension for six months and the loss of a salary increment constitutes sufficient discipline under the circumstances of the case.

The Commissioner adopted the Initial Decision of the OAL, with modification. The Commissioner found that there was evidence presented that showed that the respondent on several occasions did leave work early without permission; this, together with the evidence that respondent failed to heed the prohibition against selling goods and that she used disrespectful and unprofessional language, results in the substantiation of the charge of unbecoming conduct. Accordingly, the Commissioner ordered that respondent be suspended for a period of six months, and that she lose any salary increment she would have been entitled to in the 2006-2007 school year.

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

July 16, 2007

OAL DKT. NO. EDU 1438-07
AGENCY DKT. NO. 460-12/06

IN THE MATTER OF THE TENURE HEARING OF IESHA MCCAIN, BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION

The record of this matter, including post hearing briefs,[1] the Initial Decision of the Office of Administrative Law (OAL), and respondent's exceptions have been reviewed.[2] The Commissioner adopts the Initial Decision as the final decision in this matter, with modification.

At the outset, it should be noted that respondent did not, in her exceptions, specifically challenge the Administrative Law Judge's (ALJ) factual findings. Further, the Commissioner recognizes the standard governing the Commissioner's review:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.
>
> *N.J.S.A.* 52:14B-10(c)[3]

[1] The parties did not submit a transcript of the hearing.

[2] No reply exceptions were filed with the Commissioner.

[3] Decisional law, too, has long held that an agency head must generally defer to credibility determinations made by the ALJ who had the opportunity to hear the testimony and observe the demeanor of the witnesses. *In the Matter of the Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied,* 121 *N.J.* 615 (1989); *S.D. v. Div. Med. Assistance and Health Services,* 349 *N.J. Super.* 480, 485 (App. Div. 2002); *D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004), citing *State v. Locurto,* 157 *N.J.* 463, 470 (1999). See also *State v. Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952), certif. denied 10 *N.J.* 316 (1952).

The record supports the ALJ's conclusion that the evidence presented did not prove excessive absenteeism on the part of respondent, although the frequency of her absences admittedly impacted her department and was of legitimate concern. Similarly, the evidence reviewable by the Commissioner is consonant with the ALJ's finding that after the January 24, 2006 memorandum referencing respondent's failure - when leaving the job - to punch her time card, that particular behavior ceased. The Commissioner does not, however, accept the ALJ's conclusion that "there was no evidence presented at the hearing that respondent had ever left early without permission." (Initial Decision, p.9)

The Commissioner is mindful of the testimony of respondent's supervisor, Beverly Fisher, that she was unaware of respondent ever leaving early without her permission. However, Fisher left work at 2 p.m. each day – 2 ½ hours before respondent's dismissal time. Thus, she would not necessarily be aware of an early departure by respondent. There are references in Exhibits P-4, P-9 and P-11 to respondent leaving work early without permission. Further, during the March 10, 2006 meeting between respondent, Business Administrator Michael Steele, Fisher and Jeffrey Steele - Fisher's assistant and respondent's supervisor in Fisher's absence - respondent conceded that she had left early the prior workday, that neither Fisher nor J. Steele were available and that she did not notify B.A. Steele of her early departure. Indeed, the evidence indicates that on the afternoon of said meeting, respondent became angry and left early without permission. (P-11, Initial Decision, pp. 7-8)

The foregoing, added to the evidence that respondent failed to heed the prohibition against selling goods, and that she used disrespectful, unprofessional and profane language toward her supervisor in the presence of other employees, results in the substantiation of the charge of unbecoming conduct – as defined, for example, in *In the Matter of the Tenure*

Hearing of Motley, EDU 7421-97 (May 5, 1999), pp. 25-26, *aff'd as modified*, decided by the Commissioner (August 4, 1999), *aff'd.* State Board (December 1, 1999):

> "Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 22, 40 (App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974).

The Commissioner cannot find fault with the ALJ's recommendation that the penalty imposed on respondent should be less than termination. The evidence supports the ALJ's conclusions that the evaluation of respondent should be tempered by the existence of a "culture" of employees selling goods in petitioner's transportation department, by J. Steele's unprofessional behavior, and by the familial relationship between J. Steele and B.A. Steele, which may have had an influence upon how respondent's behavior was regarded and handled. Further, the ALJ had the opportunity to observe the credibility and demeanor of and possibly the dynamics between respondent and other witnesses.

Finally, the Commissioner rejects the two arguments set forth in respondent's exceptions. Respondent argues that it was inequitable for her to be the only employee punished for selling goods and for her to receive a penalty that is greater than the 60 day suspension that J.

Steele allegedly received for his conduct. In the record, however, there was no evidence presented concerning a suspension imposed upon J. Steele. Assuming arguendo that there was such a suspension, the record contains no information about the basis of J. Steele's penalty. By way of contrast, it was established that respondent's penalty was based upon unprofessional behavior, disregard of the prohibition on selling products at work, and irregularities in her working hours. Further, it was established that respondent sold goods after she was directly warned not to do so in a January 24, 2006 memorandum. Respondent presented no evidence that other employees continued to sell items after being warned.

Citing *In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange, Essex County,* OAL DKT. NO. EDU 3876-05, decided by the Commissioner, October 19, 2006, respondent argues that the principles of progressive discipline were violated by imposing a six month suspension and an increment withholding because respondent "has never received any significant penalty," including suspensions and increment withholdings, "imposed upon her by the Irvington Board of Education." (Respondent's Exceptions, p.2)

The Commissioner finds that the lesser penalty imposed upon the respondent in the Poston case was largely a function of the fact that all of the charges brought against Poston, save the one charge of inappropriate language in front of a student, were found to be unsubstantiated. In any event, the penalty recommended by the ALJ is reasonable and warranted in this case. It is well established that unfitness to remain a tenured school employee may be demonstrated by a single incident if sufficiently flagrant. *See, e.g., In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967).

Accordingly, the tenure charge of unbecoming conduct against respondent is upheld. Respondent is suspended for six months and loses any salary increment she might have received for the 2006-2007 school year.

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/16/07

Date of Mailing: 7/16/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01438-07
AGENCY DKT. NO. 460-12/06

IN THE MATTER OF THE TENURE HEARING OF IESHA MCCAIN, BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Evans C. Anyanwu, Esq., for petitioner Irvington Board of Education (Hunt, Hamlin & Ridley, attorneys)

Gail Oxfeld Kanef, Esq., for respondent Iesha McCain (Oxfeld Cohen, attorneys)

Record Closed: April 20, 2007 Decided: May 31, 2007

BEFORE **JOSEPH PAONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 28, 2006, petitioner Irvington Board of Education (Board) filed a tenure charge against respondent Iesha McCain alleging that she engaged in "conduct unbecoming." Respondent denies the charge and demands a dismissal. On January 19, 2007, after reviewing the charge, the New Jersey Department of Education, Bureau

of Controversies and Disputes, transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing commenced on April 16, 2007, and concluded on April 20, 2007, at which time the record was closed.

FINDINGS OF FACT

The Board contends that the charge against respondent is demonstrated by:

1. Habitual and repeated absence from work from January 2005 to February 2006 and the failure to maintain regular working hours on a regular basis, which interferes with the office operation.

2. The use of disrespectful, unprofessional and profane language toward her supervisor in the presence of other employees.

3. Failure to follow the direction of supervisors, including the failure to cease and desist in the sale of commercial items on school premises during working hours.

Respondent commenced employment with the Board as a secretary in the Security Department on October 19, 2000. On January 20, 2004, she was transferred to the Transportation Department, where her duties included answering the telephone, typing, and performing clerical functions. Beverly Fisher was respondent's supervisor. On March 3, 2004, respondent was transferred temporarily to Thurgood Marshall School after she complained that due to her pregnancy, the gasoline, oil and exhaust odors made her sick. P-1. When schools closed for the summer, she was transferred to the Board's Administrative Office. She worked there from July 1, 2004, to July 19, 2004, when she left to deliver her baby. Michael Steele, the business administrator for the Board, testified that respondent returned to work on July 1, 2005, worked one day, and thereafter again went out on leave. P-2. Respondent denied his assertion and Steele never identified the source of his information. Respondent testified that she

returned to the Transportation Department on November 21, 2005, after an authorized absence.

Respondent testified that when she first arrived in the Transportation Department, Jeffrey Steele remarked to her that he hoped she was not like the previous secretary who worked there. Jeffrey Steele is an assistant supervisor and served as respondent's supervisor in Fisher's absence. He is Michael Steele's brother. Fisher testified that respondent complied with work assignments and was a fair employee. She added that respondent and Jeffrey Steele did not get along. Fisher explained that the previous secretary also did not get along with Jeffrey Steele.

Fisher worked each day until approximately 2:00 p.m., while Jeffrey Steele started his workday between 1:00 and 2:00 p.m. Respondent was scheduled to work from 8:30 a.m. to 4:30 p.m. each day, and was permitted one hour for lunch. Respondent testified that Fisher permitted her to take lunch whenever she wanted. Respondent, however, always called Fisher on her cell phone to inform her when she would be leaving for lunch. If respondent wanted to leave early, she was required to ask Fisher for permission. Respondent testified that she never left early without permission from Fisher, and Fisher testified that she was unaware of respondent ever leaving early without her permission. She added that respondent always asked. The office could never be left unattended without someone to answer the telephones. Notwithstanding, Fisher often allowed respondent to leave for her lunch break even though Jeffrey Steele had not arrived and the office would be left unattended.

On December 2, 2005, respondent was advised by letter from Alberta Sharif, the director of Human Resources, that she had been absent for five days since her return on November 21, 2005, from a leave of absence. P-3. The letter stated that she was absent on November 22, 29, 30, and December 1 and 2. Sharif explained in the letter that respondent was "establishing a pattern of behavior which is disruptive to the operation of the office." She asked respondent to provide a physician's certificate to state the reason for her absence and further informed respondent that she would not be paid unless she provided such proof. Respondent testified that she had been ill, she supplied a letter from her physician, and she was paid for her absence. Even though

she was informed in the letter that she would be scheduled for an independent medical examination, one was never scheduled.

On January 24, 2006, in response to Jeffrey Steele's complaint, Michael Steele sent respondent a memorandum admonishing her that she left the "site" early in the day on January 13, 2006, and never informed Jeffrey Steele that she would not be returning. P-4. He also noted that respondent had "developed a pattern of leaving early and not punching out [her] time card." Respondent admitted on cross-examination that on occasion she had failed to punch out. She explained that since there was no time clock in her previous assignment, she was not in the habit of doing so. In his memorandum, Michael Steele also informed respondent that fellow employees reported that she had used foul language, and he reminded her of her obligation to act professionally. On that same date, Steele sent a second memorandum to respondent, wherein he advised her that it had come to his attention that she was selling socks at her desk. P-5. He further advised her that the Board had a policy against soliciting. He warned her that failure to comply with that policy would result in disciplinary action against her.

Respondent testified that she did not know there was a solicitation policy and stopped selling socks at her desk after the January 24, 2006, memorandum. Thereafter, she only sold socks from her car during her lunch break or after she finished work. She noted that Jeffrey Steele had sold perfume and cologne, a "bus driver" sold Avon, "Carla" sold oils and gift baskets and "Glenn" sold CD's and DVD's. Fisher also confirmed that other employees had sold items in the Transportation Department; however, respondent was the only one disciplined.

Fisher testified that Jeffrey Steele typically submitted two to three memoranda a week to her regarding respondent's behavior. Fisher, however, never disciplined respondent nor memorialized concerns about her behavior until March 14, 2006, when she submitted a memorandum to the interim superintendent, which is addressed below. P-18.

On January 27, 2006, Michael Steele wrote another memorandum to respondent regarding her attendance. P-7. He pointed out that her frequent absences were

detrimental to the Transportation Office. He noted that she took a "personal business day" on January 25, 2006, and on January 26 she failed to report to work due to "problems with [her] children in Pennsylvania." He also wrote that respondent called to indicate she would be in "to work around 12:00 noon." He advised respondent that he was recommending her termination to the Board on February 15, 2006. Respondent testified that she had notified Fisher before her reporting time and had used her personal time, which was compensable. The Board has a policy that one has to give five days' notice before taking a personal day. Respondent testified that she did not learn of this policy until she was informed by someone in Human Resources in February 2006.

On February 15, 2006, Ellen Muldrow, a school bus driver, complained in a letter that respondent failed to inform her that she was not to drive her assigned bus and that she should take another bus, because respondent was too busy selling socks. P-17. Respondent denied she was selling socks that day and even denied that there were socks on her desk. Muldrow wrote in her letter that between 2:05 and 2:15 p.m. she went to ask respondent about her bus, but respondent had already "left for the day." Muldrow testified that Fisher and Jeffrey Steele were not on the premises at the Transportation Department when she was searching for her bus. Respondent testified that earlier in the day she had been informed by the Mechanic Department that bus 101 was being repaired and the driver needed to be told to take another bus. Respondent testified that she did not know to whom bus 101 was assigned and had informed Jeffrey Steele of the situation. According to respondent, Steele responded that he would ascertain who was driving the bus. Jeffrey Steele contradicted respondent and testified that he had instructed her to advise Muldrow regarding the bus reassignment.[1] Respondent testified that she left for lunch at 2:00 p.m. and returned at 3:00 p.m. She had no further discussions about the bus upon her return. She didn't know there was any problem until the next day. Respondent testified that Muldrow admitted to her that Jeffrey Steele urged her to write the memorandum blaming respondent, while Muldrow also acknowledged at the hearing that Jeffrey Steele advised her to prepare a

[1] The testimony that respondent failed to properly advise Muldrow of the bus reassignment is not related to the charge of "conduct unbecoming." The allegation is not contained within the disciplinary charge or the statement of evidence in support of the charge. The testimony is relevant, however, to the solicitation allegation.

memorandum. Muldrow further testified that the situation angered both her and respondent. As a result, on February 16, 2006, they both argued and wanted to fight with each other.

On February 16, 2006, Michael Steele sent another memorandum to all transportation staff advising that he was aware of various individuals selling items such as socks, CD's, purses, clothes and perfume. P-6. He warned that if the practice didn't cease, the responsible individuals would be disciplined. Steele was never informed that respondent solicited thereafter. Fisher had also observed respondent selling socks, but when she asked respondent to put the socks away, respondent always complied and Fisher never disciplined respondent for solicitation.

Muldrow contradicted respondent's assertion that she stopped selling socks from her desk after January 24, 2006. She testified that when she returned to work on February 16, 2006, respondent had socks and candy on her desk and said, "I know you are going to buy something from me." She testified that she saw her selling to other employees, although she could not recall the specific dates.

In response to a complaint from Jeffrey Steele that respondent was leaving early, Michael Steele wrote to respondent on February 28, 2006, and reminded her of her work hours. P-9. He told her that she could not deviate from this schedule without written permission from "Fisher, and in her absence, Jeffrey A. Steele . . . ." He also informed respondent that upon Fisher's departure, she was to "take directives from Mr. Steele as required." Respondent testified that she only left early when she didn't take a lunch break and only after obtaining Fisher's approval.

Jeffrey Steele admitted that he did not get along with respondent and "pretty much avoided her." He testified that all she did was make personal calls and sell socks. He also testified that respondent had threatened him. Jeffrey Steele claimed that he never disciplined respondent because he was "scared to death of her." In order to protect himself against false accusations by respondent, in November 2005 Jeffrey Steele installed a surveillance camera to monitor her activities. Respondent testified

that she found it difficult to work with Jeffrey Steele and they rarely spoke to each other. They often disagreed and she admitted to raising her voice with him.

Jeffrey Steele described an occasion when respondent had left a note on a chair that read, "Do not sit on my chair." This apparently sparked a confrontation between Jeffrey Steele and respondent. Steele testified that respondent told him not to touch her "m_____ f_____ chair." Then, while in a telephone conversation with another, Steele overheard respondent state, "don't come on down, we know where he lives." Steele testified that he felt threatened by these remarks. This interchange prompted Michael Steele to send them both a memorandum on March 3, 2006. P-10. He wrote that he was aware of the volatile nature of their relationship and that both "exhibited behavior unbecoming public school employees." He referred to their exchange as "petty gripes" and "childish bickering." He placed both on notice that "anything less than professional behavior and interaction" between them would not be tolerated and reminded respondent that Jeffrey Steele should be respected as a supervisor and his instructions followed. Steele invited both to address any concerns with him, either collectively or individually. He ended by noting that he trusted both would cooperate and contribute to the successful operations of the Transportation Department.

Jeffrey Steele related a second incident, which occurred on March 10, 2006. Steele said that he observed respondent speaking to her uncle, whom Steele referred to as "my best friend," and informing him "what she would do to me." Respondent admitted that she had a conversation with her uncle and asked him to speak to Steele on her behalf. He assured her he would. Five minutes later, presumably angered after respondent's uncle spoke to him, Jeffrey Steele told respondent to remain in the office until his brother arrived. Respondent then learned from Fisher that Jeffrey Steele had complained to her about this incident. When Michael Steele arrived, he asked, "What the hell is going on?" Respondent replied that the problem was with Jeff.

In a March 13, 2006, memorandum Michael Steele wrote to the interim superintendent requesting respondent's immediate suspension and the commencement of tenure proceedings. P-11. He recommended her termination. Steele explained in the memorandum that his brother had complained to him on March 10, 2006, about

respondent's "attitude, which was causing unrest in the office." He wrote further that when he met with Jeffrey Steele and respondent, Jeffrey Steele specifically complained that respondent had called her uncle, who is friends with Jeffrey Steele. Her uncle then called Jeffrey Steele a few minutes later to ask what was going on at the job, because his niece was "going off," saying that the Steeles were harassing her and she was going to "get ghetto and deal with it." Respondent complained that Jeffrey Steele was eavesdropping. When Michael Steele asked her if she would consider a request for a transfer, respondent became enraged and responded, "Why should I have to go . . . the problem is Mr. Jeff Steele . . . he should go!" Steele then asked respondent why she had left the office unattended at 2:00 p.m. the previous day, and she responded that she had to go get her children and Jeffrey Steele and Fisher were not available. When Steele asked why she did not call his office, respondent said, "Why don't you fire me . . . I'm gonna get all my time . . . Mr. Steele . . . you know me . . . I don't care . . . in fact I don't give a f___." Respondent denies saying that. Respondent then left. As she did, Steele advised her that he would recommend her suspension and possible termination. Respondent was immediately suspended. Jeffrey Steele received a sixty-day suspension.

On March 14, 2006, Fisher wrote to the interim superintendent that on March 10, 2006, Jeffrey Steele and respondent "became involved in a verbal altercation." P-18. She testified that both were at fault and both used profanity, and there had been "several previous altercations" between them. Fisher feared that the relationship posed a danger and affected the office environment. Previous intervention by Michael Steele and Fisher was unsuccessful. She suggested that respondent and Jeffrey Steele should no longer work together in the same office. Fisher testified that both engaged in inappropriate behavior and were equally culpable.

During the hearing, the Board attempted to expand the charges and introduce documents related to respondent's attendance in 2004. P-12; P-13. Since the charge is limited to respondent's attendance from January 2005 to February 2006, the exhibits were barred. The Board also attempted to prove the charge herein by introducing a memorandum directed to respondent on May 26, 2004, reprimanding her for her behavior. P-14. Again, since the memorandum was not directed toward conduct

alleged in the disciplinary charges, it was also barred. Similarly, respondent's memorandum explaining her conduct on that date is irrelevant. P-16. Finally, the Board sought to introduce a memorandum dated June 10, 2004, from the principal at Thurgood Marshall School to the director of Human Resources about a complaint he received from a parent about respondent's telephone behavior. P-15. Respondent was not charged with any misbehavior. Accordingly, the memorandum was deemed inadmissible.

The Board alleges in the "Statement of Evidence in support of charges" that:

1. Respondent developed a pattern of leaving work early without prior authorization, failing to properly utilize her timecard despite warning and excessive absenteeism during the 2005 calendar year.

2. During the months of January through March 2006, respondent ignored repeated notices to cease and desist selling socks and other commercial items (including compact discs) on school grounds during working hours. Respondent was witnessed selling items on February 15, 2006, and other dates contrary to Board policies.

3. Respondent engaged in verbal disputes with her supervisor and has used profanity in the presence of other employees, which has created a disturbing and destructive working atmosphere.

Despite Michael Steele's assertion in his memorandum of January 24, 2006, (P-4) that respondent had developed a pattern of leaving work early without prior authorization and not punching out on a time clock, there was no evidence presented at the hearing that respondent had ever left early without permission. While Michael Steele's memorandum indicates that respondent did not have Jeffrey Steele's permission to leave early on January 13, 2006, the Board never elicited any testimony from Fisher that she did not give respondent such permission in order to contradict respondent's assertion that she never left early without Fisher's permission. In fact, Fisher testified that she was unaware of any occasion when respondent left early

without her permission. Also, while respondent admitted that she failed to use a time card on occasion, there is no evidence that she hadn't used her time card after the memorandum of January 24, 2006, which brought the issue to her attention. Based on the scant evident presented, I **CANNOT FIND** that respondent engaged in a pattern of leaving work early without prior permission or had failed to use her timecard after she had been warned to do so.

Respondent was on an authorized leave of absence until November 21, 2005. Counsel for the Board conceded that in his closing remarks. The evidence presented at the hearing established that respondent took five authorized sick days in November and December 2005, and two and one-half personal business days in January 2006. The personal days were taken in violation of the policy that requires five days' notice. However, no evidence was presented that respondent was ever apprised of this policy until after she violated it. While respondent's absences may raise concern, I **CANNOT FIND** that they were excessive.

Respondent was advised by memorandum (P-5) on January 24, 2006, for the first time, that Board policy prohibited solicitation on Board time and that she should cease selling. Respondent testified that she thereafter stopped selling socks at her desk. While Fisher, who worked with respondent every day, could not recall if respondent ever solicited again, Jeffrey Steele testified that she did, even though he could not recall a specific time. Muldrow testified that respondent was too busy selling socks on February 15, 2006, to inform her about the change to her bus assignment. She also claimed that respondent continued to sell after that, although, like Jeffrey Steele, she could not recall a specific date. Michael Steele's memorandum of February 16, 2006, (P-6) suggests that a number of people in the Transportation Department were selling various items in contravention of Board policy. While cognizant of Steele's and Muldrow's motivation and bias, and suspicious of their vague testimony, I nevertheless **FIND AS FACT** that respondent continued to sell socks after she was informed that it violated Board policy and was instructed to cease. Respondent seemed less forthright than Muldrow and Michael Steele. Her testimony in this regard appeared too pat and self-serving.

Jeffrey Steele acted as respondent's supervisor only in Fisher's absence. They disliked each other and had engaged in profanity-laced verbal disputes. Each engaged the other and both were equally at fault. While there was no direct testimony that other employees were present, it is fair to assume that other employees were witness to their arguments. Such behavior is inappropriate and adversely affects the workplace. An employee has no right to dispute a reasonable job-related request. The evidence at the hearing, however, suggested that their arguments actually reflected their impulsivity and immaturity. There was no evidence that their quarrels were ever the result of respondent's refusal to perform a work assignment or comply with a request related to her job. While I **FIND** that respondent did, indeed, engage in verbal disputes with a supervisor, she was not exclusively at fault.

LEGAL ANALYSIS

Respondent is tenured as a secretary, and, as such, pursuant to N.J.S.A. 18A:17-2(c), "shall hold [her] . . . employment . . . during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense . . . ." Tenure was designed to protect employees "from dismissal for 'unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (citing Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)).

In In re Tenure Hearing of Motley, EDU 7421-97, Initial Decision (May 5, 1999), aff'd as modified, Comm'r (August 4, 1999), aff'd, St. Bd. (December 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>, "conduct unbecoming" was defined as:

> an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and [confidence] in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

> Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. [32], 40 (App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

The Board must prove the tenure charges by a preponderance of the credible evidence. The allegation that respondent engaged in "habitual and repeated absence from work from January 2005 to February 2006 and [failed] to maintain regular working hours on a regular basis" has not been substantiated. But, the allegation that respondent failed "to follow the direction of supervisors, including the failure to cease and desist in the sale of commercial items on school premises during working hours," is substantiated. And the allegation that respondent used "disrespectful, unprofessional and profane language toward her supervisor in the presence of other employees" is also substantiated. Therefore, I **CONCLUDE** that the charge of conduct unbecoming is sustained.

Michael Steele had warned respondent not to solicit goods on Board time, yet she disregarded his warning. He also instructed her to interact in a professional manner with Jeffrey Steele, but she continued to disregard his instruction. Therefore, discipline is warranted. That discipline, however, must be tempered by the circumstances surrounding respondent's infractions. First, a culture had developed at the Transportation Department that countenanced solicitation and viewed it, at least until Michael Steele's memorandum of January 24, 2006, benignly. Second, Jeffrey Steele's behavior was as deplorable as respondent's, and the two of them were equally antagonistic and belligerent. As a supervisor, he should have acted in a more mature and responsible manner. Finally, I am concerned that the degree of attention to respondent's behavior may have been unfairly influenced by a familial relationship. For these reasons, the nature of the charge sustained in this matter does not rise to a level that requires revocation of respondent's tenure. I **CONCLUDE** that a suspension for six

months and the loss of a salary increment constitutes sufficient discipline under these circumstances. See N.J.S.A. 18A:29-14.

ORDER

It is hereby **ORDERED** that the respondent be suspended for a period of six months and that she lose any salary increment she would have been entitled to in the 2006-2007 school year.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5-31-07
DATE

JOSEPH PAONE, ALJ

Date Received at Agency:

May 31, 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 31 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

lr/da

APPENDIX

Witnesses

For Petitioner:

Michael Steele
Jeffrey Steele
Beverly Fisher
Ellen Muldrow

For Respondent:

Iesha McCain

Exhibits

For Petitioner:

P-1 Memorandum to McCain, dated March 2, 2004
P-2 Memorandum to Sharif, dated August 9, 2005
P-3 Letter to McCain, dated December 2, 2005
P-4 Memorandum to McCain, re: Attendance/Time Card, dated January 24, 2006
P-5 Memorandum to McCain, re: Solicitation, dated January 24, 2006
P-6 Memorandum to Transportation Staff, dated February 16, 2006
P-7 Memorandum to McCain, re: Attendance, dated January 27, 2006
P-8 Labor agreement for the Secretaries unit, Article IV
P-9 Letter to McCain, dated February 28, 2006
P-10 Memorandum to McCain and Steele, re: Office Behavior & Etiquette, dated March 3, 2006
P-11 Memorandum to Interim Superintendent, dated March 13, 2006
P-12 Memorandum to Sharif, dated March 26, 2004 (for identification only)
P-13 Memorandum to Sharif, dated April 29, 2004 (for identification only)

P-14 Memorandum to McCain, dated May 26, 2004 (for identification only)

P-15 Memorandum to Sharif, dated June 10, 2004 (for identification only)

P-16 Memorandum to Cummings from McCain, dated June 14, 2004 (for identification only)

P-17 Letter from Muldrow, dated February 15, 2006

P-18 Memorandum to Interim Superintendent, dated March 14, 2006

For Respondent:

None

292-07

MALVINA KOHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured mathematics supervisor employed by the district since 1997 – appealed the district's withholding of her salary increment for the 2006-2007 school year, which was allegedly based on her performance for the 2005-2006 school year. Petitioner contended that the Board's action was arbitrary and capricious, and motivated by the personal animosity of petitioner's supervisor. Respondent contends that its action in withholding petitioner's salary increment was reasonable and that the Commissioner cannot substitute her judgment for that of the Board.

The ALJ found, *inter alia*, that: there was no independent evaluation of the recommendation to withhold the salary increment, which was made by Ms. Frazier, the petitioner's supervisor; Ms. Frazier's recommendation formed the total basis for the Board's decision; and the reasons stated in that recommendation were largely without merit. Accordingly, the ALJ concluded that the withholding of petitioner's increment was arbitrary, capricious and unreasonable, and ordered the decision of the Board be reversed.

Upon a full and independent review of the record, the Commissioner agrees with the ALJ, for the reasons comprehensively detailed in her decision, that the petitioner has sustained her burden of establishing – by a preponderance of the credible evidence – that the Board's withholding of her increment was arbitrary, capricious and unreasonable and must be reversed. Accordingly, the Commissioner directed the Board to fully restore petitioner's increment for the 2006-2007 school year.

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

July 19, 2007

OAL DKT. NO. EDU 10582-06
AGENCY DKT. NO. 290-8/06

MALVINA KOHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions to the June 6, 2007 Initial Decision were dated June 22, 2007, and filed June 25, 2007, and were therefore untimely pursuant to *N.J.A.C.* 1:1-18.4; [1] consequently, the exceptions – and petitioner's reply thereto – are not considered herein.

Upon independent and careful review of the record, the Commissioner determines to adopt the recommended decision of the OAL. In so deciding, the Commissioner was mindful, as was also aptly recognized by the Administrative Law Judge (ALJ), that it is well-established that a school district's decision to withhold a teacher's increment may not be overturned unless that decision is "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960) The scope of the Commissioner's review in increment withholding matters is "not to substitute [her] judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for

[1] *N.J.A.C.* 1:1-18.4(a) specifies: "Within 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head."

their conclusions." *Id.* at 296. As such, there are *only two* determinations to be made when reviewing the Board's decision to withhold petitioner's increment, *i.e.*, 1) whether the underlying facts were as those who made the evaluations claimed, and 2) whether it was unreasonable for them to conclude as they did based upon those facts. Additionally, the burden of proving unreasonableness lies with the petitioner. *Id.* at 296-297.

Notwithstanding such a heavy impediment to the granting of relief, the Commissioner agrees with the ALJ – for the reasons comprehensively detailed in her decision – that petitioner has sustained her burden of establishing by a preponderance of the credible evidence that the Board's withholding of her increment here was arbitrary, capricious and unreasonable and, therefore, such action must be reversed.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to fully restore petitioner's increment for the 2006-2007 school year.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/19/07

Date of Mailing: 7/19/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10582-06
AGENCY DKT. NO. 290-8/06

MALVINA KOHN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Marvin L. Comick, Esq., for respondent (Love & Randall, attorneys)

Record Closed: May 23, 2007 Decided: June 5, 2007

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 13, 2006, the petitioner received notification that her increment for the 2006-2007 school term was being withheld based on her performance for 2005-2006 school year. According to the memorandum sent by Ms. Constance L. Frazier, Assistant Superintendent for Curriculum and Instructional Services and Ms. Kohn's supervisor at the time, she was requesting the withholding of an increment for the following reasons:

Inability to develop a viable Action Plan for the 2005-2006 school year to provide a viable road map to administer the Mathematics Department for Grades 7-12. This is evidenced by the **February 8, 2006** memo *(Revised) "Action Plan—School Year 2005-2006 Mathematics Department"*

Unilaterally initiating the transfer of the OMS Math Coach to cover a teaching vacancy at OMS, which was not in compliance with Board Policy. This is evidenced by the **February 6, 2006** memo, *"Factual Response For the Record to Clarify The Conflict"*

Inability to work collaboratively as a team member with fellow colleagues at the K-12 Supervisors and Administrative Council Meetings and Math Coaches, as measured by the Professional Development Action Plan *(Connected Mathematics)* submitted **via e-mail 4-11-06**

Inability to establish effective relationships and provide leadership with a member of the Mathematics Department at OHS resulting in a law suit against the District, as evidenced by the **March 28, 2006** correspondence from **Kazy and Hertz, LLP** regarding "Unlawful Discrimination Against **Dr. Aliakbar Najmi**

Failure to follow through regarding *Areas In Need of Improvement* recorded in Mrs. Kohn's **2004-2005 Annual Evaluation**

Inability to identify concerns, analysis of concerns, and the ability to develop viable and effective solutions to those concerns as evidenced by meetings conducted to constantly clarify process, i.e. the big picture!

On August 18, 2006 Ms. Kohn filed a Petition of Appeal with the Department of Education. On September 7, 2006 the School District filed its Answer. The matter was forwarded to the Office of Administrative Law (OAL) on October 17, 2006. It was assigned to ALJ Carol I. Cohen on November 13, 2006. Hearing dates were scheduled for May 15 and 17, 2007. An additional hearing date of May 23, 2007 was added. The matter was concluded on that date.

ISSUE

1. Did the petitioner prove, by a preponderance of the credible evidence, that the respondent's withholding of the petitioner's increment was arbitrary, capricious and unreasonable?

FINDINGS OF FACT

1. Malvina Kohn has been employed by the Orange Board of Education as a mathematics supervisor for 10 years, since August 1997.
2. She is the supervisor for 25 teachers for grades 7-12.
3. Up until December 2003 Ms. Kohn was supervised by Ms. Cook. Ms. Cook did evaluations for Ms. Kohn from 1997-1999. While she was contractually obligated to evaluate Ms. Kohn by June of each year, she did not do so from 1999-2003.
4. In the evaluations that Ms. Cook did produce, she gave Ms. Kohn outstanding grades throughout. She commented that: "She (Ms. Kohn) works independently as well as cooperatively as part of a team to accomplish assigned tasks. Throughout the school year, she demonstrated outstanding proficiency, imagination and judgement [sic] in planning and implementing effective programs. Malvina exhibited a willingness to extend her expertise to other departments and staff members with positive results."
5. Ms. Frazier became the supervisor in charge of evaluating Ms. Kohn in December 2003, when Ms. Cook retired. Ms. Frazier did not do an evaluation of Ms. Kohn in June 2004 for the 2003-04 school years.
6. Ms. Kohn received her evaluation for the 2004-2005 school year from Ms. Frazier in September, 2005. This evaluation should have been completed and presented to Ms. Kohn by June 2005.
7. The evaluation showed needs for improvement in supervision of instruction, assessment of pupil progress and management.
8. The evaluation was revised by Ms. Frazier and presented to Ms. Kohn in October 2005. It showed a need for improvement in Assessment of pupil progress.
9. As for the areas in need of improvement, Ms. Frazier noted in the original evaluation that Ms. Kohn needed to model and demonstrate the use of technology on a daily basis for teachers in all classes where mathematics is taught.

10. Technology was not Ms. Kohn's responsibility. There was a person in the High School assigned to this task.
11. The second area that needed improvement was: Ensure that non-floating Mathematics teachers meet and greet students at the classroom doorway before and after classes where appropriate.
12. This had been Ms. Kohn's practice before the evaluation was issued.
13. Third, Ms. Kohn was to require teachers to prominently **display student work** on an ongoing basis in the classroom, as well as **within** the **Mathematics wing**.[1] There was no testimony regarding Ms. Kohn's failure to perform this activity and it was not mentioned in the revised evaluation.
14. Fourth, Ms. Kohn was to ensure that the **instructional objective** is prominently **written** on the blackboard on a daily basis for **all lessons** taught. There was no testimony on this point and it was not included in the revised evaluation.
15. Ms. Frazier noted that Mrs. Kohn, at time [sic] can be **verbally confrontational** and **argumentative**, **overly aggressive** and **non-receptive** to **information** which she has been given that has been **validated** by the **Senior Administrator**.
16. It was also stated in the initial evaluation that Ms. Kohn needed to **identify** those individuals in the **Mathematics Department** who **do <u>not</u> have** a spoken command of the English language, and encourage them to **enroll** in the English-speaking class at the **local university** for the **2005-2006** *school year.*
17. At the time of the evaluation, there were no mathematics teachers under Ms. Kohn's supervision, who did not have a spoken command of English.
18. Ms. Kohn was also told that she **<u>must</u>** become **knowledgeable** and **conversant** not only with the CCCS in Mathematics for **Grades 7-12**, but **Grades K-6** as well.
19. Contractually Ms. Kohn was hired to supervise grades 7-12. She had no supervisory authority over grades K-6.

[1] All bold type was copied from the evaluation.

20. Along with other areas of improvement Ms. Kohn was to work on: "**Creation** of **discord** with **designated members** of the **mathematics staff.**"
21. In the revised evaluation Ms. Kohn was advised, under areas that needed improvement that she "**must** practice the **use** of the **Guiding Principles: collaboration**, consensus, and no-Fault on a **daily basis** during the **2005-2006** school year."
22. The Guiding Principles referred to a particular methodology espoused by an educator named Komer. Ms. Kohn had asked permission to take the course regarding this methodology prior to the evaluation. However, Ms. Frazier denied Ms. Kohn's request. Ms. Kohn was not familiar with this methodology.
23. Ms. Kohn was also told in the evaluation that she "**must** become more of a team player, and provide the support and guidance needed by teachers in the mathematics department...."
24. Ms. Frazier never observed Ms. Kohn in a classroom setting or at a meeting with the mathematics staff, which occurred once per month. The only observation she had of Ms. Kohn was at the Board of Education meetings.
25. Ms. Kohn had been very friendly with Mr. Samuel Hazel, the principal of the High School in which she was located. When Mr. Hazel died, Ms. Kohn asked to attend the funeral. The High School was closed on that day and most staff and students attended the funeral. Central Office was still opened. Ms. Kohn had a meeting scheduled for the day of the funeral. She asked two staff members, who were not planning to go to the funeral, to cover for her. The staff members agreed to do so. However, Ms. Frazier refused to let Ms. Kohn attend the funeral.
26. Ms. Smiley, Administrative Assistant to the Superintendent for operations/Human Resources, sent a memo to Ms. Kohn apologizing for the fact that she was not allowed to attend Mr. Hazel's funeral.
27. On a number of occasions in 2003-2004 Ms. Frazier sent Ms. Kohn transmittal memos attaching copies of job searches for positions in other districts for which Ms. Kohn might apply. While Ms. Frazier claimed that the job descriptions were general information that she forwarded on a regular basis to staff, there was no explanation of why Ms. Frazier would be

encouraging staff members to leave the district for positions in other school systems.

28. At a number of staff meetings Ms. Frazier announced that there were positions available in the District and that Ms. Kohn had applied for the positions. However, they were looking for staff that was more qualified.
29. Ms. Kohn had volunteered to initiate a Math Connect program. This involved students in grades K-12. Ms. Kohn was not familiar with the teachers and curriculum for grades K-6 since she did not supervise those grades and they were not part of her job description.
30. Mr. Halloway had been assigned to teach mathematics in the High School. He was terminated from his position in January 2006. This was a few weeks prior to the children taking a standardized mathematics test.
31. Dr. Haggerty had been hired by the Orange Board of Education as a mathematics coach to assist mathematics teachers in their teaching of mathematics concept to students. Dr. Haggerty was hired to try to raise the mathematic proficiency of students in the District.
32. The HSPA II tests scores in the District in mathematics for 2003-2004 was 23%. While there was a doubling of the HSPA II tests scores in mathematics from 23-46% for 2004-2005, this was not a passing rate and the students did not achieve a 60% increase, which was the target amount.
33. Ms. Kohn observed Dr. Haggerty on Thursday, January 12, 2006 conducting a model mathematics class for students who had been in Mr. Halloway's class. There was a substitute teacher in the class at the time of the modeling.
34. Ms. Kohn suggested to Dr. Haggerty that he might teach the class until a substitute was hired, in order for the students to be prepared for the standardized testing.
35. Ms. Kohn attempted to contact Ms. Frazier regarding this suggestion. She left several messages but did not get a response.
36. Ms. Kohn brought this suggestion to Dr. Kronin, the school's principal. While at first Dr. Kronin agreed that it was a good idea, by Sunday, January 15, she notified Ms. Kohn that she did not approve of Dr. Haggerty's acting as a substitute teacher.

37. On January 17, 2006 Ms. Frazier wrote a memo to Ms. Kohn stating that the petitioner had no authority to make a unilateral decision to transfer Dr. Haggerty. She stated that she would not hesitate to recommend that the Superintendent withhold Ms. Kohn's increment and prefer tenure charges based on this infraction.
38. On February 6, 2006 Ms. Frazier sent a Confidential Memorandum to Ms. Kohn with copies to the Superintendent of Schools, the Administrative Assistant to the Superintendent for Operations/Human Services and to Personnel file. This memorandum was labeled as "Factual Response for the Record to clarify the conflict." It was a response to Ms. Kohn's memo memorializing a meeting which Ms. Frazier did not attend.
39. Dr. Najmi, a member of the mathematics' department, filed a lawsuit against the Board of Education and his supervisor, Ms. Kohn. This matter has not gone to trial.
40. Ms. Kohn's husband was hospitalized with a heart ailment. Ms. Frazier sent a Christological Get Well Card to him and wrote inside: "get in touch with J.C." Mr. and Mrs. Kohn are practicing Jews.

ANALYSIS OF THE LAW

The District has argued that I should not overrule the exercise of discretion by the Board of Education in withholding Ms. Kohn's increment. According to its reasoning, Ms. Smiley concluded that Ms. Frazier had sufficient basis for recommending the withholding of the increment. She therefore recommended the withholding to the superintendent of schools, Dr. Parker, who then made the recommendation to the sub-committee of the Board, who then made the recommendation to the Board of Education. It was within its purview, based on the totality of the circumstances, for the Board to withhold the increment. It is clear however, from the testimony of Ms. Smiley, that there was no independent evaluation of the recommendation of Ms. Frazier by anyone up the chain of command. Ms. Smiley conferred only with Ms. Frazier and then the recommendation made its way up to the Board without any other corroboration. Therefore, in order for me to determine whether the decision to withhold the increment was arbitrary, capricious and unreasonable, I must look at the source of the allegations,

Ms. Frazier, since there was no one else at the Board of Education who evaluated the performance of Ms. Kohn.

The withholding of the increment was based on the memo of April 19, 2006 from Ms. Frazier to Ms. Smiley. According to that memo, the first reason for withholding the increment was the inability of Ms. Kohn to develop a viable Action Plan for the 2005-2006 school years, which was evidenced by the February 8, 2006 memo. During the hearing Ms. Frazier testified that the Action Plan, that was finally submitted, was viable, but not timely, since it was to be submitted at the beginning of the school year as a road map for the year ahead. The petitioner pointed out that the Action Plan was first submitted in October 2005 and went through several revisions. On January 20, 2006 there was a handwritten memo from Ms. Frazier thanking Ms. Kohn for her timely submission of the revised Action Plan. Therefore, according to Ms. Kohn, the Action Plan was both viable and timely. There could be two interpretations of timely. Ms. Frazier could be referring to the memo being timely generally or returned timely from its latest revision. What is more important is the nature of the changes requested by Ms. Frazier, which caused the plan to be reiterated on at least four occasions. While, one or two suggestions by Ms. Frazier referred to issues of content, the vast majority of the changes had to do with the form of the Action Plan. It appears from a review of the Action Plans and the handwritten notes from Ms. Frazier that there was a triumph of form over substance. (In addition, it would appear that Ms. Frazier had approved a prior Action Plan for the 2004-2005 school years, which was in a different format entirely. While Ms. Frazier claimed that she never saw the 2004-2005 form, there was contrary testimony and documentation that Ms. Frazier had seen the 2004-2005 Action Plan and not objected to its format.) As Ms. Kohn pointed out, the purpose of the Action Plan was to be a guidepost for her. Therefore, spacing, alignment of all headings and changes in font size, all issues brought up by Ms. Frazier, were really not of great importance. Yet it became the basis for returning the Action Plan to Ms. Kohn on a number of occasions and delaying the time when the final product would take effect. Thus, it would appear that a good portion of the reason why the plan's submission was not timely was the unnecessary corrections required by Ms. Frazier. In addition, one of the objections to the Action Plan was based on Ms. Kohn's insufficient information regarding the Math Connect Program. Ms. Kohn pointed out that this was a project that

she had voluntarily taken on. Ms. Frazier's response was that, once Ms. Kohn had taken on the project, she had a responsibility to plan for it properly. I agree that she did have a responsibility. However, as the petitioner pointed out, some of Ms. Frazier's criticism of the Action Plan involved Ms. Kohn's not providing the names of elementary school teachers who would work on Math Connect. Ms. Kohn was not privy to this information because she only dealt with grades 7-12. Since she was doing this project on a voluntary basis, she should have been given assistance by the people who had this information. Instead, she was left without contact people to help her complete this assignment. It would appear that Ms. Frazier set Ms. Kohn up for failure in the Math Connect project and then criticized her for it.

The second charge was that Ms. Kohn unilaterally initiated the transfer of the mathematics coach to a teaching position, which she was not authorized to do and for which she failed to obtain the proper approvals. Mr. Halloway, one of the mathematics teachers at the High School, was either terminated or resigned. As a result there was an open teaching position, which occurred during a critical point in the year, just a few weeks prior to standardized testing in the District. Ms. Kohn observed Dr. Haggerty, a staff member assigned to act as a math coach, modeling a lesson in Mr. Halloway's old class with a substitute teacher in the room. From the testimony it appears that Ms. Kohn was impressed by Dr. Haggerty's lesson and suggested that he might fill in as a substitute teacher for a short time until a permanent substitute teacher was hired. In this way the class could receive preparation for the GEPA examination. The testimony of Ms. Kohn and corroborating e-mails demonstrate that Ms. Kohn brought this suggestion to Dr. Kronin, the schools principal. At first Dr. Kronin thought that it was a good idea. However, by January 15, which was a Sunday, she had e-mailed that she did not agree to the temporary teaching assignment. Ms. Frazier and Ms. Smiley acknowledged that Dr. Kronin would have had to approve the assignment of the math coach to the position. Ms. Kohn testified that she had tried several times to reach Ms. Frazier, but she did not return her calls. Ms. Frazier's response was that she was very busy and Ms. Kohn should have contacted someone above in the chain of command. It is clear from the testimony and the e-mails and memos that Ms. Frazier went out of her way to make an issue of this incident. Her characterization of Ms. Kohn making a unilateral decision is completely off the mark. Ms. Kohn consulted with Dr. Kronin and

attempted to speak with Ms. Frazier. No testimony was presented that Dr. Haggerty actually taught Mr. Halloway's class for one day, other than the modeling lesson on January 12, when the substitute was in the room. There was no direct testimony that this alleged reassignment of teaching staff ever took place and neither Dr. Kronin nor Dr. Haggerty was called by the District to corroborate this allegation. While, Ms. Frazier claimed that she was so overburdened with work that she could not respond to Ms. Kohn's telephone messages, she was able, as the petitioner pointed out, to write a six page memo, which took her 2 hours to compose, refuting Ms. Kohn's rendition of what occurred. She wrote this, in spite of the fact that there was no proof that Dr. Haggerty ever taught a class as a substitute for Mr. Halloway. By the time Ms. Frazier wrote her memo to Ms. Kohn, the decision had been made by Dr. Kronin not to reassign Dr. Haggerty. The response of Ms. Frazier was definitely out of proportion to the incident, which had occurred. In addition, Ms. Frazier wrote this letter to refute statements made at a meeting to which she did not attend. Ms. Frazier's statement that she had to "set the record straight" reveals an attitude on her part that had little to do with the incident itself and more to do with the deteriorating relationship between Ms. Frazier and Ms. Kohn. This attitude was evidenced in the January 17, 2006 memo on the same subject. In that memo Ms. Frazier stated that: "I will not hesitate to refer this matter to the Board of Education with my recommendation to the Superintendent that the Board take further action which may include the withholding of your salary increment(s), or the preferring of tenure charges." Despite the fact that Ms. Frazier claimed that she was not planning to file tenure charges, the tenor of this memo was very threatening. In her letter Ms. Frazier did not refute Ms. Kohn's allegation that "she (Ms. Frazier) cynically stated: don't worry, I'm not going to get you fired." Instead, in her letter, Ms. Frazier stated that her response was not cynical but focused. Ms. Frazier's reaction is especially surprising, since she had not, at that point, spoken to Ms. Kohn about what had occurred.

The third reason for the withholding of an increment involved Ms. Kohn's alleged inability to work collaboratively with her fellow staff members. As an indication of this problem Ms. Frazier indicated that at a certain workshop no other staff members signed up to be on a committee with Ms. Kohn. There is certainly no requirement that a supervisor win a popularity contest in order to receive an increment. In addition, there could be many reasons, other than the staff's dislike of Ms. Kohn, that no one else

signed up to be on the petitioner's committee, including the fact that they might have wanted to work on other workshop topics. Both Ms. Frazier and Ms. Smiley acknowledged that they were not aware of any grievances filed by staff members against Ms. Kohn, other than the lawsuit, which will be discussed below. Ms. Frazier pointed out in her testimony that Ms. Kohn was often in the minority, when it came to airing her opinion on subjects. The fact that a person has a different opinion does not mean that they cannot work collaboratively. In addition, schools try to foster independent thinking on the part of their students. If they do not value independent thinking on the part of their staff, there is little chance that that attribute will be valued by the students.

Ms. Frazier also charged that Ms. Kohn was unable to establish effective relationships and provide leadership with a member of the Mathematics Department (Dr. Aliakbar Najmi) resulting in a law suit against the District. Ms. Frazier acknowledged that she knew nothing about the lawsuit other than the allegations made by Dr. Najmi's lawyer in a letter dated March 28, 2006. The fact that a lawsuit is filed is not ipso facto proof that the allegations are true. Ms. Smiley testified that Ms. Kohn called her more than any other supervisor to discuss issues amongst her staff. Ms. Kohn might not have been the most effective supervisor in settling disputes between staff members, though there is no testimony pointing to a specific incident in this regard, or, as the petitioner pointed out, she might have been so upset by the attitude evidenced by her supervisor, Ms. Frazier, that she was afraid to make a decision without checking with someone from human resources. In either case, the withholding of her increment is not based on her failure to settle disputes between her staff members.

The letter recommending the withholding of an increment also alleges Ms. Kohn's failure to follow through on areas in need of improvement based on the 2004-2005 Annual Evaluation. As the petitioner pointed out, Ms. Kohn did not receive any evaluations for the school years 1999-2004. During most of that time, Ms. Cook was her supervisor. However, Ms. Frazier failed to evaluate her for the period from December 2003-2004 although she was required to do so. When Ms. Frazier did evaluate Ms. Kohn for the 2004-2005 school year, the evaluation was not submitted on

time. In addition, the evaluation was revised. The original evaluation and the revised evaluation have different areas that need improvement. Therefore, it is not entirely clear which evaluation Ms. Frazier was referring to. If, as the petitioner suggested, we take the revised evaluation as the reference document, there are problems with Ms. Frazier's areas in need of improvement. Ms. Frazier stated that "Ms. Kohn **must** practice the **use** of the **Guiding Principles: collaboration, consensus**, and **no-fault** on a **daily** basis during the **2005-2006** school year." These principals refer to a particular style of training espoused by Komer. Ms. Kohn asked to be sent for Komer training, but her request was refused by Ms. Frazier. It seems unfair for Ms. Kohn to be charged with following guiding principals that she had no familiarity with. Ms. Kohn's evaluation also stated that she had to develop "reflective listening skills when dialoguing and communicating with colleagues" and she "needed to use prudence, especially when she is not in agreement regarding an issue or concern, so that she will not be viewed as verbally confrontational." Except for disagreements between Ms. Frazier and Ms. Kohn, there was no testimony that Ms. Kohn was confrontational. In addition, the only testimony that Ms. Kohn did not get along with her colleagues came from Ms. Frazier, who said that she felt sorry for Ms. Kohn because no one wanted to be in her group. Ms. Frazier also testified that there were two meetings where Ms. Kohn's views were in the minority. That does not translate to not being a team player. There was no explanation during the hearing as to what Ms. Frazier meant about exercising prudence and no testimony that Ms. Kohn did not provide support and guidance to her teachers in the mathematics department regarding the implementation of "**Restore Order**."(Ms. Kohn testified that she worked diligently to implement this program which was designed to restore discipline in the school.)

Ms. Kohn was also cautioned to "develop her integrative decision making skills, and avoid discord with some members of the mathematics department, and school community." It is not at all clear what this phrase refers to. As the petitioner suggested, it might have something to do with the suit by Dr. Najmi. However, as stated before, there is no proof that Dr. Najmi's allegations were well founded. Ms. Kohn was also supposed to develop viable options in the **Block Schedule.** None of the witnesses for the District testified that Ms. Kohn was deficient in anyway regarding the Block Scheduling and Ms. Kohn testified that there was no deficiency that she was aware of

regarding Block Scheduling. Ms. Frazier also claimed that Ms. Kohn had to "establish viable relationships as a team player, with colleagues **within** as well as **outside** of the mathematics department, as well as those who are not based at **OHS, OMS, or Main Street Elementary**." Considering that Ms. Frazier testified that she never observed Ms. Kohn at the High School or any other school, but only at Board of Education meetings, it would be hard to evaluate her relationships within or outside the mathematics department and to determine if she was a team player.

Finally, Ms. Frazier speculated that if Ms. Kohn developed viable solutions to the concerns listed in the evaluation, she would be able to effectuate the goals of increasing the pass rate on the GEPA and HSPA II standardized tests. Ms. Kohn pointed out the GEPA scores had doubled between 2005 and 2006. However, it is clear that going from a pass rate of 23% to 46% is still a failure. The question is whether this failure can be laid at Ms. Kohn's door. As the petitioner pointed out, the English scores on the GEPA were equally abysmal. There are many reasons why the tests scores in Orange are bad. However, it would be wrong to lay the blame at the feet of one mathematics supervisor. If Ms. Kohn's increment was to be withheld for this reason, then, as the petitioner pointed out, the increments of other supervisors, schools' principals, assistant superintendents and the superintendent himself should similarly be withheld.

Salary increments are controlled by N.J.S.A. 18A:29-14, which provides that a Board of Education may withhold a teacher's salary increment "for inefficiency or other good cause." In Bernards Twp. Bd. Of Educ. v. Bernards Twp. Ed. Ass's, 79 N.J. 311, 321 (1979), the court stated that the purpose of the statute was "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." An increment is not a statutory right but "a reward for meritorious service to the school district." North Plainfield Educ. Ass'n v. North Plainfield Bd. Of Educ., 96 N.J. 587, 593-594 (1984). The statute was intended to vest local school boards "with the ability to withhold increments from teachers who had not performed well during the previous year." Probst v. Haddonfield Bd. Of Educ., 127 N.J. 518, 526. (1991). The scope of review of on appeal from the decision of the local board is whether it had a reasonable basis for its conclusion. Kopera v. West Orange Bd. Of Ed., 60 N.J. Super. 288, 296 (App. Div. 1960). The Commissioner's role is not to substitute his judgment

for that of the local board which made the evaluation. The Commissioner must determine (1) whether the underlying facts were as those who made the evaluation claimed, and whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind their expertise. Id. at 296-297. A local board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Id. at 297.

The question therefore becomes whether the Board's action in withholding Ms. Kohn's increment was arbitrary, capricious and unreasonable. As I mentioned before, to make this determination we must look at the actions of Ms. Frazier, since it was only her recommendations that formed the basis for the Board's decision. When questioned, Ms. Frazier denied that she did not like Ms. Kohn. However, she did not trust or respect her. Ms. Frazier's January 17, 2006 memo regarding the unilateral placement of Dr. Haggerty was extremely hostile and her letter "setting the record straight" seemed inappropriate at best. In reviewing the areas that Ms. Kohn allegedly needed improvement, based on her evaluation, there was no testimony that showed that Ms. Kohn was deficient. In addition, it was not at all clear what exactly Ms. Frazier was claiming needed improvement. I found particularly telling the fact that Ms. Frazier refused to allow Ms. Kohn to go for training in a discipline that she claimed she needed to improve. Ms. Frazier's motivation behind sending memos to Ms. Kohn about other job postings outside the district and Ms. Frazier's announcements, in front of other staff members, that Ms. Kohn had applied for other positions, but the District was looking for qualified applicants, is also suspect. The petitioner has asserted that Ms. Frazier's sending a Christian religious "get well card" to her husband, who was Jewish, and her notation to "touch base with J.C." was a sign of religious discrimination. I do not believe that this action on Ms. Frazier's part was an indication of religious animus. However, at the very least, it evidenced a lack of sensitivity to the religious beliefs of one of the people whom she supervised. Also, there is insufficient evidence to sustain the charge by the petitioner that Ms. Frazier threatened her with bodily harm. Finally, Ms. Frazier's refusal to let Ms. Kohn attend the funeral of Mr. Hazel can only be described as a direct attempt to hurt the petitioner emotionally. There was no testimony that refuted Ms. Kohn's assertion that she had arranged for two teachers to cover the meeting scheduled for that day. Even if we assume that Ms. Frazier believed that the meeting

should go forward no matter what the circumstances, there is no reason that Ms. Kohn should not have been allowed to attend the funeral once she had gotten personnel to cover for her.

CONCLUSION

Based on my analysis of the testimony and evidence presented and the legal arguments I **CONCLUDE** that the withholding of the petitioner's increment for the 2006-2007 school year was arbitrary, capricious and unreasonable.

ORDER

I therefore **ORDER** that the decision of the Board of Education be reversed and the petitioner receive her increment for the 2006-2007 school year.

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

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

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

6/5/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 6/5/07

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN 6 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESSES

For Petitioner:

Malvina Kohn

For Respondent:

Constance L. Frazier

Belinda Scott Smiley

EXHIBITS

For Petitioner:

P-1 to P-35 (See attached List -2 pages)

For Respondent:

R-1 to R-17 (See attached List- 1 page)

INDEX

P1 November 12, 1997 evaluation

P2 May 5, 1998 evaluation

P3 November 16, 1998 evaluation

P4 January 14, 1999 evaluation

P5 June 1999 evaluation

P6 June 30, 2005 evaluation signed by Constance Frazier on 8/25/05

P7 June 30, 2005 evaluation signed by Constance Frazier on 10/24/05

P8 June 30, 2005 evaluation signed by Constance Frazier on 10/21/05 and Malvina Kohn on 4/7/06

P9 Annual evaluation 2005-2006 - revised 10/10/06

P10 Article 13 - Administrator's Evaluations

P11 Orange Public School Action Plan 2004-2005

P12 Orange Public School Action Plan 2004-1005

P13 February 8, 2006 memorandum - revised Action Plan 2005-2006 with attachments.

P14 Correspondence from Belinda Scott Smiley to Erica Stewart dated 7/5/06

P15 April 19, 2006 memorandum from Constance Frazier to Belinda Scott Smiley providing the "rationale for withholding the increment."

P16 January 12, 2006 memorandum from Constance Frazier to Malvina Kohn in regard to Dr. James Haggerty.

P17 Email of 1/13/06 from Kohn to Kronin; email from Kronin to Kohn dated 1/15/06; email from Frazier to Kohn sent on 1/17/06.

P18 January 17, 2006 memorandum from Constance Frazier to Malvina Kohn in regard to OMS mathematics coach.

P19 Email from Malvina Kohn to Constance Frazier sent on 1/18/06.

P20 January 31st correspondence from Malvina Kohn to Constance Frazier.

P21 February 6, 2006 memorandum from Frazier to Kohn entitled factual response for the record to clarify the conflict.

P22 Card sent by Frazier to Kohn.

P23 Job search transmittal memos - multi-page.

P24 March 22nd, 2006 memorandum from Candace Goldstein to Malvina Kohn in regard to "conclusion of affirmative action case." (2-page document)

P25 Memorandum from Sam Hazell to Nathan Parker dated April 30, 2004.

P26 Memorandum from Belinda Scott Smiley to Malvina Kohn dated December 6, 2006 in reference "apology."

P27 National Youth Leader Recognition of Malvina Kohn as honorary commission recognizing her as an active member of the 2006 National Nominating Committee.

P28 Recognition of Malvina Kohn's presentation for district wide staff professional day January 26, 2007.

P29 Memorandum of 12/10/99 from Sam Hazall to Malvina Kohn in regard to her presentation at the December 7th faculty meeting.

P30 February 2nd, 2000 correspondence from Sam Hazall to Malvina Kohn.

P-31 October 3, 2005 Memo

P-32 Notes from C. Goldstein

P-33 Affirmative Action Report

P-34 Math Supervisor-Job Description

P-35 Associate Superintendent- Job Description

MALVINA KOHN v. ORANGE BOARD OF EDUCATION
RESPONDENT'S INDEX

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JR-1 Exhibit A - April 19, 2006 memo from Frazier to Smiley

JR-2 Exhibit B - March 9, 2006 email: Kohn to Frazier that includes Frazier response

JR-3 Exhibit C - March 15, 2006 email: Kohn to Frazier that includes Frazier response

JR-4 Exhibit D - March 16, 2006 memo: Frazier to Kohn with attachment

JR-5 Exhibit E - April 10, 2006 email: Kohn to Frazier that includes Frazier response

JR-6 Exhibit F - April 11, 2006 email: Kohn to Frazier that includes Frazier response

JR-7 Exhibit G - May 2, 2006 email: Kohn to Frazier that includes Frazier response

JR-8 Exhibit H - May 22, 2006 memo: Frazier to Kohn

R-9 Exhibit I - omitted

JR-10 Exhibit J - May 3, 2006 email: Frazier to Kohn

R-11 Exhibit K - omitted

R-12 Exhibit L - omitted

R-13 Exhibit M - omitted.

JR-14 Exhibit N - January 17, 2007 memo: Frazier to Kohn

JR-15 Exhibit O - February 6, 2007 memo: Frazier to Kohn

JR-16 Exhibit P - 2004-2005 evaluation of Kohn by Frazier

JR-17 Exhibit Q - 2005-2006 evaluation of Kohn by Frazier

299-07

#299-07

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN GUARNI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE JUVENILE	:	DECISION
JUSTICE COMMISSION.	:	
	:	

SYNOPSIS

Petitioner certified tenure charges of unbecoming conduct against respondent -- a tenured special education teacher -- for conduct which included: alleged possession of heroin, a controlled dangerous substance (CDS); and failure to timely report his arrest and criminal charge for drug related activity, in violation of the Juvenile Justice Commission Human Resources Policy.

The ALJ found that: neither respondent's testimony, nor that of the witness arrested with respondent following their May 31, 2006 traffic stop, was credible; the most probable scenario arising from the credible evidence is that the respondent was the knowing possessor of the heroin found in his change purse and under the seat of his car; and respondent's claim that he was unaware that he was arrested on May 31, 2006 for possession of a CDS is unbelievable. The ALJ concluded that respondent's conduct was inappropriate for a tenured teacher and violative of the Drug Free Workplace Policy, and – whether he was the possessor of the CDS or a knowing facilitator for his companion on the night of their arrest – as an employee who works for the Juvenile Justice Commission, teaching children who in many cases are themselves involved with illicit drugs, cannot retain the statutory status that tenure brings. Further, respondent should have reported his arrest under the Drug Free Workplace Policy within five days of being charged, and he failed to comply with this policy.

Upon careful and independent review of the record, the Initial Decision of the OAL was adopted as the final decision in this matter, and the Commissioner directed that respondent be dismissed from his teaching position with the New Jersey State Juvenile Justice Commission as of the date of this decision. A copy of this decision has been transmitted to the State Board of Examiners for action as that body deems appropriate.

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

July 23, 2007

OAL DKT. NO. EDU 8705-06
AGENCY DKT NO. 381-10/06

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN GUARNI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE JUVENILE	:	DECISION
JUSTICE COMMISSION.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Juvenile Justice Commission (JJC) were filed in accordance with *N.J.A.C.* 1:1-18.4. Respondent filed neither primary nor reply exceptions.

The JJC's exceptions support acceptance of the recommended decision but, however, urge modification of language in the Administrative Law Judge's (ALJ) Conclusion and Order which it avers would serve to clarify the ultimate intent of the decision. Specifically, it suggests that the ALJ's terminology that respondent be "stripped of his tenure" be broadened to fully spell out that "respondent is dismissed from his tenured position and that his employment with the Juvenile Justice Commission is terminated." (JJC Exceptions at 2)

Upon careful review and consideration of the record in this matter, which included a transcript of the hearing conducted at the OAL on May 21, 2007 – and according due deference to the ALJ's credibility determinations,[1] – the Commissioner determines to adopt the recommended Initial Decision as she concludes that the record before her amply establishes that

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

respondent's behavior with respect to the incident surrounding the JJC's tenure charges constitutes conduct unbecoming a teaching staff member. The Commissioner further concurs with the ALJ that respondent's dismissal from his tenured teaching position is warranted.[2]

Accordingly the Commissioner adopts the Initial Decision of the OAL – for the reasons comprehensively detailed therein – and hereby orders that John Guarni be dismissed from his teaching position with the New Jersey State Juvenile Justice Commission as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action, as that body deems appropriate, against Mr. Guarni's certificate.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/07

Date of Mailing: 7/24/07

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[2] It is noted that on Page 16 of his decision the ALJ expressed uncertainty as to whether the policy of progressive discipline might have any applicability in this matter. The Commissioner hereby clarifies that the civil service concept of progressive discipline plays no role whatsoever in this matter. Although as a State employee, respondent's employment rights and responsibilities are generally controlled by the provisions of Title 11A and the implementing regulations set forth in Title 4A, as a State employee working as a teacher in a State institution, respondent was granted tenure pursuant to *N.J.S.A.* 18A:60-1.1 which specifies:

> The Legislature hereby finds that it is in the best interest of the State of New Jersey to provide job security during good behavior and efficiency for the teachers and other certified professional educators in State institutions within the Department of Corrections and the Department of Human Services. To accomplish this goal it is appropriate to provide tenure protection for such professionals teaching in such State institutions *subject to the provisions set forth in this act.* (emphasis supplied)

As such, dismissal or reduction of salary for these individuals for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause is governed by subarticle B of article 2 of chapter 6 of *N.J.S.A.* 18A. (*See* 18A:60-2), not rules and regulations of civil service.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08705-06S
AGENCY DKT. NO. 381-10/06

IN THE MATTER OF THE TENURE HEARING OF JOHN GUARNI/NEW JERSEY JUVENILE JUSTICE COMMISSION.

John Franzini, Deputy Attorney General, for petitioner Juvenile Justice Commission (Stuart Rabner, Attorney General of New Jersey, attorney)

John A. Klamo, Esq., for respondent John Guarni

Record Closed: May 21, 2006 Decided: June 5, 2007

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

John Guarni is a teacher of the handicapped, employed by the Juvenile Justice Commission ("JJC"). On May 31, 2006, he and another man, John Monroe, were in a vehicle stopped by a Westville, New Jersey, police officer, Michael R. Shomo. As a result of this stop, Shomo found glassine bags containing heroin in the hands and pockets of Mr. Monroe, a clear plastic baggie with a blue plastic bag inside containing heroin under the driver's seat and ten baggies also containing heroin in a change purse found in a cup holder that was an open part of the center console between the driver's and passenger's seat. This discovery led to the indictment of both men and has also resulted in the JJC certifying these tenure charges to the Commissioner of Education seeking to remove Mr. Guarni's tenure for conduct unbecoming and for other just

cause. N.J.S.A. 18A:6-10 and N.J.S.A. 18A:60-2. More specifically, in addition to the charge of unbecoming conduct for allegedly being in possession of a controlled dangerous substance, Guarni is also charged with failing to timely report his arrest and criminal charge for drug related activity in violation of JJC Human Resources Policies 05H-19.2 and 05H-1.7. The contested case was transferred to the Office of Administrative Law and was heard before this judge on May 21, 2007.

STIPULATED FINDINGS OF FACT

Prior to the hearing the parties entered into a written Stipulation of Facts. Each is hereby accepted as a **FINDING OF FACT**.

1. John Guarni (hereinafter "Respondent") was initially employed by the New Jersey Department of Corrections as a Teacher 2 at its Voorhees South program, effective August 1, 1988.

2. Respondent is certified as Teacher of the Handicapped and attained tenure in August 1994.

3. Effective July 1, 1996, Respondent transferred to employment with the Juvenile Justice Commission (hereinafter "Petitioner").

4. Respondent signed an Acknowledgment of Receipt for Petitioner's Drug Free Work Place Policy on October 24, 1996.

5. On November 23, 1996, Respondent was promoted to the position of Teacher 1.

6. On and after April 13, 1998, Respondent was assigned to teach at Petitioner's Camden Community Service Center, a residential program housing up to 50 male juvenile delinquents.

7. Respondent signed an Acknowledgment of Receipt of Petitioner's Policy on Reporting Arrests and/or Incarcerations on June 8, 1999.

8. From April 17, 2006, through July 18, 2006, Respondent was on an approved medical leave.

9. Respondent returned to work on July 19, 2006.

10. On May 31, 2006, shortly after 6:00 o'clock in the evening, Patrolman Michael Shomo of the Westville, New Jersey Police Department, stopped the 1998 maroon Mitsubishi Eclipse operated by Respondent for an alleged motor vehicle violation.

11. The chain of custody of the controlled dangerous substances confiscated by Officer Shomo of the Westville Police Department during a search of Mr. Monroe and Mr. Guarni's auto on May 31, 2006, was maintained through and after analysis of those substances by the New Jersey State Police Office of Forensic Sciences, South Regional Laboratory.

12. Officer Shomo logged all of the items of evidence into the Westville Police Department Evidence Locker under Control No. 4160. The items of evidence confiscated from Mr. Monroe were given Control Nos. 4160-A and 4160-B. A single baggie containing heroin was given Control No. 4160-C. Ten baggies containing heroin were given Control No. 4l60-D.

13. The items of evidence were continuously maintained in the Westville Police Department Evidence Locker until June 12, 2006 when they were removed by Lt. Stevenson of the Westville Boro Police Department and transported to the New Jersey State Police, Office of Forensic Science, South Regional Laboratory for testing.

14. The items of evidence were received at the South Regional Laboratory and logged in on June 12, 2006 at 1:49 p.m. The item with Control No. 4160-B was logged in as Item No. 1. The item with Control No. 4160-A was logged in as Item No. 2. The item with Control No. 4160-C was logged in as Item No. 3, and the item with Control No. 4160-D was logged in as Item No. 4.

15. All of the items of evidence, including Item No. 3 with Control No. 4160-C and

Item No. 4 with Control No. 4160-D, were returned to Lt. Stevenson on June 19, 2006, and returned to the Westville Police Department Evidence Locker on that date.

16. The chain of custody of all of the evidence items, in particular those with Control No. 4160-C (Item No. 3) and 4160-D (Item No. 4), was maintained from the time the items were confiscated by Officer Shomo on May 31, 2006, through and subsequent to the return of the items to the Westville Police Department Evidence Locker on June 19, 2006, after testing at the New Jersey State Police South Regional Laboratory.

17. The New Jersey State Police Office of Forensic Sciences Certified Laboratory Report, Laboratory No. S06-04592, dated June 15, 2006, executed by Heather A. Garoh, Forensic Scientist 1, New Jersey State Police, Exhibit P-12, is admissible in evidence and establishes the composition, quality and quantity of the substances submitted to the New Jersey State Police South Regional Laboratory for analysis.

18. The Certified Laboratory Report of Heather A. Garoh, New Jersey State Police Office of Forensic Sciences, Laboratory No. S06-04592, dated June 15, 2006, states, among other things, that one of the ten packets comprising Item 4 contained 0.02 grams of heroin, and that Item 4 together with Item 3 have an estimated net weight less than 1/2 ounce.

19. The evidence item with Control No. 4160-C (Item No. 3), one blue wax baggie, contains heroin.

20. The evidence item with Control No. 4160-D (Item No. 4), 10 blue wax baggies, contains heroin.

21. On June 2, 2006, Respondent received written notice in the mail from Westville Boro Municipal Court that the matter was being referred to the Gloucester County Prosecutor's Office for review and action.

22. Respondent returned to work on July 19, 2006.

23. On August 16, 2006, Respondent, John Guarni, and John B. Monroe were

indicted by the Gloucester County Grand Jury, Criminal Indictment No. 06-08-00702-I, for possession of heroin in violation of N.J.S.A. 2C:35-10a(1), a crime of the third degree.

24. On August 24, 2006, Respondent received notice by mail to appear at the Gloucester County Criminal Case Management Office in Woodbury, N.J. on August 30, 2006.

25. On August 30, 2006, Respondent appeared at the Gloucester County Criminal Case Management Office in Woodbury, N.J. accompanied by his attorney and was advised that he had been indicted for possession of heroin in violation of N.J.S.A. 2C:35-10a(1).

26. On September 7, 2006, Respondent first reported to Petitioner the fact of his motor vehicle stop on May 31, 2006, the discovery of alleged controlled dangerous substances by the Westville Boro Police during that stop and a subsequent search, and his indictment on August 16, 2006 for possession of heroin in violation of N.J.S.A. 2C:35-10a(1).

27. Respondent was suspended without pay effective September 12, 2006, pursuant to the provisions of N.J.S.A. 18A:6-8.3.

28. Tenure charges were filed with the Juvenile Justice Commission's Office of Education on September 27, 2006 and served on Respondent on the same day.

29. Respondent submitted a response to the charges by e-mail dated October 16, 2007.

30. Tenure charges were then filed by the Juvenile Justice Commission with the Commissioner of Education on October 20, 2006 and served on Respondent on the same day.

31. Respondent filed an answer to the charges on November 8, 2006.

32. By letter dated November 9, 2006, the Commissioner of Education referred the matter to the Office of Administrative Law for a hearing.

33. By Order dated January 4, 2007, the Honorable Walter L. Marshall, J.S.C., granted Respondent's motion to suppress evidence with respect to the criminal charge against him of possession of heroin in violation of N.J.S.A. 2C:35-10a(1).

34. On January 29, 2007, Indictment No. 06-08-00702-I, filed against Respondent for possession of heroin in violation of N.J.S.A. 2C:35-10a(1), was dismissed.

35. Upon dismissal of the indictment, Respondent's suspension without pay was continued pursuant to the provisions of N.J.S.A. 18A: 6-14.

36. Respondent received 5 written reprimands between 1997 and 2003. He received a written reprimand dated October 28, 2003 for excessive absenteeism (16 absences) between January 1, 2003 and July 28, 2003. He received a written reprimand on March 19, 2003 for neglect of duty - the neglect resulted in an escape. He received a written reprimand for excessive tardiness/absenteeism dated Dec. 23, 2002. He also received a written reprimand for excessive tardiness/absenteeism dated November 16, 2001. Finally, he received a written reprimand dated April 22, 1997, for neglect of duty in administering a proficiency exam.

37. Respondent consistently received favorable performance evaluations during his employment with Petitioner.

TESTIMONY

Officer Shomo testified that he pulled over Mr. Guarni's car due to the failure of the two occupants to be wearing seatbelts. He asked Mr. Guarni, who was in the driver's seat, for his credentials and then, when he asked Mr. Monroe for identification and Monroe said that he had none, Officer Shomo had Monroe exit the vehicle. Monroe had a hand in his pocket and was told to take it out. He then put his hands back in his pockets and said that he only had money in his pockets. However, when he

produced money from his pocket, he also held in his hand a clear plastic baggie with a blue plastic baggie inside which appeared to contain a creamy powder. Monroe was placed under arrest for possession of controlled dangerous substances ("CDS") and removed to the back of the police car, where another officer had arrived in a separate police vehicle. A search of Monroe revealed two more baggies in his pocket containing what appeared to be crack cocaine. When the officer returned to the Guarni vehicle, he asked Guarni to leave the car and told him what had been found on Monroe. Officer Shomo asked Guarni if there was anything on him or in the car that the officer should know about, but Guarni denied that there was. The officer searched the passenger compartment and discovered a plastic baggie under the driver's seat with a substance therein and in the open area of the console, a change purse containing ten clear plastic baggies containing a creamy powder. The car was secured and Guarni placed under arrest for possession of CDS. A check revealed that while Guarni's driver's license was valid and there were no warrants for him, Monroe was the subject of an outstanding warrant in Bellmawr, Camden County. Guarni was then taken to the Westville Police station by Patrolman Hibbs and Monroe was likewise transported to the station by Shomo. Neither man said anything in response to being informed that they were under arrest for possession of heroin. At the station, each man was advised of his Miranda rights and signed a Miranda Rights Advisement form. Each waived his right to counsel.

When Officer Shomo displayed the change purse to the men as they sat together on a bench and asked whose change purse it was, Guarni replied that it was his. Shomo then asked who the heroin that was found in the change purse belonged to? Guarni replied, "yes, I'm off the wagon." This reply was written by the officer in his police report, but he acknowledged that he neither taped nor video-recorded the interchange, nor wrote a contemporaneous note of the verbatim response. He insisted that his written report contained the verbatim statement made by Guarni. At the time of this interchange, Mr. Monroe, who was seated next to Guarni, said nothing.

Following the comment about the change purse, the men were processed, including being photographed and fingerprinted. Guarni was issued a summons for the seat belt offense and released on his own recognizance ("ROR"). According to the

officer, a criminal complaint was prepared, P-4, charging a violation of N.J.S.A. 2C:35-10A(1).

Lisa Bell, Human Resources Manager for JJC since its inception over ten years ago, testified about the several policies regarding Reporting Arrests and/or Incarcerations and Drug Free Work Place. Under the Reporting Policy, employees "must contact their supervisor within 48 hours or before reporting for duty, whichever is less" regarding an arrest, detention or incarceration. Exhibit P-21, Procedure, Page 1, item 1. Drug related charges must be reported in accordance with the Drug Free Work Place Policy 05H-1.7, which as of October 26, 2005, states "all Department employees are required to report to their Human Resources Manager, any criminal charge for drug-related activity whether committed within or outside the workplace. A criminal charge must be reported within five days. Appropriate discipline may be imposed for failure to report a charge within five days. Appropriate discipline may range from a written reprimand to discharge." JJC Policy & Procedure, section V., page 3, revised October 26, 2005.

Ms. Bell explained that in the past when policies were revised, hard copies were provided to the employees, but in the past couple of years intranet communication has been utilized to notify employees of revisions. The same reporting timeline was in effect under the earlier Drug Free Workplace Policy in effect prior to the October 2005 revision. Mr. Guarni first reported the charges against him in a letter dated September 7, 2006.

John Monroe testified that he has known Mr. Guarni for about four or five years, having met him through Monroe's wife. Monroe claimed that when Officer Shomo stopped Mr. Guarni's vehicle on May 31, he was in possession of thirteen baggies containing heroin which he was holding in his closed hand. He wanted to get rid of them and put them into the change purse which was in the open console located to his immediate left as he sat in the front passenger seat. As he did this, Mr. Guarni was not looking in his direction and was probably paying attention to the police car. The change purse could be opened by simply pressing its ends. When Monroe was outside of the

car and was asked by the officer about what was in his pocket, he thought he only had money there, but when he took his hand out, pinching a dollar, he did not realize that he also had baggies containing heroin and crack cocaine and he had a baggie showing with the money in his hand. The crack cocaine was his wife's. Monroe was then taken to the area behind the car and the officer approached Guarni and had him step out of the car and asked Guarni if there was anything in the car and Guarni said "no." However, the officer looked under the driver's seat and produced a baggie, which Monroe claimed he knew nothing about, but speculated that he had perhaps dropped one of the bags in his possession. Shomo said to Guarni that he thought that Guarni had told him there was nothing and Guarni responded that he did not know where the officer "got that from." Shomo continued the search and found the change purse. As Monroe recalled the trip to the police station, both he and Guarni were transported in the same police car. There was no conversation about what was found at the station and no one said what they were charged with. The men were fingerprinted and photographed. Shomo did ask if the change purse was Guarni's and Guarni said it was, but the officer did not ask about the heroin in the change purse. He said that Monroe would be given a summons, which was actually mailed to Monroe at a later date. No tickets were given at the station. However, Monroe agreed that he knew that night that he was under arrest for the possession of the crack cocaine and the heroin that was in his pocket.

Mr. Monroe testified that the heroin in the change purse was his and was not Mr. Guarni's. On cross-examination he admitted that he was not really sure if Shomo asked Guarni what he was doing with heroin.

Mr. Monroe was examined regarding the events that preceded the car stop. He explained that his wife had asked Guarni to give him a ride to Monroe's mother house. She lives in Pennsauken. He got off work at 4:00 pm. and the men left on the trip, which actually took them to Mt. Ephraim Avenue in Camden, at 4:15 pm. Monroe testified that he was actually going to "cop" drugs, and he directed Guarni to Mt. Ephraim Avenue in "Polocktown," a section in Camden. He told him where to stop. Monroe exited the vehicle and "went around the corner." He claimed that Guarni

assumed that Monroe was going to his mother's house, where Guarni had previously taken Monroe. The trip into Camden took perhaps twelve to thirteen minutes. According to Monroe, he was gone for about five minutes, during which he obtained a bundle, which he said usually was eleven bags, but actually is made up of thirteen. He asked for the "rest" and obtained all thirteen. He then returned to the location where he had been dropped off and waited for fifteen or twenty minutes until Guarni returned to that location. He held the baggies in his hand. Then they headed directly back towards Monroe's home, only to be stopped by the police in Westville.

Mr. Monroe admitted that until his testimony in this hearing he had never admitted that the heroin in the change purse was his. He has been convicted of several criminal offenses, including larceny, burglary and fraud in 1978; 2nd degree murder in 1982; forgery in 1998; and possession of CDS in 2002 and 2003.

John Guarni testified that on May 31, he was at his family physician's in the afternoon. He had received a telephone call from Mrs. Monroe, who asked him if he could give her husband a ride to his mother's house. Guarni believed that the mother lived in Pennsauken and that Monroe also had relatives who lived in Camden. He had previously driven Monroe to the front of a house that he believed to be Monroe's mother's.

After picking up Monroe, they proceeded at Monroe's direction to Mt. Ephraim Avenue in Polocktown in Camden. He stopped where he was told and when Monroe exited the vehicle, Guarni, who was uncomfortable sitting in his car in that neighborhood, told Monroe that he would return in ten to fifteen minutes and if Monroe was not there, he would leave. He did not know what Monroe was doing. When he returned, Monroe entered the car and they started back to Westville in rush hour traffic, which slowed the trip considerably. The officer stopped them at around 6:00 pm. When the officer said that he was not wearing a seat belt, Guarni, who has hands, but does not have forearms due to a birth defect, told the officer that he could not wear them. The officer then remarked that the handicapped placard was improperly placed. He asked Monroe for identification and then had Monroe exit the car when he could not produce any. The next thing he heard was Monroe calling out that Guarni should call

his wife and "get me out." After Monroe was placed in the police car and another police vehicle arrived, Officer Shomo told Guarni that drugs had been found on his passenger. Guarni said that he did not know anything about that and Shomo took Guarni behind the car and asked if he had anything on him or in the car that he needed to know about. He made mention of the possibility of the car being impounded. He then searched the passenger seat area and said that he "found one" under the driver's seat, which caused Guarni to think that "it was a set up." He told the officer that "I don't know nothing about it." The officer did not show him the change purse. After they were transported in separate police cars to the station, Guarni was never told that he was under arrest. He was asked for his vital information, fingerprinted and photographed. He and Monroe were seated on a bench and Shomo showed them Guarni's wallet and asked if it was his. Guarni said that it was and then Shomo asked "is this your change purse? What are you doing with all the heroin?" Guarni then realized that Monroe must have "copped dope." He told the officer, "Apparently someone fell off the wagon." Guarni never said that heroin was his. Monroe was present when the change purse was displayed and said nothing.

Guarni, who obtained an attorney immediately after the May 31st incident, stated that he was not given a summons on May 31. If he had been arrested that day he assumed that he would have been told that he was. In June he received notice from the Westville Boro Municipal Court that advised that a matter had been transferred to the Gloucester County Prosecutor's Office for their review and action. However, this notice did not refer to any drug charge, but instead listed the matter transferred as "Summons B 003967" issued in May 31, 2006, for a violation of N.J.S.A. 39:3-76.2F. That summons was issued for "failure to wear a seatbelt." An indictment for unlawful possession of CDS was returned by the Grand Jury on August 16, 2006. He received one in August.

Mr. Guarni acknowledged that on May 31, he did not drive Monroe to the front of the house that he had driven to before and believed to be Monroe's mother's home. While he worked in Camden, Guarni professed a lack of knowledge of the location of the Pennsauken/Camden border or of the proximity of "Polocktown" or Mt. Ephraim

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

June 5, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

JUN - 8 2007

June 6, 2007
Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 May 21, 2007, Stipulations

FOR THE PETITIONER:

P-1 Not in evidence

P-2 Miranda Rights dated 5/31/06

P-3 Westville Police Dept. Investigation Report by Ptl. Shomo dated 5/31/06

P-4 Not in evidence

P-5 Evidence Custody/Control Report dated 5/31/06 (1 of 2)

P-6 Evidence Custody/Control Report dated 5/31/06 (2 of 2)

P-7 Evidence Submission Review dated 6/2/06

P-8 Evidence Receipt, N.J. State Police dated 6/19/06

P-9 Arrest No. 22182-1 of John Guarni, dated 5/31/06

P-10 Evidence Receipt Log, N.J. State Police, dated 6/19/06

P-11 Not in evidence

P-12 Certified Laboratory Report, N.J. State Police, dated 6/15/06

P-13 thru P-19 Not in evidence

P-20 JJC Policy & Procedure #Adm 1-99, from 5/28/99

P-21 JJC Policy & Procedure #05H-19.2 effective 10/27/05

P-22 JJC Policy & Procedure #05H-1.7 revised 10/26/05

P-23 JJC memorandum dated 5/28/99, signed by John Guarni on 6/8/99

P-24 Receipt acknowledgement for John Guarni for policy on drugfree workplace dated 10/24/96

P-25 Statement of John Guarni dated 9/7/06

P-26 thru P-30 not in evidence

P-31 Superior Court Order suppressing evidence issued 1/4/07

P-32 Superior Court Indictment Dismissal for John Guarni dated 1/29/07

P-33 Not in evidence

P-34 Criminal Indictment No. 06-08-00702, filed 8/16/06

FOR THE RESPONDENT:

R-1 Notice of Transfer to County Prosecutor, dated 6/2/06

R-2 Complaint-Summons issued to John Guarni for failure to wear a seatbelt on 5/31/06

298-07

MAURICE S. KAPROW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BERKELEY TOWNSHIP, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought resolution of one remaining issue following an August 2006 Commissioner's decision, and a March 2007 Interlocutory Order which concluded that petitioner's claims for payment of accrued vacation/personal days and health insurance waiver following his successful action seeking appointment to the position of District Director of Elementary Education were not cognizable before the Commissioner, but had to be pursued in Superior Court. The final remaining issue involved petitioner's claim for post-judgment interest.

The ALJ found that a check for $611.33 has been paid to the petitioner, representing full payment of petitioner's claim for post-judgment interest. Consequently, the ALJ concluded that the sole remaining issue in dispute has been resolved, and ordered dismissal of the contested case as moot.

Upon a full and independent review, the Commissioner concurred with the Administrative Law Judge – for the reasons clearly stated in his decision – that this matter is now moot, and dismissed the petition.

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

I- 7/23/07
M- 7/24/07

OAL DKT. NO. EDU 12277-06
AGENCY DKT. NO. 397-11/06

MAURICE S. KAPROW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BERKELEY TOWNSHIP, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were filed in accordance with *N.J.A.C.* 1:1-18.4. The Board filed no reply exceptions.

Petitioner's exceptions are presented verbatim below:

> ***By decision dated June 7, 2007, Administrative Law Judge Jeff S. Masin dismissed the petition as moot as a result of two factors:
>
> 1. Judge Masin's Interlocutory Order dated March 29, 2007 adopted by the Commissioner on April 19, 2007, which Interlocutory Order found the Commissioner to be without jurisdiction as to all issues except the issue of post-judgment interest.
>
> 2. The remaining issue of post-judgment interest was amicably resolved between the parties.
>
> In order to be certain that there is no waiver of right to appeal this matter to the State Board of Education once a final disposition is entered by the Commissioner, the Petitioner reiterates the exceptions he filed to Judge Masin's March 29, 2007 Interlocutory Order as set forth in Petitioner's letter of April 9, 2007, a copy of which is attached and incorporated by reference herein.

Upon a full and independent review of the record, the Commissioner concurs with the ALJ – for the reasons clearly stated in his decision – that this matter is appropriately dismissed as moot.[1]

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/07

Date of Mailing: 7/24/07

[1] Although the Commissioner cannot speak for the State Board as to what is appealable before that body, it is noted – as recognized by petitioner in his exceptions – that the Commissioner's Interlocutory Decision on the issue of jurisdiction was issued on April 19, 2007.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12277-06
AGENCY DKT. NO. 397-11/06

MAURICE S. KAPROW,

Petitioner,

v.

BOARD OF EDUCATION OF BERKELEY TOWNSHIP, OCEAN COUNTY,

Respondent.

Duane O. Davison, Esq., for petitioner (Lomurro, Davison, Eastman & Munoz, attorneys)

John C. Sahradnik, Esq., and **Mary Jane Lidaka,** Esq., for respondent (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Record Closed: May 31, 2007 Decided: June 7, 2007

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

This contested case was the subject of prior decisions and orders entered which effectively left only one issue for resolution. In an Interlocutory Order issued by this judge on March 29, 2007, I concluded that petitioner's claims for certain "emoluments" following his successful action seeking appointment to the position of District Director of Elementary Education was not cognizable before the Commissioner of Education, but had to be pursued in Superior Court as these claims involved contractual matters that did not arise under the school laws "but rather from statutory or common law." Archway

Programs v. Pemberton Board of Education, 352 N.J. Super. 420, 425 (App. Div. 2002). The Commissioner adopted my Order in a letter opinion dated April 19, 2007, directing that this case proceed on the remaining issue of petitioner's claim for post-judgment interest. The parties have now advised that a check for $611.33 has been paid to the petitioner "in full for the post-judgment interest claimed in this matter." Letter of Duane Davison, Esq., dated May 31, 2007 (attached). As a result, I **CONCLUDE** that the sole remaining issue in dispute in this case has been resolved and the contested case shall be **DISMISSED AS MOOT**. It is so **ORDERED.**

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

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

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

June 7, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

fax 6/7/07

Mailed to Parties:

JUN - 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

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PETER H. LEDERMAN
BETTINA E. MUNSON ◆
JAMES A. PAONE, II
THOMAS M. COMER ✦
ROBERT S. BONNEY, JR. ○
ANDREA WHITE O'BRIEN ◆

CERTIFIED BY THE SUPREME COURT OF N.J. AS A:
✦ CIVIL TRIAL ATTORNEY
○ CRIMINAL TRIAL ATTORNEY
◆ MATRIMONIAL LAW ATTORNEY

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MICHAEL D. SCHOTTLAND ✦
JULES S. LITTMAN
JOHN KAYE

May 31, 2007

RECEIVED
2007 JUN -4 P 1:40
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Honorable Jeff S. Masin, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

RE: Kaprow v. Berkeley Township Board of Education, Ocean Co.
OAL DKT NO. EDU 12277-06S
AGENCY DKT NO. 397-11/06

Dear Judge Masin:

This is to advise that by letter dated May 24, 2007 Mary Jane Lidaka, Esq., attorney for the Berkeley Township Board of Education, forwarded to me a check in the amount of $611.33 as payment in full for the post-judgment interest claimed in this matter.

Respectfully Yours,

DUANE O. DAVISON

DOD/ma
cc: Maurice S. Kaprow
Mary Jane Lidaka, Esq.

The Certified designation by the New Jersey Supreme Court is limited to attorneys who have demonstrated 1) substantial involvement in trial matters in Superior Court, 2) an unblemished reputation as attested to by judges and attorneys, and 3) substantial knowledge and continuing legal education shown by passing a special written examination on trial practice. Mr. Lomurro, Mr. Eastman, Mr. Heugle, Mr. Comer and Mr. Schottland are Certified Civil Trial Attorneys. Mr. Lomurro and Mr. Bonney are Certified Criminal Trial Attorneys. Ms. Munson and Ms. White O'Brien are Certified Matrimonial Law Attorneys.

297-07

#297-07

J.Z. on behalf of minor child C.Q.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged a decision of the respondent school district not to allow her daughter, C.Q., to participate in graduation exercises, which were held on the same day as the emergent relief hearing on the matter at the Office of Administrative Law (OAL). The Administrative Law Judge (ALJ) determined that petitioner had not provided evidence sufficient to meet the standards necessary for a grant of emergent relief, and that respondent's action was not arbitrary, capricious or unreasonable. The ALJ's order was received by the Commissioner just prior to the graduation ceremony on June 11, 2007, with insufficient time remaining to review the audiotape of the hearing or issue a final written decision.

As the graduation ceremony in question took place on June 11, 2007, the application for emergent relief has now been rendered moot. Nonetheless, the Commissioner noted that she found no fault with the ALJ's conclusion that petitioner's evidence fell short of meeting the emergent relief standards. Furthermore – upon review of the record – the Commissioner concurred with the ALJ that respondent's action was not arbitrary, capricious or unreasonable; the Board's determination was based on long-standing district policy prohibiting students who have not met all graduation requirements from participating in graduation exercises. Accordingly, the Commissioner dismissed the petitioner's appeal and application for emergent relief.

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

July 23, 2007

OAL DKT. NO. EDU 4486-07
AGENCY DKT. NO. 150-6/07

J.Z. on behalf of minor child C.Q.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was transmitted to the Office of Administrative Law (OAL) as an application for emergent relief. Petitioner's appeal challenged a decision of the respondent school district not to allow her daughter, C.Q., to participate in graduation exercises that were to take place on the same date as the hearing in the OAL – June 11, 2007. After hearing testimony from the parties and reviewing the exhibits presented, the Administrative Law Judge (ALJ) determined that petitioner had not provided evidence sufficient to meet the standards necessary for a grant of emergent relief. Further, the ALJ found that respondent's action was not arbitrary, capricious or unreasonable. The ALJ's Order was received by the Commissioner just prior to the graduation ceremony on June 11, 2007, with insufficient time remaining before the ceremony to review the audio tape of the hearing or to issue a final written decision.

As the graduation ceremony in question took place on June 11, 2007, the application for emergent relief has now been rendered moot. Nonetheless, the Commissioner notes that she finds no fault with the ALJ's conclusion that petitioner's evidence fell short of meeting the emergent relief standards. As to the merits of the respondent's action, after reviewing the record, including the audio tape of the June 11, 2007 hearing, and the

Initial Decision, the Commissioner concurs with the ALJ that it was not arbitrary, capricious or unreasonable.

The testimony and exhibits presented by respondent demonstrated that C.Q. failed her fourth year of English, a course required by the State for graduation. Her average for the year was 67, three points short of a passing grade. The district's long-standing policy, set forth in respondent's exhibit R-1, prohibits students who have not met all graduation requirements from participating in graduation exercises. This policy was applied this year to fourteen students, including one whose average in English was 69. (Initial Decision, p. 5)

Evidence offered at the hearing established that C.Q.'s test scores throughout the year were erratic, ranging from 0 to 100. She failed to complete many assignments, including homework, essays and her term paper, which was a significant component of the grade for the course. (R-2) Her unexcused absences, about which letters were sent home, exceeded the allowed amount. (R-5)

In respondent's district students and parents have on-line access to students' scores for each assignment in each course, to allow a detailed picture of the students' academic progress and to flag problems. Petitioner acknowledged that she has internet service to her home. (Initial Decision, p. 3) Additionally, the principal of C.Q.'s school met with her on or about May 1, 2007, to discuss the fact that her graduation was in question. A follow-up letter was sent home to advise her parent(s) that C.Q. should meet with her teachers to "make arrangements to complete all work," and that attendance was "crucial." (R-4) Nonetheless, C.Q. accumulated five more absences, two being unexcused. (R-5)

Rules and regulations for participation in graduation ceremonies are clearly within the purview of management's discretion. *J.M. on behalf of minor child C.P. v. Hanover Park*

Regional Board of Education, OAL DKT. NO. EDS 5606-00, AGENCY DKT. NO. 00-4152E, Final Decision June 23, 2000, p.2 (matters concerning graduation are within the discretion of the District). Under the foregoing circumstances, it cannot be said that respondent's application to C.Q. of its policy about graduation requirements was arbitrary, capricious or unreasonable. Thus, petitioner's challenge to this action cannot succeed. As explained by the ALJ:

> Board decisions will not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." [*G.M. v. Roselle Park Borough Board of Education*, 95 *N.J.A.R.* 2d. (EDU) 107, 109] Local boards of education have reasonable discretion for various managerial matters.
>
> Initial Decision, p. 4-5.

Finally, the Commissioner acknowledges that petitioner and her daughter have struggled with more difficult family circumstances than many of C.Q.'s fellow students. C.Q. is to be commended for her progress, and the Commissioner hopes that she will soon complete the requirements for her high school diploma and attend college. However, the Commissioner concludes that respondent's action was reasonable.

Accordingly, petitioner's appeal and application for emergent relief are dismissed and, pursuant to *N.J.A.C.* 1:1-3.3, the Commissioner requests the return of the file from the OAL.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/07

Date of Mailing: 7/24/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 4486-07

AGENCY DKT. NO. 150-6/07

J.Z. O/B/O C.Q.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

J.Z., petitioning parent, pro se

Barbara R. Lapham, Esq., for respondent (Capizola, Baker, Lapham & Fralinger, P.A.,attorneys)

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

STATEMENT OF THE CASE

On or about June 11, 2007, petitioner learned that her daughter would not be participating in the graduation ceremony scheduled on the same date. Petitioner's daughter, C.Q., failed her College English IV course with a grade of 67. She was required to receive a final passing grade of 70. The District's policy clearly provides that any student not meeting all of the requirements will not participate in graduation ceremonies. (R-1). I **CONCLUDE** that petitioner did not meet her burden of proof

establishing that she was entitled to emergent relief or that the decision of the District was arbitrary and capricious.

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a petition for emergent relief on or about June 11, 2007. The matter was transmitted to the Office of Administrative Law (OAL) on June 11, 2007, to be heard as an emergent contested case. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5o.

The matter was scheduled for hearing on June 11, 2007, at 2:00 p.m. at the OAL office in Atlantic City, New Jersey. The hearing proceeded on that date.

SUMMARY OF REVELANT FACTS

Petitioner's arguments are appropriately summarized in her request for emergent relief. It provides as follows:

> I am requesting emergency relief for my daughter, [C.Q.], they are not allowing her to walk or graduate with her graduating class. Graduation is 6/11/07 at 5 pm. [C.] has unusual circumstances, and I feel considering her cercumstances (sic) that she should be able to graduate and walk with her class, which she has worked to so hard to do. In 1994 [C.'s] aunt, my sister, was murdered here in Buena Vista Township. This can be verified by loggin (sic) on to America's Most Wanted. Her name was [P.B.]. She left behind four child, in which I fault and received custody of. I raised them along with my three children, all together. Four of them have all ready graduated and become secsessful (sic) adults and unfortunately I received no kind of assistance raising them, I had to work 14 hours a day, and was unable to help [C.] with her homework/school work, so she ended up becoming, which I regret greatly, in the Special education classes. By herself she worked her way out of the learning center and into regular classes, although it was hard for her she went on to become a national honor society student, principal's list, and honor roll & student of the month. In her last hear at high school [C.] decided to get

> a job to pay for the things I could not afford to by her so she could be like all of the other kids. This hurt her grade, specially in the two middle marking periods, and she had also been very sickly this year and they never contacted me myself to tell me my daughter was in danger of not graduating until it was too late. I received a call from her guidance consoler (sic) a few days before graduation saying she had to study very hard for her final so she could pass and that was the first that I had heard from the school that she was in any kind of trouble. She did study hard, and got an 83 on her final, but unfortunately her average for the year came out to an 67, three points away from passing and graduating. I spoked to everyone that I possibly could to resolve this problem and no one would help. Please do not do this to my little girl. Please allow her to walk with her graduating class tonight at 5 pm. She has cried so much her eye is swollen shut, but yet she still wants to walk anyway. After all she's been through I feel if you do not allow her after all these (sic) years working hard to walk with her class that it will do psychological damage, and she will give in life. She plans to attend Cumberland County College.
>
> Please I begg (sic) of you help her.

Petitioner acknowledged that her daughter's grades are available on the internet. She also acknowledged that she has internet capability at home.

Petitioner urged that her daughter may suffer psychological damage as a result of not participating in the graduation ceremony. Upon further inquiry, however, petitioner confirmed that her daughter does not presently suffer from any psychological disorder, nor is she currently being treated for any psychological or mental deficits.

Kenneth Soboloski, Principal, testified for the District. Soboloski relied primarily on the District's policy. The policy provides any student not meeting all of the requirements will not participate in graduation ceremonies. (R-1). Soboloski has been with the school district for approximately twenty-five years. He stated that this has been the policy as long as he has been with the District.

Soboloski stated that petitioner's daughter did not complete all of the requirements to participate in graduation. Specifically, she failed College English IV, which is a requirement to graduate. C.Q. received a 67. A 70 is considered a passing grade.

Soboloski stated that he reviewed the list of students who potentially may not graduate in early May. He personally met with these students and advised them of what was required to graduate. Moreover, he sent a letter to their parents advising them of potential problems with graduation. (R-4). Accordingly, Soboloski believed that the parents and students had ample notice by way of report cards, internet access to grades and his letter (R-4), which was dispatched at least six weeks before graduation.

APPLICABLE LAW

Petitioner carries the burden in seeking emergent relief. The standard is set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340 (1997). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. The relative hardship to the parties in granting or denying relief must be considered. Id. at 132-34.

The burden not only rest with petitioner to meet the emergent relief standards but petitioner also has the burden of proving unreasonableness for actions that are within the management's prerogative. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. Board decisions will not be "usurped or

assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." Ibid. Local boards of education have reasonable discretion for various managerial matters. For example, the Commissioner has held that the matters of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a `management prerogative' of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." Paddock v. Demarest Bor. Bd. of Educ., 1974 S.L.D., 435, 440; See also, Kopera v. Bd. of Educ. Tp. Of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

Petitioners have not met the abovementioned elements necessary for emergent relief. Here, petitioner has not established that her daughter will suffer any irreparable harm. While failing to participate in the graduation ceremony is emotionally unsettling, it does not equate to irreparable harm. There was no evidence of any potential psychological damage as argued by petitioner. Furthermore, the legal right is well settled in favor of the District. Rules and regulations for participation in graduation ceremonies are clearly within the purview of management's discretion. It is not for this tribunal or the Commissioner to interfere with those decisions unless they are unreasonable, arbitrary or capricious. As stated by Soboloski, this has been the school's policy for at least twenty to twenty-five years. There are fourteen other students who will not graduate. One of C.Q.'s peers in the same College English IV class received a 69. This is one point away from a passing grade and that student will not be permitted to participate in the graduation ceremonies either.

I am mindful that petitioner's daughter worked very hard to get the passing grades she did earn. This was accomplished under more difficult circumstances than those commonly facing most students. Petitioner had to work several jobs in order to meet her obligations. Petitioner lost her sister. Petitioner provided housing and shelter for her sister's children. This was all disruptive to the household. Petitioner's daughter progressed very well, except for the last half of this year. I encourage petitioner and her

daughter to move past this event, complete whatever obligations are outstanding to receive her diploma and to attend college as planned.

I **FIND** the policy and the decision of the District to be reasonable under the circumstances presented. I **FIND** that there are no further issues to be resolved as the request for emergent relief pertained to a graduation ceremony is scheduled for the same date as this Order.

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** and hereby **ORDER** that petitioner's request for emergent relief be **DENIED.** The action filed by petitioner is **DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 11, 2007
DATE

W. TODD MILLER, ALJ

/sd

APPENDIX

Documents In Evidence

For Petitioner:

For Respondent:

R-1	Graduation and Promotion Policy
R-2	Scores, College English IV, Term 06-07 Q4
R-3	Quick Lookup, Term 06-07 Q4
R-4	Letter to Parent, May 1, 2007
R-5	Attendance Report, Term 06-07 Q4

Witnesses

For Petitioner:

J.Z.

C.Q.

For Respondent:

Kenneth Soboloski, Principal

OAL DKT. NO. EDU 4709-07
AGENCY DKT. NO. 180-6/07

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
MILU BUS SERVICE AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,	:	
RESPONDENTS.	:	

The record of this matter, including the audiotape of proceedings, and the recommended Order of the Office of Administrative Law (OAL) – granting petitioner's application for emergent relief pending hearing on the merits – have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons expressed in the OAL Order, that petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6, particularly with respect to likelihood of success on the merits based upon construction of the operative statute (*N.J.S.A.* 18A:39-11.3).

Accordingly, the recommended Order of the OAL, staying the County Superintendent's determination limiting the Middletown Board of Education's ability to disqualify Milu Bus Service as a bidder on district transportation contracts to two specified contracts for a period of three years, is adopted for the reasons expressed therein. This matter shall proceed to plenary hearing at the OAL as contemplated by the parties and the ALJ.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/19/07
Date of Mailing: 7/19/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER
GRANTING EMERGENT RELIEF
OAL DKT. NO. EDU 04709-07
AGENCY DKT. 180-6/07

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Petitioner,

v.

MILU BUS SERVICE AND MONMOUTH COUNTY SUPERINTENDENT OF EDUCATION,

Respondents.

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

The Board of Education of the Township of Middletown, Monmouth County ("Board"), seeks emergency relief from the Commissioner of Education, in regard to a decision issued by the Monmouth County Superintendent of Schools on June 15, 2007, in which the County Superintendent determined that the Board had demonstrated that Milu Bus Service had been guilty of nonperformance in respect to its service to the Board under bus service contracts and therefore a "prior negative experience" existed as to Milu. The Superintendent found that given the existence of this "experience" the Board could exercise its discretion under N.J.S.A. 18A:39-11.3 and could decide whether to disqualify Milu as a prospective bidder. However, the Superintendent added

that to the extent that the Board decided to disqualify Milu, any disqualification was "limited to bus routes MAST 3 and N234" and was "for a period of three years."[i] The Board contends that while the County Superintendent properly exercised her statutory role by determining the existence of nonperformance and a "prior negative experience" as N.J.S.A. 18A:39-11.3 provides she must do before the Board "may" exercise its discretion to decide to disqualify a bidder, she exceeded her authorized role when she placed limitations upon the authority of the Board as to how it might exercise that discretion. As the Board must shortly award contracts for bus service for the coming school year and must undertake the process for properly advertising and awarding such contracts, it seeks to remove the limitations on its discretion as imposed by the Superintendent's ruling, which it believes are not lawful. The Attorney General, representing the County Superintendent, and Milu, oppose emergency relief. Milu represents that it has filed an appeal of the County Superintendent's underlying determination concerning the existence of nonperformance and a "prior negative experience," but that appeal has not yet been referred to the Office of Administrative Law. Thus, at this time there is no challenge before me to the underlying decision of the county superintendent that a nonperformance occurred and that this constituted a "prior negative experience." It is this context that the right of the Board to emergency relief must be judged.

N.J.S.A. 18A:39-11.3 states

> a. A board of education may, by resolution approved by a majority of the board of education and subject to the provisions of subsection b. of this section, disqualify a bidder who would otherwise be determined to be the lowest responsible bidder for a pupil transportation contract, if the board of education finds that it has had prior negative experience with the bidder. The disqualification shall be for a reasonable, defined period of time which shall not exceed three years.

[i] At oral argument the deputy attorney general posited that this statement might be unclear, as the statute itself defines the possible period of disqualification as "a reasonable period of time which shall not exceed three years." However, the Superintendent's words are very clear. She has directed that the disqualification that might be imposed on Milu in regard to these two routes be for "three years." Also, Board counsel notes that given the changes from year to year in pupil transportation needs and routes, these specific routes may not exist in this or any coming year. This may raise a question as to what the effect of the limitation of any disqualification to these two routes may mean from a practical point of view. If they do not exist, does the authority of the Board to disqualify Milu for its nonperformance disappear entirely?

> b. As used in this section, "prior negative experience" means any of the following:
>
> (1) the bidder has been determined to be "nonperforming" under a pupil transportation contract after a hearing which shall include the bidder, the superintendent of schools, and the county superintendent of schools. The county superintendent of schools shall make the determination as to nonperformance and this determination may be appealed to Commissioner of Education and the State Board of Education, as provided by law;
>
> (2) the bidder defaulted on a transportation contract thereby requiring the board of education to utilize the services of another contractor to complete the contract;
>
> (3) the bidder defaulted on a transportation contract thereby requiring the board of education to look to the bidder's surety for completion of the contract or tender of the costs of completion; or
>
> (4) the bidder has at least a 10% ownership in any contractor that had prior negative experience with the board of education as described in paragraphs (1) through (3) of this subsection.
>
> [Ibid.]

Thus, this statute provides that given certain circumstances a board of education may exercise its discretion to disqualify a bidder. However, if the basis for such action is to be based upon "nonperformance," the board may not itself determine the existence of such a predicate experience. That determination is vouchsafed to the county superintendent. The plain language of the act then makes it clear that it is not the county superintendent who makes the decision whether to disqualify. Instead, that is the board's decision to make once the county superintendent determines that "nonperformance" has been established. Further, there is no language in the statute which purports to give the county superintendent any role whatsoever in either deciding to exercise the discretion to disqualify or to place any limits upon the board as to if and how it shall exercise that discretion, once the county superintendent has found that nonperformance occurred. Under this statute, once the county superintendent finds nonperformance, it is clearly for the board to disqualify if it so decides, and for it to place

any lawful parameters on the disqualification. Then, If the disqualified bidder believes that the board has exceeded the bounds of reasonableness regarding any particulars of the disqualification, such as, for example, that it has disqualified the bidder as to all transportation contracts for all routes rather than only for those on which specific examples of nonperformance were proven to the satisfaction of the county superintendent, than, as is typically the case where a party believes that a local school board has acted in an arbitrary and capricious manner, the bidder may challenge the board's action before the Commissioner, who typically will not interfere with the exercise of a board's discretion unless it has acted in such an arbitrary or capricious manner. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).[ii]

For the board to prevail on its request for emergent relief, it must satisfy the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). The moving party must establish that 1. It will suffer irreparable harm if the requested relief is not granted; 2. The legal right underlying the moving party's claim is settled; 3. The moving party has the likelihood of prevailing in the merits of the underlying claim; and 4. When the equities and interests of the parties are balanced, the moving party will suffer greater harm than the other party if the requested relief is not granted.

ARE THE LEGAL RIGHTS UNDERLYING THE CLAIM SETTLED?

There is at present no question but that the Board has the legal right to exercise its discretionary authority to determine whether to disqualify Milu. The Board does not dispute that the superintendent was correct in finding the existence of nonperformance and a prior negative event, indeed it endorses such finding. Its only dispute with her is the limitations she placed on the exercise of its discretion. While Milu may contend that no such nonperformance was proven and that no "prior negative experience" exists, its appeal from the County Superintendent's ruling is not yet ripe. Thus, in judging whether the Board's legal right to disqualify is settled, at this time, based upon the statutory

[ii] It is perhaps telling that in her brief, the deputy attorney general states that in regard to the safety concern raised by the Board, the superintendent "took these concerns into consideration when making her determination. Had she determined that the pupils . . . were in danger because of Milu's nonperformance, she would have disqualified it entirely" (emphasis added). But nowhere does the statute give the superintendent the authority to disqualify. That decision is specifically assigned to the board of education.

construct, it clearly is. What is at contest now is whether in exercising its discretion the Board, should it even determine to effectuate any disqualification, is prevented from applying that disqualification to contracts for routes other than the two routes identified by the superintendent and whether it may impose any disqualification, whether only to one or both of the two identified routes or to others that may be subject to bidding, for a period other than the three years which the superintendent said must be the period of disqualification.

IS THERE A REASONABLE LIKELIHOOD OF SUCCESS?

Here, both Milu and the Superintendent argue that the limitation placed on the Board's discretion, limiting any disqualification to the two routes on which nonperformance occurred, does not violate the authority of the Superintendent. If the only evidence of nonperformance, and thus of prior negative experience, proven to the Superintendent (of course Milu is going to claim none was proven), is on these routes, then the only authorization that the Board has under the statute is to disqualify as to those two routes and the Superintendent, by saying so, is merely establishing the limits of her finding of nonperformance, that is, it has not been proven as to other routes and thus no predicate event for the exercise of the Board's discretion as to the other routes exists. Indeed, the deputy attorney general posited that given the Superintendent's reference to nonperformance on the two routes, it is implied that she found no nonperformance on the other routes. Be that as it may, the Board's decision as to what the impact of a finding of nonperformance and of a prior negative experience on any routes under contract to the potential bidder may, perhaps correctly, be influenced by whether the Board determines that as a result of the finding(s), the offending bidder is not a "responsible bidder." If it then deems disqualification from all bidding to be the proper response to the Superintendent's finding of nonperformance, that decision as to the scope of disqualification, as well as to the fact of any disqualification at all, can be challenged by the disqualified bidder as being arbitrary before the Commissioner.[iii] The

[iii] At oral argument I posited a scenario where nonperformance on a particular route led to the death of a student. The Superintendent might decide that the contractor failed in its performance on that route. But would the board be justified in deciding that a potential bidder responsible for the death of a student should be disqualified from competing for contracts to transport any of its students? And would the voters be justified in voting out of office board members who took the chance on continuing a relationship with

plain wording of the statute simply does not give the Superintendent the role of deciding what to do after she decides that a nonperformance occurred. That is for the Board to determine. Thus, to the extent that the Board here seeks to overturn the restrictions imposed, it has a strong likelihood of prevailing on that issue.

IRREPARABLE HARM

The Superintendent argues that there is no showing of irreparable harm if the restrictions imposed by the Superintendent remain in place pending a plenary hearing. Generally, harm is considered irreparable if it can not be redressed by monetary damages. Crowe, supra. at 132. The Board argues that what is at stake in deciding on any disqualification based on the nonperformance demonstrated here is student safety, for the genesis of the claims against Milu arose from incidents in which student safety has, or could have been, compromised, including an incident in which a pupil was allegedly supplied with methadone by a Milu employee on a school bus. That employee is under indictment; another is also indicted for supplying cigarettes to students on the school bus. Milu's attorney, without offering any supporting documents, disputes that the aide was involved in any such distribution.

What in fact the Superintendent found was that the Board complained about incidents occurring "primarily" on routes MAST 3 and N234, that an indictment had been returned for an incident allegedly occurring on N234, involving distribution by an aide of a controlled dangerous substance on a school bus and endangering the welfare of a child, that Milu admitted "that the proper criminal history background checks and fingerprinted (sic) had not been completed on the aide," that the Board and employees thereof had been named in a Notice of Claim by the family of the student allegedly injured in this October 30, 2006 incident, that the parties had reached a Sidebar Agreement on December 15, 2007 reinforcing the "element" [?] requirements of the statute and code and allowing Middletown Township staff to conduct on-site inspections of Milu buses on a daily basis and that a Corrective Action Plan had been submitted to the DOE's Office of Compliance Investigation and approved by that office. She then

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such a contractor? It is for the board to make the decision how nonperformance should be treated, and if it exceeds its proper limits, for the Commissioner to declare its conduct arbitrary and to overturn it?

concluded that Middletown had presented several "legitimate concerns regarding the Defendant's [Milu's] failure to adhere to statutory and code requirements," *primarily* centered on two bus routes assigned to Milu, that Milu had admitted to negligence, that "upon review" of the Corrective Action Plan, Milu "has adequately addressed all elements of the Plan," that Milu admitted that its lack of follow-up was "due to a breakdown in personnel responsibilities, and has restructured its personnel to provide proactive attention to statutory and code requirements," that delays in the State's fingerprinting process have "contributed to delays in receipt of documentation for bus drivers and aides," and that the Board bears a "level of responsibility" to ensure that all contractors adhere to statutory and code requirements for proper documentation of drivers and aides (emphasis not in original). She also concluded that Milu had not performed under elements of the contract, specifically 1 (all contractors to comply with New Jersey statutes, regulations and policies of the district governing pupil transportation); 16 (bus routes and stops not to be deviated from except by prior written consent or in the case of emergency, "which shall be reported promptly, thereafter to the school district"); 17 (every driver shall meet all regulations of the State. . .); 17a (bidder agrees to submit list of certified drivers . . .to furnish NJ Transmittal Form for Non-Criminal Check . . . for all personnel including drivers and aides); 17b (bidder shall prepare a plan . . . to provide for pre-employment review and testing, including criminal history checks for all staff as applicable under State law); 36 (successful contractor to provide list of drivers driving Middletown students); and 39 (Board requires that all persons-drivers and aides, having contact with the school children shall be a reliable person of good character and shall comply with rules for drivers in all federal, state and local regulations including background check).

If the Board is required to limit any disqualification of Milu to the two routes identified by the Superintendent, it may be placed in the unenviable position of having to award a contract(s) to a low bidder which has been demonstrated to have failed to perform its contractual responsibilities regarding matters that are either directly related to or arguably involve concerns regarding the safety of students. Failure to perform criminal background checks and negligence in the carrying out of transportation duties, including the overriding concern for pupil safety that is inherent in any transportation

contract, are matters that any board of education must take into account in determining whether a prospective bidder is "responsible." Matters of pupil safety trump matters of economic concern, such as the need to assure sufficient bidders. If the Board is required to contract with Milu despite its failures, no amount of money could redress any subsequent failure that might endanger the safety of students. Thus, if this emergent relief is not granted, irreparable harm may occur.

BALANCING THE EQUITIES

It is important to recall that at this juncture the Board has not yet determined if it will actually disqualify Milu, or of it does, to what extent it will do so. The only issue presently before the Commissioner is whether the Board is limited by the County Superintendent's decision as to the manner in which it may exercise its statutory discretion. While Milu may now claim that it has been hurt by the Superintendent's finding of nonperformance, as of this moment it has not been been disqualified. If the Board eventually does disqualify it, then Milu may challenge that action, and if it deems it necessary, may apply to the Commissioner for emergent relief from the effects of the disqualification. But now, the Board has been limited and the party whose action is challenged is not Milu, but the County Superintendent. The equities in favor of the board receiving relief are stronger than those favoring the Superintendent. As noted, it seems clear that the Superintendent overstepped her bounds. The Board may be harmed if required to accept bids, perhaps the low bid(s), from Milu. The Superintendent's interests are purportedly the need to assure that there is no interruption in transportation services to the students of Middletown Township. There is no evidence in the record to suggest that even if Milu is disqualified from all contracts with this Board, that the Board will not be able to contract with responsible bidders at reasonable cost to its citizens. The potential harm to the district and its pupils outweighs the potential harm posited by the Superintendent.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01887-07
AGENCY DKT. NO. 431-11/06

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL POLICY AND PLANNING,

Respondent.

Sheldon H. Pincus, Esq., for petitioner (Bucceri & Pincus, attorneys)

Sookie Bai, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General of New Jersey, attorney)

Record Closed: June 22, 2007 Decided: June 22, 2007

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

This matter was transmitted to the Office of Administrative Law on February 22, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

During a telephone conference on June 18, 2007, counsel advised that the matter had been settled and forwarded the enclosed Settlement Agreement indicating the terms of settlement which was received by the undersigned on June 22, 2007.

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

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

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

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

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

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

6-22-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 6-27-07

Mailed to Parties:

JUN 27 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

ANNE MILGRAM
FIRST ASSISTANT ATTORNEY GENERAL
OF NEW JERSEY
Attorney for Respondent
New Jersey Department of Education
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Sookie Bae
Deputy Attorney General
(609)984-8464

RECEIVED
2007 JUN 22 A 8:29
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,	BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION
Petitioner,	AGENCY DOCKET NO. 431-11/06 OAL Dkt. No.: EDU-01887-07N
v.	
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL PLANNING AND POLICY,	**SETTLEMENT AGREEMENT**
Respondent.	

WHEREAS, Petitioner, Bergen Center for Child Development, Inc. ("BCCD") and Respondent, New Jersey Department of Education, Office of Fiscal Planning and Policy ("Department"), have mutually agreed to settle the above-captioned matter, with Sheldon Pincus appearing on behalf of BCCD and Anne Milgram, First Assistant Attorney General of New Jersey, by Sookie Bae, Deputy Attorney General, appearing on behalf of the Department; and

WHEREAS, on or about November 17, 2006, the Petitioner filed a Verified Petition of Appeal with the New Jersey

Commissioner of Education, that challenged the disallowance of certain costs in regard to its hiring of an Occupational Therapist for the school year 2005-2006; and

WHEREAS, in lieu of filing an Answer to the Verified Petition of Appeal, the Respondent, on December 21, 2006, filed a Motion to Dismiss the Verified Petition, alleging that the matter was not ripe for review; and

WHEREAS, on or about January 9, 2007, BCCD filed a Cross-Motion seeking Leave to file an Amended Verified Petition of Appeal and for Summary Judgment; and

WHEREAS, on or about January 31, 2007, the New Jersey Department of Education, Director of the Bureau of Controversies and Disputes transmitted the matters to the N.J. Office of Administrative Law for disposition by an Administrative Law Judge; and,

WHEREAS, the matter was scheduled for Oral Argument ~~April~~ June 19, 2007 and decision by an Administrative Law Judge;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. BCCD agrees that it shall undertake to have its Certified Public Accountant provide to the Department the salary paid to and the cost of any associated fringe benefits paid on

behalf of Karen Fink ("Fink"), in each calendar month, commencing December 1, 2005 and ending July, 31, 2006.

2. Within forty-five (45) days of receiving the information detailed in paragraph 1 of this Agreement, the Department shall adjust BCCD's approved school tuition rate for the school year 2005-2006. Within forty-five (45) days of receiving the audited financial statements for 2006-2007 which are to be submitted by November 1, 2007 pursuant to regulation, the Department shall adjust BCCD's approved school tuition rate for the school year 2006-2007.

3. The adjustment referenced in paragraph 2 of this Agreement shall be based on the parties' estimate that the total cost of the salary and fringe benefits paid by BCCD on behalf of Fink for the period commencing December 1, 2005 and ending June 30, 2006, was approximately $34,440, and that the total cost of salary and fringe benefits paid by BCCD on behalf of Fink from from July 1, 2006 to July 31, 2006 was approximately $4,640.

4. In accordance with the details set forth above, it is understood that the adjustment will be within reasonable proximity to an allowance of the salary and fringe benefits paid on behalf of Fink from February 1, 2006 through June 30, 2006 in the projected sum of Twenty-One Thousand, Nine-Hundred and Twenty-Three Dollars ($21,923), an allowance of the salary and fringe benefits paid on behalf of Fink from July 1, 2006 through July 31, 2006 in

the projected sum of Four-Thousand, Six-hundred and Forty ($4,640), and a disallowance the salary and fringe benefits paid on behalf of Fink from December 1, 2005 through January 31, 2006 in the projected sum of Twelve-Thousand, Five-Hundred and Seventeen Dollars ($12,517).

5. Upon the Department's adjustment of the tuition rate for the 2005-2006 and 2006-2007 school years as set forth in this Agreement, BCCD agrees to withdraw its petition in the above-caption and release the Department from all claims and give up any and all claims raised in its Petition filed with the Bureau of Controversies and Disputes on or about November 17, 2006.

6. Entry into this Agreement shall not be construed as an admission of wrongdoing or liability by either party.

7. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement.

8. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

9. The undersigned representatives of the BCCD and the Department hereby acknowledge that they have been duly authorized to sign this Settlement Agreement and bind their respective principals to its terms.

10. All terms of this Settlement Agreement are deemed material.

294-07

OAL DKT. NO. EDU 1887-07
AGENCY DKT. NO. 431-11/06

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL POLICY AND PLANNING,	:	DECISION
RESPONDENT.	:	

The record of this matter and Settlement Agreement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement – pursuant to *N.J.A.C.* 1:1-19.1(c) and (d) – is deemed to be the final decision in this matter.

IT IS SO ORDERED.

Lucille Edaly
COMMISSIONER OF EDUCATION

Date of Decision: 7/19/07

Date of Mailing: 7/19/07

CONCLUSION

I **CONCLUDE** that the Board has satisfied the requirements for emergent relief. It is **ORDERED** that pending a plenary hearing, the restrictions on the Board's discretion to deal with the finding of nonperformance are stricken.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 11, 2007
DATE

JEFF S. MASIN, ALJ

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Certification of William J. Doering in Support of Petition of Appeal and Request for Emergent Relief

P-2 2005-2006 Student Transportation Contract – Multi-Contract and related documents, Middletown Twsp. BOE, Monmouth County

11. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Sheldon Pincus, Esquire
On Behalf of Petitioner

6/20/07
Date

ANNE MILGRAM
FIRST ASSISTANT ATTORNEY GENERAL
OF NEW JERSEY

Sookie Bae, DAG
On Behalf of Respondent

6/18/07
Date

300-07

OAL DKT. NO. EDU 3139-07
AGENCY DKT. NO. 17-1/07

D.R.P., ON BEHALF OF MINOR CHILD, B.L.DeP.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMPTON, SUSSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to meet her burden of establishing B.L.DeP.'s entitlement to attend school in the Board of Education's district pursuant to *N.J.S.A.* 18A:38-1.

Accordingly, the Initial Decision of the OAL – dismissing the Petition of Appeal and directing that petitioner be assessed tuition in the amount of $3,751.02 plus $59.54 for each day of B.L.DeP.'s continued attendance subsequent to April 4, 2007 – is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/25/07
Date of Mailing: 7/25/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

D.R.P., ON BEHALF OF MINOR CHILD, B.L.DeP.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMPTON, SUSSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of Hampton Township – contested respondent's determination that her nephew, B.L.DeP., is ineligible to attend school in respondent's district, claiming that she was in the process of taking guardianship because of family or economic hardship pursuant to *N.J.S.A.* 18A:38-1(b). Respondent sought tuition reimbursement for the alleged period of ineligible attendance.

The ALJ found that: B.L.DeP. was not properly domiciled in respondent's school district as required under *N.J.S.A.* 18A:38-1(a); no proof was submitted by petitioner that she is the legal guardian of her nephew; both D.R.P. and D.S. – B.L.DeP.'s mother – failed to demonstrate a family or economic hardship that would render the parent unable to support or provide care for her son. The ALJ concluded that B.L.DeP. is neither domiciled in respondent's district nor living in the home of someone domiciled in the district due to family or economic hardship, affirmed the Board's decision to remove the child from district schools, and granted the Board's application for tuition in the amount of $3,751.02 plus $59.54 per day for each day of B.L.DeP.'s attendance in the district after April 4, 2007.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision as the final decision, and directed that petitioner be assessed tuition for B.L.DeP.'s period of ineligible attendance, as set forth by the ALJ.

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

July 25, 2007

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3139-07
Agency Dkt. No.: 17-1/07

D.R.P., on behalf of minor child, B.L.DeP,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMPTON, SUSSEX COUNTY,
Respondent.

D.R.P., pro se, representing petitioner

Cherie L. Adams, Esq., representing Board of Education of the Township of Hampton, Sussex County
(Sills Cummis Epstein & Gross, attorneys)

Record Closed: April 30, 2007 Decided: June 11, 2007

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner D.R.P., a resident of the Township of Hampton, appeals the determination of respondent Board of Education of the Township of Hampton (Board) that B.L.DeP., petitioner's nephew, is ineligible to attend the Hampton Township

schools. The Board answered that B.L.DeP.'s mother does not reside in the Township of Hampton, he does not have a legal guardian that resides in the Township of Hampton school district and the appeal has not shown a family or economic hardship, which would render the parent unable to support or provide care for the child. N.J.S.A. 18A: 38-1(b). Respondent requests tuition reimbursement for the alleged period of ineligible attendance.

By letter of January 3, 2007, the Board notified the mother of B.L.DeP. of its determination. On January 23, 2007, the Commissioner received an appeal from D.R.P., indicating that she was "in the process of taking guardianship". On February 9, 2007, an Answer was filed on behalf of the Board. On or about February 22, 2007, the Board received documentation which included an affidavit of applicant/guardian and a sworn statement of non-resident parents, dated February 9, 2007, for the purposes of enrolling B.L.DeP. as a non-resident "affidavit" pupil. On March 6, 2007, the Commissioner of the Department of Education transmitted this matter as a contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on April 4, 2007 and the record remained open pending receipt of additional documents from the parties and response to those documents. The record closed on April 30, 2007.

EVIDENCE

In January 2007, D.S., B.L.DeP.'s parent and legal guardian, attempted to enroll B.L.DeP. in the Hampton Township school district. D.S. is a resident of Hopatcong Borough. On January 3, 2007, the Board advised D.S. that B.L.DeP. is ineligible to be enrolled in the Hampton Township schools because "It is against school policy and state statute to switch schools on a temporary basis simply for the purpose of receiving an education as you have stated in our conference". D.R.P., B.L.DeP.'s maternal aunt, appealed the Board's determination and indicated in the appeal that "we are in the process of taking guardianship" and "DYFS and Child Study feels he is more stable mentally with me, due to hardship on my sister D.S.". No proof was offered by D.R.P. at the time, either to dispute the Board's contention or to support its own position on

appeal. Therefore, I am compelled to **FIND** as fact that B.L.DeP. was not properly domiciled in the Hampton Township school district as required under N.J.S.A. 18A:38-1(a) because no proof was submitted by D.R.P. either in January 2007 or at this hearing, that she is the legal guardian for B.L.DeP.

On February 9, 2007, D.R.P. and D.S. completed sworn statements which included an affidavit of applicant/guardian and a statement of non-resident parents and, on February 22, 2007, the Board received the documents. Although these documents were not part of the Board's initial determination of ineligibility, the documents were considered at this hearing in order to determine whether B.L.DeP. is entitled to a free public education pursuant to N.J.S.A. 18A:38-1(b)(1).

D.S., a single mother of four children, although admitting the Hampton Township schools as being "better", testified that the reason her son, B.L.DeP. is living with her sister, D.R.P., is "not just for education" but "really for his well being and his health". D.S. admits, on cross examination, to the fact that B.L.DeP. "can't be with me because of issues". D.S. describes "emotional trauma" but is unable to provide any supporting proof as to this concern. D.S. also submits a sworn statement of non-resident parents in which she states in her handwriting that "do to finical and other reasons" she is not capable of supporting the said child. However, neither the testimony provided or any of the proofs submitted, whether in February 2007 or as requested by the Court, support D.R.P.'s petition that D.S. is incapable of supporting or providing care for B.L.DeP. due to a family or economic hardship. I **FIND** that both D.R.P. and D.S. failed "to demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child."

LEGAL DISCUSSION

New Jersey provides that "public schools shall be free to . . . any child who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a minor child follows that of her parents. P.P.M. on behalf of S.S. v. Bd. of Ed. of the South Orange-

Maplewood School District, http://lawlibrary.rutgers.edu/oal/html/initial/edu01839-031.html. However, an exception exists under the following circumstances enumerated in *N.J.S.A.* 18A:38-1(b)1:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child *gratis* and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Thus, to meet the statutory requirement for the admission to the schools of a district of a child whose parent or parents do not live in the district, the evidence must show that; (1) petitioner is domiciled within the district; (2) petitioner is supporting the child *gratis*; (3) the child's parents are not capable of supporting or caring for her due to family or economic hardship, and (4) the child is not residing with petitioner solely for the purpose of receiving a free public education in the district. The requirement of the parents to substantiate the last two of the above elements is reiterated in N.J.A.C. 6A:22-3.2(a)1i which provides that a student is not eligible to attend school in a district unless:

> The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic

hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

Where the above elements are not met, the resident shall be assessed tuition computed on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance. N.J.S.A. 18A:38-1(b)1.

If the school board determines that the evidence does not support the validity of the claim of the resident for admission of a child whose parents or guardian do not live in the district, it may deny admission to the child and the resident may appeal to the Commissioner for a hearing. The resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in [the statute]." N.J.S.A. 18A:38-1(b)1.

As petitioner was the applicant for purposes of allowing B.L.DeP. to attend the Hampton Township district schools as an affidavit student, it was her responsibility to ultimately provide support for the application or to obtain from others such information necessary to support that application. A petitioner must establish not only a family hardship but one that renders the parents not capable of caring for their child. H.K and G.K on behalf of minor children J.K. and C.K v. Board of Education of the Township of Cherry Hill, Camden County, http://law library.rutgers,edu/oaldecisions/initial/edu673-97.html.(1998). Petitioner has not presented any evidence that might establish either element.

I **CONCLUDE** that B.L.DeP. is neither domiciled in the Township of Hampton school district or living in the home of someone domiciled in the district due to family or economic hardship.

The Board is entitled to recover tuition from a parent of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2) The Notice of Final Ineligibility letter dated January 3, 2007 calculates the annual tuition as $ 10717.00. The per diem rate is $ 59.54. ($ 10717.00 for one year divided by 180 days pursuant to N.J.A.C. 6a:22-6) There have been 63 days of ineligible attendance. Accordingly, the total due the Board through April 4, 2007, the date of the hearing, is $ 3751.02.

ORDER

I hereby **ORDER** that the Board's decision to remove B.L.DeP. from the Hampton Township school district is **AFFIRMED**. I further **ORDER** that the Board's application for tuition reimbursement is hereby **GRANTED** in the amount of $ 3751.02, plus $ 59.54 per day for each day B.L.DeP. attends school in the district after April 4, 2007.

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

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

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

June 11, 2007
DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 6/11/07

Mailed to Parties:

JUN 12 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESSES

Petitioner

D.S.
D.R.P.

Respondent

Everett C. Burns

EXHIBITS

Petitioner

P-1 DYFS letter dated April 18, 2007 regarding B.L.DeP.

Respondent

R-1 M.E. McKeown School New Student Registration Form
R-2 Minutes of meeting with D.S. of January 3, 2007
R-3 Notice of Ineligibility letter to D.S. dated January 3, 2007
R-4 Minutes of meeting with D.S. of January 18, 2007
R-5 Letter from Everett Burns to D.S. dated January 22, 2007
R-6 Affidavit of Applicant/Guardian, Application by a resident, Sworn statement of Non-resident parent

301-07

#301-07EL

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

July 27, 2007

Nikola Tasevski, President
Integrated Security Technology, Inc.
462 Barbara Avenue
Wyckoff, NJ 07481

Megan A. Ward, Esq.
Kelly & Ward, LLC
93 Spring Street – 4th Floor
P.O. Box 887
Newton, NJ 07860

Marc H. Zitomer, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
Ten James Street
Florham Park, NJ 07932

Thomas A. Sansone, President
T&R Alarm Systems, Inc./T&R Electric Systems, Inc.
189 Sargeant Avenue
Clifton, NJ 07013

Dear Parties:

I have reviewed the Petition and Application for Emergent Relief filed in the matter of *Integrated Security Technology, Inc. v. Township of Hardyston, Board of Education of the Township of Hardyston, Sussex County, T&R Alarm Systems, Inc., and T&R Electric Systems, Inc.*, Agency Dkt. No. 192-7/07, together with the submissions filed in response to the Department's July 17, 2007 request for briefing on the question of Commissioner of Education jurisdiction over the allegations made by petitioner. Upon such review, I have determined to deny petitioner's application for the reasons set forth below.

Petitioner asks that I stay the security system contract awarded to T&R Alarm Systems, Inc. on July 2, 2007 by Hardyston Township, and instead award it to petitioner as the lowest responsible bidder because T&R was not "responsible" in accordance with the requirements of law.

Initially, I note that any request of this type must meet the established standard for grant of extraordinary remedy, as set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982); see *N.J.A.C.* 6A:3-1.6. Specifically, the requesting party must be able to demonstrate that it will suffer irreparable harm in the absence of immediate relief, that its claim is based on settled law, that it is reasonably likely to prevail on the merits, and that the balance of equities and interests lies in its favor. In the present instance, I find that petitioner's application does not meet the requisite standard.

Even assuming, *arguendo*, that petitioner may be able to demonstrate irreparable harm, it cannot meet the remaining criteria because I cannot find at this point in proceedings that I properly have jurisdiction over this matter. Although primarily alleging violation of statutes and regulations outside school law, petitioner contends that this matter does fall within my jurisdiction because the contract in question (purportedly) arose out of a joint purchasing agreement between the Township and the Hardyston Board of Education pursuant to *N.J.S.A.* 18A:18A-11 *et seq.*, the provisions of which were not followed as required; the Township, however, specifically and vigorously denies such contention, characterizing petitioner's claim of a joint agreement as a "wild conjecture" proffered solely in furtherance of petitioner's attempt to litigate this matter in an administrative forum. Thus, the linchpin of petitioner's claim to Commissioner of Education jurisdiction in this matter is the subject of a material factual dispute, so that I cannot possibly find that the law is settled in petitioner's favor, that petitioner is likely to prevail on the merits of its substantive claim, or that petitioner's position is favored by the balancing of interests and equities. *Crowe, supra*, citing *Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 *N.J. Eq.* 299, 305-06 (E. & A. 1878) (a preliminary injunction should not issue where all material facts are controverted).

Moreover, even if my jurisdiction over this matter were more clearly established, there may be a question of petitioner's standing to challenge the bidding process itself after having elected to submit a bid pursuant to it, and it is further questionable whether I could in any event order the relief petitioner ultimately requests, since – if the provisions of the Public School Contracts Law apply as claimed – *N.J.S.A.* 18A:18A-22 may entitle the Board and Township to reject all bids.

Accordingly, I hereby DENY petitioner's Application for Emergent Relief and – unless petitioner in the interim notifies the Department and the parties that it no longer wishes to pursue its appeal before the Commissioner – direct that the Hardyston Board of Education and Township of Hardyston file their respective answers to the Petition of Appeal within twenty (20) days of their receipt of said petition.[1] Upon receipt of such answers, this matter will be transmitted to the Office of Administrative Law with the instruction that the assigned Administrative Law Judge address Commissioner of Education jurisdiction as a threshold issue, followed – if Commissioner jurisdiction is, indeed, established – by determinations on petitioner's standing to challenge the underlying bidding process and whether the Commissioner could order the relief requested even if petitioner's allegations were deemed true.[2] [3]

Sincerely,

Lucille E. Davy
Commissioner

c: County Superintendent
Jones Addo

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[1] T&R Alarm Systems, Inc. has already filed an Answer on its own behalf, additionally noting that T&R Electric Systems, Inc. did not bid on the contract at issue.

[2] Petitioner and respondent(s) T&R Alarm/Electric are advised to review the rules of the Office of Administrative Law pertaining to representation (*N.J.A.C.* 1:1-5.1 *et seq.*), so that they may ascertain whether their respective presidents are permitted to represent them.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

306-07

306-07

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

PETITIONER,

V.

ROBERT A. HOUSER,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board of Education sought removal of respondent Board member on grounds that his wife's Workers' Compensation claim against the Board – which was pending when respondent sought and assumed office during the 2006 school election, but was withdrawn when the Board raised the issue of conflict shortly before filing its petition in May 2007 – disqualified him from Board membership. Respondent denied that the claim was disqualifying, and contended that in any event its withdrawal mooted the Board's dispute; he further contended that the Board's petition must be dismissed as untimely, and that he was entitled to indemnification of his defense costs.

The ALJ found the Petition of Appeal timely, since the Board did not become aware of respondent's conflict until April 2007 and the matter was one of significant public interest; he further found that the dispute was not mooted by withdrawal of respondent's wife's claim. The ALJ concluded that such claim disqualified respondent from Board membership, and that his candidacy, election and seating were void from the outset. Respondent was ordered removed from the Board, with the County Superintendent of Schools to fill the resulting vacancy. Respondent was found to be entitled to indemnification of costs since the dispute arose out of his *de facto* Board membership.

The Commissioner adopted in part and reversed in part. The Commissioner concurred that the matter was not moot, and that it should be heard as a matter of significant public interest notwithstanding her disagreement with the ALJ's reasoning as to timeliness. The Commissioner further concurred that a spouse's Workers' Compensation claim against the board was an inconsistent interest precluding board membership pursuant to *N.J.S.A.* 18A:12-2, and that where such a claim existed at the time a candidate assumed office, his or her board membership was susceptible to being declared void. However, the Commissioner reversed the ALJ's finding that respondent was unable to run for Board office, holding instead that the provisions of *N.J.S.A.* 18A:12-2 do not apply to board candidates whose conflict is capable of being cured prior to seating if the candidate is elected. (*Thomas v. Edwards* State Board decision) The Commissioner also reversed, on equitable grounds, the ALJ's directive that respondent be removed as a Board member. Finding that the Board and respondent were equally culpable for failing to recognize and resolve the disqualifying conflict prior to respondent's assumption of office, the Commissioner deemed both the Board's challenge and respondent's cure to have occurred *nunc pro tunc*, so that respondent's Board membership could be now validated by re-administration of his oath of office, which the Board was directed to effectuate forthwith. Respondent was held entitled to indemnification of costs, subject to the provisions of *N.J.S.A.* 18A:12-20 as to accuracy and reasonableness.

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

July 30, 2007

305-01

305-07

OAL DKT. NO EDU 11180-04
AGENCY DKT. NO. 317-9/04

F.A.C. on behalf of minor child A.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The Initial Decision and record of this matter, including affidavits submitted subsequent to the hearing at the Office of Administrative Law (OAL) [1] but entered into evidence by the Administrative Law Judge (ALJ) when no objections were made by the respective opposing parties, have been reviewed. Accepting the ALJ's credibility determinations - as the Commissioner is obligated to do[2] - the Commissioner adopts the Initial Decision as the final decision, for the reasons set forth therein.

Petitioner's appeal is granted. A.A. was entitled to a free public education in respondent's district during the time that he attended school there; respondent's counterclaim is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/30/07

Date of Mailing: 7/30/07

[1] The Commissioner was not provided with a transcript of the March 1, 2006, hearing.
[2] *See, e.g., D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004).
[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11180-04

AGENCY DKT. NO. 317-9/04

F.A.C. O/B/O A.A.,

Petitioner,

v.

CITY OF CLIFTON BOARD OF EDUCATION,

Respondent.

F.A.C., petitioner, pro se

Anthony V. D'Elia, Esq., for respondent (Chasan Leyner & Lamparello, attorneys)

Record Closed: March 19, 2007 Decided: June 13, 2007

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

F.A.C. (petitioner) filed a petition with the State Department of Education (DOE) requesting a hearing to contest a determination by the City of Clifton (Clifton) Board of Education (BOE or respondent) that A.A., a minor child, was not entitled to a free public education in the District's schools. Respondent filed an Answer and Counterclaim seeking reimbursement of tuition, and the DOE transmitted the matter to the Office of

Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

The parties appeared for an initially scheduled hearing. F.A.C. requested that the hearing be adjourned, as she had decided to retain counsel. Her request was granted. Subsequent hearings were adjourned at petitioner's and respondent's requests; petitioner represented that she was still attempting to retain counsel. A hearing was subsequently conducted; petitioner was not represented by counsel. Settlement discussions which had previously commenced were again considered subsequent to the hearing, but were not successful. Additionally, the parties filed various documents, which were not available at the hearing, and, after communications in that respect, they were moved into evidence. The record was closed on the date of the last communications.

NATURE OF THE CASE

As is discussed in more detail hereinafter, the burden of proof, by a preponderance of the credible evidence, is upon F.A.C. to demonstrate that A.A. was entitled to a free education in the District at the time in question. If he were not, the burden is upon the BOE, also by a preponderance of the credible evidence, to establish the tuition for which petitioner is liable.

FINDINGS OF FACT

UNDISPUTED FACTS

It is clear that many of the relevant facts are not in dispute. Based upon a review of the entire record, I **FIND** the following to be facts.

F.A.C. is A.A.'s aunt. K.A. is A.A.'s father and F.A.C.'s brother. E.N. is A.A.'s mother. S.K. and N.B. are cousins of petitioner. S.K. has, currently, resided in the United States since 2000. S.K. previously resided in this country from 1975 until 1981.

N.B. has resided in proximity to petitioner for at least two years. They see each other on a regular basis, almost daily. F.A.C. resides in Clifton.

On or about September 3, 2004, petitioner completed, and filed with respondent, an application (Application) for admission of A.A. to the District's schools. The application stated, in part, that A.A., who was born in the United States, on February 27, 1989, had been residing with E.N., in "CESKA"; A.A. would be residing with F.A.C. for three weeks, while his father was in Europe; E.N. resided in Yugoslavia; and H.A., A.A.'s sister, who was 12 years old at the time, resided with E.N., and attended school, in Yugoslavia. (Exh. P-1, p. 2.)

As part of the Application, F.A.C. completed a document providing information pertinent to herself, which stated that F.A.C. had commenced residing at the applicable address, in Clifton, on July 1, 2004. She responded "No" to a question asking if the student would be claimed as a dependent on the applicant's income tax returns, though she did not respond to an inquiry regarding who would do so. (Id. at 3.) Petitioner responded as follows to a question regarding why the student was residing with the applicant:

> The student's father sold the house, will be buyuing {sic} house or apartment in Clifton, the student lives with me (Aunt F) and the father is at this time in Europe, when he returns he'll live with the other sister until after they either buy or rent something in Clifton, N.J. (Ibid.)

Petitioner also provided to respondent, as part of her Application, an "AFFIDAVIT OF APPLICANT (CLIFTON RESIDENT)", which was sworn and subscribed to on September 2, 2005, which stated, in part, that she was "gratuitously supporting" A.A., as if he were her "own child". (Id. at 4.)

By letter notice dated September 9, 2004, the BOE advised petitioner that it had denied her application for admission of A.A. to the District's schools.

N.B. went to Europe in August 2005, for two months. She visited with K.A. In her presence, K.A. signed an "AFFIDAVIT", dated August 15, 2005, which document, although signed by a "WITNESS", was not sworn. That document states that K.A. is the father of A.A., with "sole custody"; since September 2004, K.A. had not been "capable" of supporting, nor providing care for, A.A. because of "family and economic hardship"; since September 2004, and pursuant to K.A.'s "request", F.A.C. "has kept and supported my son gratis, as if he were her child". (Id. at 5 & Exh. R-4.) The Affidavit also stated that commencing in September 2004, A.A. had:

> resided exclusively and continuously at my sister's address in Clifton, New Jersey, and has never resided (and is not now residing) in the City of Clifton for the sole purpose of receiving a free public education with the Clifton school district. (Ibid.)

When she returned to the United States, N.B. gave the Affidavit to petitioner.

On the face of the document, K.A. executed a statement, before a Notary Public in the Czech Republic, on April 7, 2007. That document states that he gave petitioner "POWER of Attorney" over A.A., the latter was residing in the Unites States with her, she "Feeds & clothes him", and K.A. is "unable to care for him until FURther otherwise notice." (Exh. P-3.)

By letter dated October 17, 2006, petitioner stated that K.A. had returned to the United States, he was living with a cousin, and his daughter had also come to this country and was residing with another sister of petitioner.

A.A. was "enrolled" in the District's school system, at Clifton High School (High School), between September 15, 2004 and March 14, 2005. The annual per pupil cost for a student at the High School during that period of time was $8,000.00. The total per diem cost for A.A., for that period of time, was $ 5,221.80, reflecting 108 days at $48.35 per day.

DISPUTED FACTS

Petitioner testified that initially, during the summer of 2004, and subsequently, K.A. always told her he would be returning to the United States to care for his son. Although she always believed him, he did not do so. She cared for A.A. as if he were "her own"; she did not know what to do when it became apparent that K.A. would not return. Petitioner and her husband work and have two children, who are in school, one in college. They pay expenses for their children and A.A. and have never received financial assistance from K.A. She also never received funds from E.N., nor the latter's family.

On cross-examination, F.A.C. testified that A.A., who had previously been in Europe with his father, returned to the United States during the summer of 2004. A.A. and K.A. had previously lived in this country, with another individual, a "waitress", in the latter's apartment. K.A. had no funds, having "gambled everything away," and was not working. To petitioner's knowledge, he had not worked during the prior eight years, and she did not how he had previously obtained funds. K.A. and A.A. had resided, during that time period, in Fairfield, New Jersey. To petitioner's knowledge, based upon information he told her, K.A. had won a "lottery", bought a house, and made "investments". He had previously been employed as a Superintendent in an apartment building. However, to her knowledge, by the summer of 2004, K.A.'s investments "dried up", and he, and A.A., lived with another sister of petitioner, in Europe. K.A. was not employed and did not attempt to find employment, to petitioner's knowledge. Petitioner did not try to discuss the details of the situation with him, as his "personality" had become "very different"; it was "very unique." Another brother sent him money. A.A. had wanted to return to the United States, during the summer of 2004, because he found school in the Czech Republic "very hard" and did not know "the language". Additionally, he is a United States citizen and had been to this country previously, "his entire life". K.A. continuously promised to return to the United States, but petitioner ultimately realized that everything he said was "all lies." At the time of the hearing, K.A. had been residing in the Czech Republic, with another sister, to petitioner's knowledge. Petitioner also testified, on cross-examination, that A.A. "had no where else to go", but

with her. To petitioner's knowledge, E.N. does not have the financial resources "to care for" A.A.

N.B. testified that when she saw K.A. in 2005, he appeared to be "reclusive", like "Howard Hughes." He was "dysfunctional" with his family, including the sister with whom he lived. To N.B., K.A. did not appear to be oriented to everyday matters. K.A. did not appear to understand her when she attempted to speak with him about A.A., and did not seem to "care." He stated, with "anger", "let her take care of it", referencing petitioner. K.A. appeared to be "in a shock." Upon returning to United States, N.B. told petitioner that there was "no hope in him", nor for E.N.

N.B. also visited with E.N., who resided with her parents and H.A. in the Czech Republic, in the parents' home. To her observations, E.N. did not care for A.A., financially, nor practically. E.N.'s relatives, who "cried", told N.B. that they financially assisted E.N. and her child. The only income was a "pension" of E.N.'s father, approximately $65.00 a month. N.B. had previously not been in the Czech Republic for 25 years.

S.K., who resides in New Jersey, testified that the family is "close." S.K. testified that she spoke with K.A. during the summer of 2003, when she visited with the family in the Czech Republic. To her knowledge, until then, K.A. had "substantial investments" in the Czech Republic. However, by the time of her visit, he was "in serious trouble". Although K.A. did not provide "too many" specific details, he stated that his financial condition was "dire" and that he had lost his "last asset", his home in Fairfield, New Jersey. To S.K.'s knowledge, based upon what K.A. told her, K.A. thought, subsequently, that it would be a "good opportunity" to return to Serbia, where A.A.'s "ancestors" resided and A.A. could "learn the language." A.A. attended school in Serbia during the 2003-2004 school year, residing, with his father, in a "small town", Novi Patar. At the end of the school year, in June 2004, S.K. received communications from petitioner, indicating that A.A. had had a "difficult school year" and had encountered difficulties in learning the Serbian language. A.A. wanted to return to the United States. To S.K.'s understanding, A.A. would be returning, and K.A. would be

doing so "shortly" thereafter. S.K. spoke with petitioner several times during the summer of 2004. F.A.C. told her that K.A. was still in the Czech Republic and that he, and A.A., would "shortly" be returning to the United States and living with her. K.A. told petitioner, to S.K.'s knowledge, that he would be doing so as soon as he completed certain business matters. Although A.A. did return to the United States, K.A. never did so. Petitioner told S.K. that she would be registering A.A. in the District's school system, where her children had attended school, and such did not appear "unseemly" to S.K., as everyone expected K.A. to return to the United States "shortly."

S.K. also testified that A.A. has lived with his father since he was four years old. E.N. became "severely ill" at that time, and was not able to care for herself and A.A. To her knowledge, petitioner supported A.A., receiving very little funds from the family. K.A. was "not responsive" during telephone communications. By February 2005, it had become clear that K.A. would not be returning the United States. In approximately June 2005, petitioner told S.K. that K.A. had indicated he was now residing in Serbia, in the Czech Republic, with petitioner's sister and other relatives. K.A. was "incoherent" in telephone communications, and maintained he had "lost everything." To S.K.'s knowledge, E.N. had previously suffered a "nervous breakdown" and could not care for A.A. Such resulted in a "trauma" for her children. A.A. subsequently did not complete high school. S.K. testified that she had most recently spoken with K.A. in March 2006. He sounded "psychologically", "mentally", not "competent." He could not respond to a "single question." K.A. told her that he was not employed.

On cross-examination, S.K. testified that, to her knowledge, E.N. had been diagnosed with "schizophrenia", and other conditions, soon after A.A. was born. She reiterated that K.A. sounded "incoherent" when she most recently spoke with him.

On redirect testimony, S.K. reiterated that E.N. has not cared for A.A., financially nor practically, since he was four years old, and that she is not able to care for him now. To her knowledge, E.N. has taken "constant medication" since A.A. was four years old.

I found petitioner, N.B., and S.K. to be credible witnesses. Their testimony was consistent and was not discredited on cross-examination. The testimony, including the manner in which they phrased pertinent matters, was specific and had the ring of truth. Respondent does not really dispute the veracity of the testimony. Petitioner was forthcoming throughout the proceedings, as evidenced by the submission of her October 17, 2006 letter. I am persuaded that, during the period in question, A.A. resided with F.A.C. and her family, and they supported him because his parents are incapable of doing so. The testimony that by the summer of 2004, A.A., who was born in the United States and had lived here for a substantial period of time, wanted to return because of difficulties encountered in the Czech Republic was credible. It is reasonable to infer that there was no intent by F.A.C. to have him live with her merely to attend the District's schools. It is also clear that, for whatever reasons, E.N. has not been able to care for A.A., financially and otherwise, for many years; and K.A., for several years, before his son entered the High School. Additionally, A.A.'s parents have contributed little, if at all, to his financial support.

Based upon a review of the entire record, including credibility determinations, I **FIND** the following to be additional facts.

Prior to the summer of 2004, A.A. and K.A. had resided in the United States for substantial periods of time. A.A. had resided with his father since he was approximately four years old. Since that time, E.N. has resided with her parents, and other relatives, in the Czech Republic. K.A. and A.A. returned to the Czech Republic, and A.A. attended a school in Yugoslavia, during the 2003-2004 school year. By the summer of 2004, A.A. was requesting to return to the United States. He did so during the summer of 2004. Although K.A. continually told F.A.C. that he would shortly also return to live in the United States, he never did so. For whatever reasons, E.N. and K.A. are incapable of caring for, and supporting, A.A., and provided little, or no, financial assistance to F.A.C. in that respect. A.A. resided with petitioner and her family during the time he attended the High School, and she and her husband supported him.

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including to individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a).

Local school districts must also provide a free education to any person who is kept in the home of another person domiciled within the district and supported by such other person gratis as if he/she were such other person's own child, upon the filing by that person with the pertinent Board of Education (Board) of a sworn statement. Such statement shall, if so required by the Board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement must also state that he/she intends to keep and support the child gratuitously for a longer time than merely through the school term. A copy of certain documents regarding residency shall also be filed. The parent/guardian shall file with the Board a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely to receive a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. Id. at § (b)(1).

If, in the Board's judgment, the evidence does not support the validity of a resident's claim, the Board may deny admission to the child. The resident may contest such a decision to the Commissioner and shall be entitled to a hearing on the validity of the claim. The resident shall have the burden of proof, by a preponderance of the evidence, to demonstrate that the child is eligible for a free education. No child shall be denied admission during the pendency of such proceedings. If the child is then currently enrolled in the district, he/she shall not be removed during the period in which the resident may contest the Board's decision, nor during the pendency of the

proceedings before the Commissioner. If, in the judgment of the Commissioner, the evidence does not support the resident's claim, the Commissioner shall assess tuition for the student, prorated to the time of the student's ineligible attendance in the district. Ibid.

Based upon the information available to it at that time, respondent's September 9, 2004 decision was reasonable and consistent with the law. However, based on the record in this case, as reflected in the Findings of Fact, and the applicable statutory provisions, I am persuaded that petitioner met her burden of proof.

CONCLUSIONS

I **CONCLUDE** that petitioner proved, by a preponderance of the credible evidence, that A.A. was entitled to a free public education in the District, from September 15, 2004 until March 14, 2005, and that respondent's Counterclaim should be dismissed.

ORDERS

It is hereby **ORDERED** that A.A. be deemed to have been entitled to a free public education in respondent's schools, from September 15, 2004 until March 14, 2005, and that respondent's Counterclaim be and is hereby **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 13, 2007
DATE

DIANA C. SUKOVICH, ALJ

Date received at Agency: June 13, 2007

Mailed to Parties:

JUN 15 2007
June 13, 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses

For Petitioner:

F.A.C.

S.K.

N.B.

Exhibits In Evidence

P-1 Application for Admission and Affidavit of K.A.

P-2 Affidavit of F.A.C.

P-3 Affidavit dated August 14, 2006

P-4 Letter dated October 17, 2006

R-2 Letter dated September 9, 2004

R-3 Affidavit of Karen Perkins

R-4 Affidavit of K.A.

302-07

#302-07

R.A.J., on behalf of minor child, C.A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent Board's determination that her grandchild, C.A.P. – a 10th grader who has been a student in the district's schools since kindergarten – is ineligible to receive a free public education in Ewing Township schools. The relevant time frame for this case concerns the 2006-2007 school year, during which C.A.P. attended an out-of-district placement pursuant to his individualized educational plan. Respondent contended that C.A.P.'s mother, L.J., lives in Trenton, and sought to disenroll him and collect payment for tuition for the period from October 2006 through the end of the school year

The ALJ found that petitioner has satisfied, by a preponderance of evidence, the conditions required pursuant to *N.J.S.A.* 18A:38-1 for entitlement to a free public education in Ewing Township Schools: petitioner is domiciled in the district, is supporting C.A.P. *gratis*, is assuming all personal responsibility for C.A.P. relative to school requirements, and intends to support C.A.P. gratuitously beyond the school year; C.A.P.'s parents are not capable of supporting him due to a family or economic hardship, and did not send him to reside with petitioner solely for the purpose of receiving a free education in the district. Accordingly, the ALJ concluded that C.A.P. was properly enrolled as an affidavit student for the 2006-2007 school year, and dismissed the Board's counterclaim for tuition.

Upon full and independent review, and according due deference to the ALJ's credibility determinations, the Commissioner concurs with the ALJ that C.A.P. was properly enrolled as an affidavit student for the 2006-2007 school year and adopts the Initial Decision as the final decision in this matter.

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

July 27, 2007

OAL DKT. NO. EDU 2329-07
AGENCY DKT. NO. 81-3/07

R.A.J., on behalf of minor child, C.A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon full and independent review of the record, and according due deference to the Administrative Law Judge's (ALJ) credibility determinations,[1] the Commissioner agrees with his conclusion that C.A.P. was properly enrolled in the Ewing Township School District as an affidavit student for the 2006-07 school year.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein.

IT IS SO ORDERED.[2]

Priscilla T. Day
COMMISSIONER OF EDUCATION

Date of Decision: 7/27/07

Date of Mailing: 7/30/07

[1] The Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner provides no cause for modification or rejection in this regard.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2329-07
AGENCY DKT. NO. 81-3/07

R.A.J. ON BEHALF OF C.A.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

R.A.J., petitioner, pro se

Jeffrey F. Belz, Esq., for the respondent

Record Closed: June 6, 2007 Decided: June 13, 2007

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

C.P. is currently enrolled as a 10th grade student with the Ewing Township Board of Education. R.J. is C.P.'s grandmother and L.J. is C.P.'s mother. R.J. resides in the Township of Ewing and L.J. resides in the City of Trenton. In October 2006, the Board

received information leading it to conclude that C.P. was not domiciled in Ewing. The Board sought to disenroll C.P. from the District and seek payment for tuition.

On December 19, 2006, a hearing was held before the Board regarding the residency of C.P.. L.J. and R.J. testified before the Board. The Board concluded that C.P. was not domiciled in Ewing and sought to disenroll him. On behalf of C.P., R.J. appealed the Board's determination to the Bureau of Controversies and Disputes, Department of Education. The Board counterclaimed seeking payment for tuition from October 2006 until his disenrollment.

The matter was transferred to the Office of Administrative Law, where it was filed on March 29, 2007. A hearing was held on May 30, 2007. During the pending appeal and at this time, C.P. remains a student of the Ewing Township Board of Education. N.J.S.A. 18A:38-1.

FACTUAL DISCUSSION

Testifying on behalf of petitioner were the following witnesses: T.J., C.P.'s Aunt, M.F., family friend, O.S., C.P.'s classmate and friend, C.P., R.J. and L.J. Testifying on behalf of the Board was David Mikalauskas, Attendance Officer.

Petitioner's witnesses testified consistently regarding C.P.'s living situation and support. Mikalauskas's testimony did not contradict the testimony of petitioner's witnesses.

C.P. has been a student of the Ewing Township School District since kindergarten. The relevant time frame for this case concerns C.P.'s 10th grade year – the 2006-2007 school year. C.P. during this school year has been attending an out-of-district placement in Lumberton, N.J. C.P. is classified as eligible for special education under the category "Multiply Disabled". The District is paying for his out-of-district placement as he was placed there pursuant to his individualized educational plan.

In September 2006, L.J. completed a residency form for the District. R-2. On that form, L.J. stated that she resided in Ewing Township with C.P. On October 26, 2006, Mikalauskas received the roster from the Trenton Housing Authority and learned that L.J. was residing in Trenton in public housing. Mikalauskas also received the lease for the Trenton apartment in which C.P. was listed as a tenant with his mother, L.J. L.J. admits to residing in Trenton since February 2006, and explained that she simply misread the residency form when she noted she resided in Ewing Township. Mikalauskas testified that the question on the form is clear in that it is asking for the parent to state his/her address, not the address of the student.

L.J. was residing with R.J. at the Ewing home until February 2006. That is the time that L.J. was taken off the public housing waiting list and was advised that an apartment was available in Trenton. She admits to putting C.P. on the lease. She testified she had to include him on the lease to be eligible for the 2-bedroom apartment. L.J. testified that C.P. did not move in with her in Trenton. L.J. testified that her mother and C.P.'s grandmother, R.J., provides a good living environment for C.P. in Ewing. She notes that she did not have C.P. move in with her because C.P.'s friends are all in Ewing, it is safer in Ewing, he has lived there most of his life and the school in Ewing is better. L.J. left the Ewing residence because there was not that much room. C.P.'s father has a residence in Trenton, but he is now incarcerated. C.P. did not spend much time with his father prior to incarceration.

L.J. testified that there is a lot of crime where she lives in Trenton. She provided a newspaper article and victim notification form regarding an incident in which a man broke into her apartment and shot and killed a pitbull while kids were there. She testified that her son does come over every weekend, but his stays vary from just a day-visit to staying over night. L.J. testified that she does not let C.P. out of the apartment because she is so worried about gangs, drugs and violence in the area. She testified that she would rather live in Ewing, but that she cannot afford to rent or buy a place there.

L.J. did work through a staffing employment agency from May 2006 through December 2006. L.J. testified that she has been unemployed since December 2006 and has been collecting unemployment. She testified that she is actively looking for job through a one-stop career center. L.J. and C.P. are on Medicaid, and L.J. receives food stamp benefits. L.J. pays about $149 per month in rent, which includes utilities.

L.J. testified that when she was employed she paid about 30% of C.P.'s expenses, and now that she is unemployed she pays about 20% of his expenses, either through providing money to R.J. or to C.P. directly. The remaining financial support comes from R.J. and R.J.'s husband. L.J. testified that it is very difficult for her to financially support C.P. given her situation and she does not think she could in fact support him if he lived with her. The evidence from the testimony shows that R.J. and R.J.'s husband buy most of C.P.'s clothes, food and pay for entertainment expenses. C.P. eats with them in Ewing most every night and R.J. gives him lunch money for school.

R.J. testified consistent with L.J. and the other witnesses for petitioner. She has lived in Ewing with her husband for about 29 years. She lives there now with C.P. and two other grandchildren. She testified about supporting C.P., through buying clothes, food, etc. R.J. testified that L.J. does not have much money to support C.P. and that most of the financial support is from herself and her husband. R.J. testified that L.J. will occasionally pay for C.P. to see a movie, or something similar. R.J. noted that she also attends IEP meetings and parent-teacher conferences for C.P., along with L.J.

R.J. testified that C.P. stays at her house during the week and on the weekends will go to L.J.'s house for the day and/or spend a night. Last summer, L.J. and R.J. both said that C.P. spent the majority of his time with R.J. in Ewing because that is where all his friends are. They estimate that C.P. spent about 8 days per month at L.J.'s residence in Trenton during the summer. For holidays and holiday breaks, they likewise said the majority of time is spent by C.P. at R.J.'s house. R.J. testified that she expects C.P. to stay living at her house even when he is done with high school. She

said that all of his friends are in the area and R.J. is worried that Trenton is too dangerous for C.P.

C.P. testified consistent with L.J. and R.J. about his living situation and where he gets his financial support. He noted that his mother has money problems and that he gets his money mostly from R.J. and her husband. He said he has friends in Ewing and would like to stay in school there because it is better. C.P.'s friend and classmate, O.S., confirmed the testimony of the other witnesses about C.P.'s living situation. T.J., L.J.'s sister, testified that it is dangerous in Trenton where L.J. lives. She said C.P. gets his financial support from R.J. and that he lives in Ewing with R.J. and her husband. T.J. testified that C.P. sometimes goes to his mother's house on the weekends.

L.J. claims C.P. on her taxes. L.J. and R.J. have joint custody of C.P. through a Superior Court Order they received about six months ago.

Mikalauskas testified that the tuition for a regular education student in grades 9 through 12 is $9,911 per year, based on 181 days. This amounts to $54.75 per day. The Board is seeking tuition from petitioner starting on October 26, 2006, which is the day Mikalauskas learned that L.J. resided in Trenton and listed C.P. on her lease. The District is seeking tuition based on the costs for a regular education student, not the cost for C.P.'s special education program. Mikalauskas testified that the Board did not do any investigation of residency in this matter because it had the lease with L.J. and C.P.'s name on it.

As noted above, Mikalauskas's testimony does not directly contradict testimony from petitioner's witnesses. Petitioner and her witnesses were credible in describing C.P.'s living situation and support. They were passionate, sincere and consistent in their testimony.

ANALYSIS

N.J.S.A. 18A:38-1 defines which children are entitled to a free public education in a given school district on the basis of their domicile. Under N.J.S.A. 18A:38-1(b), petitioner, R.J., must satisfy by a preponderance of the evidence the following conditions in order for C.P. to remain a student of Ewing Township School District without charge and to not be responsible for any tuition for the 2006-2007 school year:

(1) petitioner is domiciled in the District;
(2) petitioner is supporting C.P. *gratis*;
(3) petitioner is assuming all personal responsibilities for C.P. relative to school requirements;
(4) petitioner intends to support C.P. gratuitously for longer than the school year;
(5) C.P.'s parents are incapable of supporting or providing care for C.P. due to a family or economic hardship; and
(6) C.P.'s parents did not send him to reside with petitioner solely for receiving a free education in the District.

See also N.J.A.C. 6A:22-1.1. Through the credible testimony of petitioner's witnesses, I conclude that petitioner has satisfied theses six conditions by a preponderance of the evidence.

First, the evidence is clear and uncontradicted that petitioner is domiciled in the District. Second, the evidence is clear and uncontradicted that R.J. is supporting C.P. gratis. Although L.J. does make limited contributions to C.P.'s financial support, this does not make C.P. ineligible under N.J.A.C. 6A:22-3.2(a)(4). Third, the evidence is clear and uncontradicted that R.J. is assuming all personal responsibilities for C.P. relative to school requirements. R.J. and/or her husband ensure C.P. attends school, and R.J. attends teacher-parent conferences and IEP meetings. R.J. provides for C.P.'s lunches at school and ensures C.P. is prepared academically.

Fourth, the evidence demonstrates that petitioner intends to support C.P. gratuitously for longer than the school year. Last summer, the evidence shows that C.P. spent a majority of his time in Ewing at R.J.'s residence. In fact, the testimony was that C.P. spent about 8 days per month during the summer in Trenton with L.J. Moreover, R.J. testified that she expects C.P. to continue to reside with her in Ewing even after C.P. graduates from school.

Fifth, the evidence demonstrates that C.P.'s parents are incapable of supporting or providing care for him due to a family and economic hardship. C.P.'s father is incarcerated. Even when he was not incarcerated, C.P. did not spend much time with his father. C.P.'s mother, L.J., is suffering a financial hardship while she is unemployed. Her testimony was that she could not provide for C.P. if he resided with her because she has very little money. Even when she was employed, she testified that her wages were so low that it would not make it much easier to provide or support C.P. Most importantly, L.J.'s living environment is in a dangerous area in Trenton. The testimony by petitioner's witnesses was that it is dangerous and L.J. provided proof that her apartment was broken into by a man with a gun. L.J. does not even let C.P. out of the house when he visits because she fears the gangs, drugs and violence in the area.

Sixth, the evidence demonstrates that C.P.'s parents did not send him to reside with petitioner solely for receiving a free education in the District. There is no question from the evidence that one of the factors driving the decision to keep C.P. in Ewing is because it has a better school system. This is true especially in light of the fact that C.P. has been there since kindergarten and now attends an out-of-district placement. L.J. and R.J. are both concerned that if he attended a school in Trenton that it would not pay for his current placement in Lumberton. Although education is one reason C.P. is in Ewing, it clearly is not the only reason. L.J. testified that she wants him in Ewing because R.J. provides better care for him. She testified that R.J. provides a more stable environment for him. L.J. also notes that it is safer in Ewing and she does not want him exposed to the gangs, drugs and violence near her apartment in Trenton. C.P.'s friends also reside in Ewing.

CONCLUSION AND ORDER

Based on the foregoing, I conclude that petitioner satisfied the criteria set forth in N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-1.1 et seq. Accordingly, I hereby ORDER that:

(1) the Board's counterclaim be dismissed; and

(2) C.P. was properly enrolled in the Ewing Township School District as an affidavit student for the 2006-2007 school year.

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

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

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

June 13, 2007
DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency: 6/14/07

Mailed to Parties:

JUN 19 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS

For petitioner:

P-1 Newspaper Article
P-2 Victim Notification Form
P-3 Letter from Mark Smith, Sr.
P-4 Letter from Nicole Brown

For respondent:

R-1 Transcript of Proceedings taken on December 19, 2006 at Ewing Township Board of Education
R-2 Residency Affidavit

WITNESSES

For petitioner:

T.J., Aunt of C.P.
M.F., Family Friend
O.S., Classmate and Friend of C.P.
C.P.
R.J., Grandmother of C.P.
L.J., Mother of C.P.

For respondent:

David Mikalauskas, Attendance Officer

308-07

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
ROBERT A. HOUSER,	:	
RESPONDENT.	:	

SYNOPSIS

Board of Education sought removal of respondent Board member on grounds that his wife's Workers' Compensation claim against the Board – which was pending when respondent sought and assumed office during the 2006 school election, but was withdrawn when the Board raised the issue of conflict shortly before filing its petition in May 2007 – disqualified him from Board membership. Respondent denied that the claim was disqualifying, and contended that in any event its withdrawal mooted the Board's dispute; he further contended that the Board's petition must be dismissed as untimely, and that he was entitled to indemnification of his defense costs.

The ALJ found the Petition of Appeal timely, since the Board did not become aware of respondent's conflict until April 2007 and the matter was one of significant public interest; he further found that the dispute was not mooted by withdrawal of respondent's wife's claim. The ALJ concluded that such claim disqualified respondent from Board membership, and that his candidacy, election and seating were void from the outset. Respondent was ordered removed from the Board, with the County Superintendent of Schools to fill the resulting vacancy. Respondent was found to be entitled to indemnification of costs since the dispute arose out of his *de facto* Board membership.

The Commissioner adopted in part and reversed in part. The Commissioner concurred that the matter was not moot, and that it should be heard as a matter of significant public interest notwithstanding her disagreement with the ALJ's reasoning as to timeliness. The Commissioner further concurred that a spouse's Workers' Compensation claim against the board was an inconsistent interest precluding board membership pursuant to *N.J.S.A.* 18A:12-2, and that where such a claim existed at the time a candidate assumed office, his or her board membership was susceptible to being declared void. However, the Commissioner reversed the ALJ's finding that respondent was unable to run for Board office, holding instead that the provisions of *N.J.S.A.* 18A:12-2 do not apply to board candidates whose conflict is capable of being cured prior to seating if the candidate is elected. (*Thomas v. Edwards* State Board decision) The Commissioner also reversed, on equitable grounds, the ALJ's directive that respondent be removed as a Board member. Finding that the Board and respondent were equally culpable for failing to recognize and resolve the disqualifying conflict prior to respondent's assumption of office, the Commissioner deemed both the Board's challenge and respondent's cure to have occurred *nunc pro tunc*, so that respondent's Board membership could be now validated by re-administration of his oath of office, which the Board was directed to effectuate forthwith. Respondent was held entitled to indemnification of costs, subject to the provisions of *N.J.S.A.* 18A:12-20 as to accuracy and reasonableness.

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

OAL DKT. NO. EDU 2948-07
AGENCY DKT. NO. 128-5/07

BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
ROBERT A. HOUSER,	:	
RESPONDENT.	:	

The record of this matter and the Order on Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed, as have the exceptions and replies filed by the parties upon notification by the Department of Education that the Commissioner would consider the Order of the Administrative Law Judge (ALJ) as an Initial Decision fully resolving the parties' dispute on the merits.[1]

On exception before the Commissioner, respondent initially objects to the ALJ's failure to dismiss the petition of the Board of Education (Board) as untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i). Respondent contends that the ALJ erred not only in concluding that the regulation in question is inapplicable to boards of education, but also in determining that – even if the rule is deemed applicable – the Board was entitled to file within 90 days of either respondent's wife's notice of taking a day off to attend her Workers' Compensation proceeding or the Board attorney's advice regarding respondent's alleged conflict. According to respondent, his wife's Workers'

[1] Although afforded the opportunity to do so, neither party objected to proceeding in this manner.

Compensation employee claim petition was filed a full year before his seating as a member of the Board in May 2006, so that the Board would be hard pressed to argue that it lacked constructive notice of the facts necessary to pursue its claim prior to the filing of its petition in May 2007. (Respondent's Exceptions at 2-5)

Respondent further contends that, if not for reason of untimeliness, the Board's petition should have been dismissed as moot in light of the undisputed withdrawal of his wife's Workers' Compensation claim. He recites at length the circumstances and holdings of *Acevedo, supra*, and *Margadonna, supra*, and, likening them to his own situation, asserts that the ALJ should have followed these precedents and allowed him to keep his seat rather than disregarding them and ordering him removed. (Respondent's Exceptions at 5-11)

Finally, respondent argues that the ALJ erred in finding that a spouse's Workers' Compensation petition constitutes a conflict of interest precluding board membership pursuant to *N.J.S.A.* 18A:12-2. Reviewing case law previously raised before the ALJ, including *Mercer, supra, and Taliaferro, supra,* he points to aspects of each case that either support or are distinguishable from his own situation, contending that he should not be found to have a disqualifying interest because: the claim at issue is indirect; there is no evidence that he would benefit from it in a substantial and material way; and the Board is unlikely to have any involvement whatsoever in handling it so as to place him in a position to exert improper influence. (Respondent's Exceptions at 11-16) Alternatively, respondent urges, if the Commissioner does find a spouse's Workers' Compensation claim to be a disqualifying interest, such interpretation should – as a matter of first impression – be applied prospectively and not be used as a basis for

reaching back to invalidate respondent's election and seating, especially where the offending claim has since been withdrawn. In this regard, respondent asserts that *N.J.S.A.* 18A:12-2 does not, on its face, prohibit a Board member's spouse from seeking Workers' Compensation benefits, nor does any previous school law decision address precisely this issue; thus, the ALJ's comment that everyone is presumed to know the law is inapplicable because "no statute or published opinion could have given Respondent any notice of the possibility of a disqualifying conflict." (*Id.* at 17-19, quotation at 18-19)

The Board replies by reiterating its prior arguments and maintaining that: 1) its petition was timely notwithstanding respondent's untrue statement that the Board and its administrative staff had knowledge of his wife's Workers' Compensation claim at the time of his nomination and election;[2] 2) respondent's election was voided by the existence of such claim as well as the false statement of qualification on his nominating petition; 3) such claim is clearly disqualifying in light of prior case law; and 4) there is nothing novel about either the controlling statute or the ALJ's interpretation of it, so as to warrant prospective application. (Board's Reply Exceptions at 2-10)

Additionally, in primary exceptions of its own, the Board objects to the ALJ's holding that respondent is entitled to indemnification for the legal fees and costs incurred by him in defending against the present action, contending that such action *cannot* be found to have arisen out of respondent's performance of his duties as required by statute, since it pertains to his qualification and not to his conduct, and the public

[2] The Board attempts to support this claim with a supplemental certification of the Board Secretary, to which respondent objected by letter dated June 19, 2007. Respondent urged – correctly – that such certification was submitted in violation of *N.J.A.C.* 1:1-18.4(c) and may not be considered by the Commissioner herein.

should not be forced to bear the cost of defending a Board candidate's false claim of qualification; at the very least, the Board asserts, it must be afforded the clear opportunity to contest his statements of fees and costs. (Board's Exceptions at 1-2) The Board also objects to the ALJ's statements suggesting that respondent neither engaged in, nor was alleged by the Board to have engaged in, wrongful concealment with respect to his qualification for Board membership, averring that – as it has consistently maintained from the outset – respondent *did* engage in fraudulent concealment by the very act of certifying that he was qualified for Board membership when he was not. (*Id.* at 3)

In reply, respondent contends that – in addition to the clear language of statute and case precedent entitling him to indemnification – it must be noted that the question of whether a spouse's Workers' Compensation petition disqualifies one from Board membership is a novel one before the Commissioner, and was in this instance raised by the Board a full year after respondent's election and seating. Respondent urges that he has at all times acted in good faith and diligence, even to the point where his wife withdrew her petition "so as to avoid even an appearance of conflict" once the issue was brought to his attention. (Respondent's Reply at 2-5, quotation at 5) Moreover, in anticipation of an almost certain challenge to "any and all fees and costs" submitted to the Board in conjunction with his request for indemnification, respondent asks the Commissioner to rule herein that the costs of defending against *that* challenge will also be indemnified, so as to prevent unnecessary litigation and put the Board on notice that it may not attempt to exert taxpayer-funded "financial muscle" in the form of continual legal challenges as a ploy to intimidate respondent and other present or prospective Board members who challenge district actions. (*Id.* at 5-7, quotation at 6)

Respondent additionally urges adoption of the ALJ's finding that he engaged in no wrongful concealment, contending that the Board's argument to the contrary relies solely on his signing of a nominating petition and taking the Board member's oath of office – neither of which remotely suggests that a spouse's previously filed Workers' Compensation petition is a matter that must be disclosed, let alone that it constitutes an impermissible conflict of interest. According to respondent, he at all times believed that his wife's pending claim petition was no impediment to Board membership, and the Board does not even allege that he ever took action as a Board member with regard to or in furtherance of it. (Respondent's Reply at 8-10)

Upon careful consideration, for the reasons set forth below, the Commissioner adopts in part, and rejects in part, the recommended Order/Initial Decision of the OAL.

Initially, the Commissioner concurs with the ALJ's rejection of respondent's attempts to have this matter dismissed on grounds of untimely filing and mootness, without adjudication on the merits. However, the Commissioner so holds for reasons of compelling public interest (Order/Initial Decision at 8), not because *N.J.A.C.* 6A3-1.3(i) places no limits on boards of education or because the Board's cause of action arose on the specific dates identified. To the contrary, the referenced rule does, in fact, apply to a petition brought by a local district board of education – as it applies to *any* interested party bringing action against a "district board of education, individual party, or agency" – and has consistently been so interpreted,[3] while reckoning the Board's cause of action as the specific date it purports to have acquired actual knowledge

[3] The Commissioner acknowledges respondent's citation, in Reply Exceptions at 10-12, of a recent Commissioner decision dismissing as untimely a petition filed by a board of education.

of respondent's wife's pending Workers' Compensation petition – or was in receipt of the ensuing legal advice – is not appropriate in this matter for reasons more fully set forth below. Rather, the Commissioner concurs with the ALJ that dismissal of the instant dispute on procedural grounds would leave unaddressed a question of significant public interest – the legal status of a sitting board of education member – thus warranting relaxation of procedural rules pursuant to *N.J.A.C.* 6A:3-1.16.

Turning, then, to the Board's claim on the merits, the Commissioner first concurs with the ALJ that a spouse's pending Workers' Compensation claim constitutes an inconsistent interest disqualifying a board member from service pursuant to *N.J.S.A.* 18A:12-2. (Order/Initial Decision at 7-13) Initially, the Commissioner notes that a board member's own pending Workers' Compensation claim has already been held, in a decision that carefully considered the nature of such claims, to constitute a disqualifying interest. *In the Matter of Richard Tullo, Board of Education of the Pinelands Regional School District, Ocean County*, decided by the Commissioner April 26, 1999[4] Further, it is well established, through the long line of cases recited by the ALJ, that claims of family members resulting in a potential benefit to the board member's household constitute an indirect conflict of interest in violation of *N.J.S.A.* 18A:12-2,[5] and that the purportedly insignificant amount or nature of a claim – or the small likelihood of a board member actually being in a position to exert improper influence with respect to it – is immaterial when considering the existence of an

[4] Although not recited by the ALJ, this decision was discussed by both parties in their OAL briefs. The Commissioner notes in the interest of clarity that the Workers' Compensation claim at issue in that matter arose out of the board member's prior employment with the board.

[5] See also, *Board of Education of the Borough of Palmyra, Burlington County v. Robert Marinnie,* decided by the Commissioner June 8, 2005.

inconsistent interest. See also *Tullo, supra*. Finally, it is of no import that – as argued by respondent – there is no prohibition against employment of a spouse by the board of education on which a board member sits, or that the spouse is seeking to vindicate rights arising from such employment; simply stated, a choice must be made between board membership and a claim which the board member or family member otherwise has the right to pursue. *Taliaferro, supra*; *Kennedy, supra.* Thus, under plainly evident principles of law, the existence of his wife's pending Workers' Compensation claim disqualified respondent from Board membership.

However, notwithstanding that a spouse's Workers' Compensation claim would preclude a person from assuming office, it would not – contrary to the finding of the ALJ and the arguments of the Board – preclude the pursuit of *candidacy* for such office. As held by the State Board of Education, it is evident from the "clear and unambiguous language" of *N.J.S.A.* 18A:12-2 that "a victorious school board candidate who cured any conflicts prior to the commencement of his or her term of office would *not* be disqualified from board membership by operation of that statute," which "cannot be read to disqualify individuals with inconsistent interests from being *candidates* for board membership", in contrast to *N.J.S.A.* 18A:12-1 – which addresses the basic qualifications of citizenship, residency, ability to read and write, voter registration, and so forth, required of candidates in order to file a nominating petition.[6] *Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards*, decided by the State Board of Education November 3, 1993,

[6] The Commissioner notes that the predecessor statute to *N.J.S.A.* 19:60-5 (*N.J.S.A.* 18A:14-10, repealed and recodified as *N.J.S.A.* 19:60-5/6 by P.L. 1995, c. 278) was in effect at the time of the State Board's decision; however, there is no substantive difference between the two with respect to the point at issue.

emphasis in original (reversing a Commissioner's decision, at 93 *N.J.A.R.*2d (EDU) 369, finding a candidate disqualified in accordance with then-existing case precedent consistent with *Howell, supra*)[7] Although the State Board recognized (slip opinion at 4) that the existence of a *contractual* relationship with a board might represent an incurable conflict, see also *Visotcky, supra*, at 266-67, that consideration is inapplicable under circumstances, such as here, where a choice can freely be made between board membership and maintaining a claim against the board.

Thus, respondent was able to seek election to the Board notwithstanding his wife's pending Workers' Compensation claim, since it represented a conflict capable of being cured if he were elected. As a consequence, he *cannot* be found to have made untruthful representations with respect to qualification in his nominating petition (Exhibit P-B/R-A[8]), so that the suggestion that he ran for office under false pretenses cannot be sustained, and the provisions of *N.J.S.A.* 19:3-7 – voiding the nomination and election of any candidate filing a false statement in conjunction with such election – do not apply.

Nonetheless, it remains true that, once elected, a candidate must cure any disqualifying interest prior to assuming office. It is well established – as correctly found by the ALJ – that a person who does not hold the requisite qualifications cannot take the necessary oath of office, and is consequently disqualified from entering into the duties of office; further, where the oath is taken and duties are assumed notwithstanding such

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[7] The State Board's decision was inadvertently omitted by the publisher (Barclays) when the Commissioner's decision was published at 93 *N.J.A.R.*2d (EDU) 369. A copy of the decision is appended hereto.

[8] It is worthy of note that the nominating petition itself clearly differentiates – both verbally and in the form's graphic layout – the qualifications of *N.J.S.A.* 18A:12-1, which must be met by "candidates filing a nominating petition for board membership" from the self-contained cautionary statement that "no board of education member shall be directly or indirectly involved in any contract with, or claim against the board."

disqualification, both the oath and the service will, upon subsequent adjudication, be invalidated from their inception. *Visotcky, supra*; see also, Attorney General Formal Opinon 1960 – No. 3, citing *Waldor v. Untermann*, 7 *N.J. Super.* 605 (Law Div. 1950), affirmed 10 *N.J. Super.* 188 (App. Div. 1950), *McCue v. Antisell*, 105 *N.J. Super.* 128 (App. Div. 1965) This result is not altered by case law cited by respondent for the proposition that board members have in the past been allowed to remain on the board if they eliminated their inconsistent interests; in those cases – unlike that of respondent herein – the inconsistent interest arose *during* their terms as board members, *subsequent* to their qualification and lawful assumption of office, and did not exist at the time of their election or appointment. In this instance, it is indisputable that respondent took the oath of office and entered into the duties of Board membership pursuant to *N.J.S.A.* 18A:12-2.1 notwithstanding that he had an inconsistent interest in violation of *N.J.S.A.* 18A:12-2; consequently, both his oath and his Board membership are susceptible to being declared void in their entirety.

In seeking to resolve this matter consistent with the holdings of law set forth above and the particular facts here presenting, then, the Commissioner is confronted with the novel (and troubling) scenario of a board of education seeking to remove from its membership a duly nominated and elected candidate who took the requisite oath of office, assumed the duties of membership, served as a member for nearly a year before his qualification was challenged,[9] and now continues to serve pending the outcome of this matter – all in violation of law, due to the existence of an inconsistent interest that went

[9] In this respect, the present matter differs from *Visotcky, supra*, where – although the board member in question remained on the board for several months after his appointment while the matter was being adjudicated – the challenge to the appointment's validity was filed almost immediately.

unrecognized (or unacknowledged) at the time of his seating and remained so for many months thereafter, but was promptly cured once raised.

In urging the Commissioner not to remove him from the Board, respondent argues that any finding of inconsistent interest based on his wife's pending Workers' Compensation claim has been rendered moot by her undisputed action to withdraw it, and that – even if this were not so – a finding of disqualification based on a spouse's Workers' Compensation claim cannot be applied retroactively since it is based on a previously unadjudicated point of law. The former argument, however, fails to recognize that respondent cannot simply "continue" as a Board member, since the existence of an inconsistent interest prevented him from being lawfully sworn and seated in the first place. The latter argument, on the other hand, ignores that: 1) candidates are responsible for evaluating their own circumstances in light of law which they must be presumed to know; 2) the language of *N.J.S.A.* 18A:12-2, and of the Board's nomination form based upon it, is sufficiently clear to have alerted respondent to the possibility that his wife's pending claim – awareness of which he does not deny – might constitute a disqualifying conflict of interest; 3) even the most cursory inquiry into the prior application of *N.J.S.A.* 18A:12-2 in case law would have revealed the significant likelihood that a conflict existed in respondent's instance;[10] and 4) where the potential for a disqualifying interest even appears to exist, candidates have an obligation to seek clarification prior to assuming office, rather than keeping silent because they themselves

[10] In this regard, the Commissioner views as disingenuous in the extreme respondent's contention that neither *N.J.S.A.* 18A:12-2 nor published case law expressly required him to declare the existence of a spouse's Worker's Compensation claim or indicated that such was an impermissible conflict of interest. As set forth above, the inferences to be drawn on this point are clear, straightforward and based on longstanding precedent.

believe there is no conflict or because they prefer to await an actual challenge before addressing the issue..

The Board, on the other hand, insists that respondent must be removed from office, notwithstanding that its challenge to his qualification was raised nearly a year after his assumption of membership, and was promptly addressed once raised – because the Board could not have acted before it did given that it lacked knowledge of respondent's wife's Workers' Compensation claim until April 2007, when she took a day off from work to attend her case hearing. However, the Commissioner finds that – while the Board may well have delegated administration of Workers' Compensation matters to a third-party insurer and it may well be true that the Superintendent and Board Secretary/Business Administrator did not have personal knowledge of respondents' wife's claim until alerted to it by chance[11] – just as respondent had a responsibility to address his status vis-à-vis qualification for board membership in light of law he must be presumed to know, so, too, did the Board have a responsibility to assess that status in light of its imputed knowledge of claims filed against it, particularly by its own employees based on circumstances arising directly out of their employment and reported to building administrators (see Exhibit P-A/R-E). *NCP Litigation Trust v. KPMG LLP*, 187 *N.J.* 353, 366 (2006) (A principal is deemed to know facts that are known to its agent; notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of that fact is material to the agent's duties to the principal; because the principal cannot avoid responsibility through ignorance, imputation also

[11] Although respondent disputes the Board's contention in this regard, it is lent credence by the Board's silence until the referenced event and the alacrity with which it acted thereafter.

"encourages a principal to develop effective procedures for the transmission of material facts, while discouraging practices that isolate the principal or co-agents from facts known to an agent.) See also *Tullo, supra*.

In light of the above, then, the Commissioner concludes that the matter now before her could and should have been raised prior to respondent's seating as a Board member, but was not owing to omissions attributable, respectively, to respondent and the Board alike. Because both parties are equally culpable, and because the record clearly demonstrates the action each would have taken had the issue of respondent's qualification been timely considered by either – the Board refusing to seat respondent and respondent moving promptly to eliminate the alleged conflict – the Commissioner finds that the interests of justice, as well as those of the Barnegat Township electorate, would best be served by deeming *both* the Board's petition and respondent's curing of his disqualifying interest to be actions taken *nunc pro tunc*, as if they had occurred when they should have, between the time of respondent's election and his seating on the Board.

Consequently, the Commissioner rejects the ALJ's conclusion that that respondent must be removed as a Board member and the resulting vacancy filled by the Ocean County Superintendent of Schools pursuant to *N.J.S.A.* 18A:12-15. Instead, the Board is hereby found to be correct in its *nunc pro tunc* assertion that respondent had, at the time of his election, an inconsistent interest preventing him from being lawfully seated on the Board, so that he could not take the oath of office and assume his duties unless the conflict was cured; however, due to the prompt withdrawal with prejudice of his wife's Workers' Compensation employee claim petition, respondent is concomitantly found to have eliminated – by exercising *nunc pro tunc* the choice he should have been

compelled to make upon his election – any impediment to his lawful assumption of Board membership. Accordingly, the deficiency in respondent's seating may now be cured by re-administration of his oath of office pursuant to *N.J.S.A.* 18A:12-2.1, thereby validating – on a retroactive basis – both his seating on May 1, 2006 and his subsequent Board service.

Turning to the last issue remaining in this matter, the Commissioner concurs with the ALJ that respondent is entitled to indemnification for the costs of defending against the Board's action herein – subject, as would be any adjudicated entitlement to board indemnification, to the Board's subsequent right to challenge, as a new cause of action, the accuracy, validity or reasonableness of actual costs submitted in accordance with *N.J.S.A.* 18A:12-20. In this regard, the Commissioner declines respondent's request for a prospective ruling additionally directing the Board to indemnify him against any ensuing challenge of his submitted defense costs, since such request in the present context effectively constitutes a prayer for declaratory ruling seeking consequential relief based on underlying facts which are future, contingent and disputed, contrary to the clear provisions of N.J.A.C. 6A:3-2.1(a)1. Instead, the Commissioner holds that any question of indemnification, beyond respondent's basic entitlement to it, is appropriately addressed – should the dispute respondent anticipates, in fact, arise – in the attendant contested case proceeding, based on the specific legal argument and factual record developed therein.

Accordingly, the recommended Order/Initial Decision of the OAL is adopted in part and rejected in part, as set forth above. Pursuant to the Commissioner's determination herein, the Barnegat Township Board of Education is directed forthwith to

re-administer respondent's oath of office, *nunc pro tunc*, and to indemnify him for the costs of defending this action consistent with *N.J.S.A.* 18A:12-20.

IT IS SO ORDERED.[12]

COMMISSIONER OF EDUCATION

Date of Decision: 7/30/07

Date of Mailing: Faxed 7/30/07

[12] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

EDU #2133-93
C # 62-93
SB # 25-93

WAYNE W. THOMAS, ACTING BOARD SECRETARY, BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
CHARLENE J. EDWARDS,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 8, 1993

For the Petitioner-Respondent, Martinez & Jennings
(Robert P. Martinez, Esq., of Counsel)

For the Respondent-Appellant, Tosca E. Blandford-Bynoe, Esq.

Petitioner, the acting board secretary of the Board of Education of the Township of Willingboro (hereinafter "Board"), sought a declaration from the Commissioner of Education regarding the qualifications of respondent to be placed on the ballot for the annual school election to be held on April 20, 1993. Petitioner's challenge, pursuant to N.J.S.A. 18A:12-2, arose as a result of respondent's ownership of a child care center in a building owned by the Board and leased to respondent under the terms of a written one-year lease for the period July 1, 1992 to June 30, 1993.

On April 5, 1993, the Administrative Law Judge ("ALJ") determined that, as a result of the lease agreement, respondent had an inconsistent interest prohibited by N.J.S.A. 18A:12-2. Finding

such conflict to be substantial and material, the ALJ concluded that it served as a bar to her qualifying as a candidate for election to the Board. Accordingly, the ALJ recommended that respondent's name be stricken from the ballot.

On April 8, 1993, the Commissioner adopted the ALJ's findings and conclusions. The Commissioner agreed

> that respondent's position as a lessee in a landlord/tenant relationship with the school district constitutes a conflict under N.J.S.A. 18A:12-2 so as to preclude her from seeking a seat on the Willingboro Board of Education as the factors affecting the contract to which she is a party--notwithstanding that she is but one of several such parties--are so inherently widespread and diffuse as to make it difficult, if not impossible, to adequately remove herself by absention from actual or potential conflict.

Commissioner's decision, slip op. at 12. (Emphasis added.)

Respondent filed the instant appeal on May 7, 1993, arguing that her contractual relationship with the Board was not of such nature as to preclude her from seeking a seat on the Board or serving thereon.

Although the election which formed the basis for the instant petition was held prior to our decision herein, we find that this matter involves an issue of public importance which is likely to recur in the future, warranting a determination in this matter on the merits. See, e.g., In re Geraghty, 68 N.J. 209, 212 (1975).

After a thorough review of the record, we affirm the Commissioner's determination that the lease agreement between respondent and the Board was an inconsistent interest of such nature as to disqualify her from serving as a member of the Board pursuant to N.J.S.A. 18A:12-2. However, we reverse the Commissioner's

determination that, as a result of such conflict, respondent was barred from being a candidate for election to the Board.

N.J.S.A. 18A:12-2, "Inconsistent interests or office prohibited," provides, in pertinent part:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board...

That statute, by its express terms, applies only to board members, prohibiting a "member of any board" (emphasis added) from having an interest in a contract with the board. A candidate for a seat on a board is not a board "member" within the express prohibition of the statute. Given the clear and unambiguous language of the statute, it is evident that a victorious school board candidate who cured any conflicts prior to the commencement of his or her term of office would not be disqualified from board membership by operation of that statute. Thus, N.J.S.A. 18A:12-2 cannot be read to disqualify individuals with inconsistent interests from being candidates for board membership.[1]

In this case, respondent was party to a lease agreement with the Board at the time she sought election to the Board. Given the nature of the conflict, we fully agree with the Commissioner's determination that N.J.S.A. 18A:12-2 would have disqualified respondent from actually serving as a member of the Board. However, for the reasons expressed hereinabove, that statute did not bar her

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[1] We note, in response to petitioner's exceptions citing the nominating petitions of school board candidates in which they certify that they are qualified to be elected, that N.J.S.A. 18A:12-2, "Inconsistent interests or office prohibited," is distinct from N.J.S.A. 18A:12-1, "Qualifications of board members," which includes citizenship, residency, the ability to read and write, and voting registration. Our decision herein is strictly limited to the facts in the record before us as applied under N.J.S.A. 18A:12-2.

from seeking election to the Board and serving thereon if she divested herself of the inconsistent interest prior to the commencement of her term of office.

We therefore affirm the Commissioner's determination that the lease agreement between respondent and the Board was an inconsistent interest of such nature as to preclude her from actually serving as a member of the Board, but reverse the Commissioner's decision that, by virtue of such conflict, respondent also was barred by N.J.S.A. 18A:12-2 from being a candidate for election to the Board.

In that the record indicates that the contractual relationship between respondent and the Board would not have terminated until June 30, 1993, subsequent to the annual school election and commencement of new board members' terms, see N.J.S.A. 18A:10-3, and respondent does not indicate any intent or ability to have cured such conflict prior to taking office, we find no basis for disturbing the outcome of the district's 1993 school election.

Attorney exceptions are noted.

November 3, 1993

Date of mailing 05 NOV 1993

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON EMERGENT RELIEF
OAL DKT. NO. EDU 2948-07
AGENCY DKT. NO. 128-5/07

BOARD OF EDUCATION
OF THE TOWNSHIP OF BARNEGAT,
Petitioner,
v.
ROBERT A. HOUSER,
Respondent.

David F. Corrigan, Esq., for petitioner

Ben A. Montenegro, Esq., for respondent (Montenegro, Thompson, Montenegro & Genz, attorneys)

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

STATEMENT OF THE CASE

Petitioner Board of Education of the Township of Barnegat (BOE) asserts that, consistent with N.J.S.A. 18A:12-2, respondent Robert A. Houser was disqualified from election to the BOE and that he is disqualified from service as a member of the BOE and the BOE seeks an order removing him from that office. The respondent denies that he was and is disqualified.

The case can be summarized. N.J.S.A. 18A:12-2 prohibits a member of a board of education from having any interest "directly or indirectly in any . . . claim against the board" and N.J.S.A. 19:60-5 requires that any candidate for election to a board of education be "legally qualified to be elected." N.J.S.A. 19:3-7 provides that if a candidate for election files "any false statement, the nomination or election of such candidate . . . shall be null and void." In 2005, respondent's wife, a BOE employee, filed a Workers' Compensation claim against the BOE. See N.J.S.A. 34:15-1 to -31. In 2006, while the respondent's wife's claim was pending, he submitted a nominating petition for the April 18, 2006, election to the BOE, wherein he certified that he was legally qualified to serve as a member of the BOE. The respondent appeared on the ballot and received votes sufficient for election to the BOE. Thereafter, in May 2006, he began service as a member of the BOE. In April 2007 the respondent's wife took a day off from work for the BOE and appeared in the Workers' Compensation court for her case. The BOE then requested an opinion on the matter and an attorney wrote that, consistent with N.J.S.A. 18A:12-2, given respondent's wife's outstanding claim against the BOE, he was prohibited from lawfully taking the oath and serving on the BOE, but that it was unclear whether, if the claim was dismissed with prejudice, the respondent's disqualification would continue. The BOE then brought this case, contending that the respondent must be removed from BOE membership as disqualified, moving for emergent relief, and requesting that the matter be referred to the county superintendent of schools for filling the membership of the BOE. See N.J.S.A. 18A:12-15; N.J.A.C. 6A:3-1.6; Crowe v. DeGioia, 90 N.J. 126 (1982). The respondent denies that he was disqualified; citing N.J.A.C. 6A:3-1.3, he contends that the BOE's petition should be dismissed as out-of-time; and, citing N.J.S.A. 18A:12-20, he claims that the BOE should reimburse him for his attorney's fees. Additionally, the respondent submits that the BOE has not satisfied standards for emergent relief and, since his wife has now requested dismissal with prejudice of her claim against the BOE, he submits that the BOE's case should be dismissed as moot.

PROCEDURAL HISTORY

On May 8, 2007, the BOE filed with the Department of Education its petition and papers in support of its motion for an order granting interim relief. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the clerk of the Office of Administrative Law (OAL), where it

was scheduled for a hearing. N.J.S.A. 52:14B-2(b). On May 11, 2007, the attorneys and I conferred, the attorneys stipulated to certain facts, and the parties agreed that the hearing should be adjourned to allow submission of additional papers. On May 16, 2007, the respondent submitted his answer and counter-petition and papers in opposition to the BOE's claim and motion. On May 17, 2007, the attorneys and I conferred and the BOE advised that it would not settle and that it requested a decision on its petition. The BOE and respondent submitted additional papers, the last of which were received on May 22, 2007.

FINDINGS OF FACT

The respondent's wife, a BOE employee, has alleged that, on October 18, 2004, in the BOE's school system, she was exposed to mold, causing her to suffer "migraine headaches, elevated blood pressure, dizziness, shortness of breath and asthma" and causing her to refrain from work from December 2, 2004, until December 13, 2004, and, on May 25, 2005, (represented by counsel) she filed a Workers' Compensation Employee's Claim Petition, captioned as Houser v. Barnegat Township BOE, CP 2005-15595. P-A; see N.J.S.A. 34:15-1 to -31. Pursuant to a contract between the BOE and SAIF, SAIF manages Workers' Compensation claims against the BOE. R-1.

On February 25, 2006, the respondent signed a certification, certifying that he was qualified to serve as a member of the BOE, and he submitted a nominating petition for the annual school election to be held on April 18, 2006, for membership on the BOE. P-B; see also N.J.S.A. 19:60-5(d).

The respondent received votes sufficient for election to the BOE and on May 1, 2006, he signed the usual oath, swearing that he possessed the qualifications prescribed by law to serve as a member of a board of education. P-C; see also N.J.S.A. 18A:10-3(b). Thereafter, the respondent began service as a BOE member.

The respondent alleges that he was "an outspoken critic" of many of the fiscal decisions by the prior members of the BOE and that, as a member of the BOE, he has pursued fiscal reform, including restructuring the superintendent's contract. He alleges that he appropriately

recused himself from BOE actions related to his wife's employment with the BOE. He alleges that, in response to his "efforts at fiscal responsibility," the school district administration and BOE counsel have attempted to have him removed from his position as a BOE member. He further notes that charges against Scott Sarno, his former running mate, were filed with the School Ethics Commission. The Commission dismissed the charges, noting that Mr. Sarno asserted that the charges were "politically motivated," but that there was a reasonable basis for them and they were not frivolous. R-1; R-H.

In a letter to the School Ethics Commission dated November 10, 2006, Joseph D. Coronato, Esq., of the Mulvaney, Coronato and Brady law firm, wrote the following: The BOE had retained his law firm as special counsel. The respondent is the AFL-CIO's National Director of Organizing with duties including developing union membership and advocating for union principles and benefits. The respondent, as a member of the BOE's Budget Committee, must negotiate with unions on all contractual issues and represent the public interest in union issues brought to the BOE. The BOE requested the Commission's advice on whether a violation of the School Ethics Act would occur if a board of education member who is an officer of a national union participated in labor contract negotiations with other unions such that he would be disqualified from participating in such negotiations. R-C; see N.J.S.A. 18A:12-21 to -34.

In a letter dated January 5, 2007, to Mr. Coronato, Paul C. Garbarini, chairperson of the School Ethics Commission, wrote that, at the Commission's November 28, 2006, meeting, it determined that the board of education member's (the respondent's) participation in labor contract negotiations with other unions would not violate N.J.S.A. 18A:12-24(c). R-D.

On April 2, 2007, the respondent's wife, having requested time off from her employment with the BOE, appeared for her case before Workers' Compensation Judge Arnold B. Goldman. P-F; P-1.

The respondent's wife's request for time off alerted BOE school administrators to the Workers' Compensation claim and they requested legal guidance relative to the matter. By letter dated April 23, 2007, Stephen K. Foran, Esq., of the Gilmore and Monahan law firm, wrote that, under N.J.S.A. 18A:12-2, the respondent's wife's claim against the BOE constituted a conflict of

interest, which prohibited the respondent from lawfully taking the oath and serving as a BOE member. Mr. Foran added that it was "unclear" whether, if the Workers' Compensation claim were dismissed or finally adjudicated before adjudication of the issue of the disqualification, the respondent would still be subject to removal. P-E.

By letter to Judge Goldman dated May 3, 2007, the respondent's wife requested that her claim be dismissed and withdrawn, "for personal reasons." R-I.

On May 8, 2007, the BOE filed its petition and motion papers. N.J.S.A. 18A:6-9.

By letter dated May 11, 2007, Christine A. Dolan, Esq., the respondent's wife's attorney, requested that Judge Goldman dismiss the case. R-K. By letter to Judge Goldman dated May 14, 2007, Ms. Dolan represented that the respondent's wife "no longer wishes to pursue her workers' compensation claim" and submitted a proposed "Order of Dismissal with Prejudice." R-K.

CONCLUSIONS OF LAW

Education and elections in New Jersey are highly regulated.

N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." Consistent with N.J.S.A. 18A:12-2, N.J.S.A. 19:60-5 requires that the petition of a candidate for nomination for election to a board of education state that the candidate "is legally qualified to be elected to the office." Further, consistent with these statutes, N.J.S.A. 19:3-7 states, "If any candidate for nomination for or election to any public office . . . shall file any false statement, the nomination or election of such candidate . . . shall be null and void."

The above-cited statutes are consistent with the well-established principle that a public official is a fiduciary and trustee of the public and must serve the public interest with exclusive loyalty and the highest fidelity. Public officials must exercise judgment unaffected and undiluted by any interest that might inure to them individually. When a public official's personal or private interest directly or indirectly differs from that of the public, he is thereby disqualified from acting

in that regard. Such a conflicting interest includes one that is personal in nature, and "the interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance." Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956).

Timeliness of the BOE's Petition

The respondent, citing N.J.A.C. 6A:3-1.3, contends that the BOE's petition, having been filed more than 90 days after the election, should be dismissed as out-of-time.

Historically, a statute of limitations defense was unavailable against a public entity bringing action to enforce the law, even after inadvertence or neglect of a public agent. Port Authority of N.Y. and N.J. v. Bosco, 193 N.J. Super. 696, 699 (App. Div. 1984).

The rule upon which the respondent relies states that a petition shall be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education." N.J.A.C. 6A:3-1.3(i). Therefore, the rule does not appear to limit a board's petition, but rather to limit the time for filing a petition to challenge board action or to seek relief from a board.

Even if N.J.A.C. 6A:3-1.3 limited the time for a board to file a petition, statutes of limitations and the like are equitable in nature, intended to stimulate a litigant to pursue a claim within a reasonable period of time. O'Keefe v. Snyder, 83 N.J. 478, 490-91 (1980); Fidelity and Deposit Co. of Md. v. Abagnale, 97 N.J. Super. 132, 139 (Law. Div. 1967). Since N.J.A.C. 6A:3-1.3 is a Department of Education rule (not a statute), the Department has discretion in determining whether it should bar a petition without a determination on the merits of the case. See also D. R. Horton v. Dep't of Envtl. Protection, 383 N.J. Super. 405, 410 (App. Div. 2006), applying the standard of substantial compliance to the time limitation for filing a request for administrative relief.

Here the BOE filed its petition within 90 days of the respondent's wife's request for a day off for her Workers' Compensation case and within 90 days of receipt of the attorney's advice

relative to the respondent's wife's claim against the BOE. Further, given the compelling public policy recognized in the above-cited statutes, this case should be decided on its merits and not dismissed on such a technicality.

The Merits of the BOE's Petition

The respondent's wife's Workers' Compensation claim petition sets forth a "claim," i.e., a "statement of the facts . . . [purportedly] showing that [the claimant] is entitled to relief" from the BOE, and that claim was outstanding at the time of the respondent's election to the BOE and during his service on the BOE. R. 4:5-2; see also N.J.A.C. 1:1-1.3(a). (The elective provisions of the Workers' Compensation Act constitute a complete substitution for the common law per quod action, so the respondent could not be party in his wife's claim against the BOE. See N.J.S.A. 34:15-8; Danek v. Hommer, 9 N.J. 56, 58 (1952); Weir v. Mkt. Transition Facility, 318 N.J. Super. 436, 444-45 (App. Div. 1999).)

The BOE asserts that, consistent with N.J.S.A. 18A:12-2, given the respondent's wife's employment with the BOE and her claim against it, the respondent was disqualified from election to the BOE and he must be removed from that office.

The decision as to whether a particular interest is sufficient to disqualify a member of a local public body should be made according to the circumstances of the case. Aldom, supra, 42 N.J. Super. at 503 (citing Gland v. Mayor of North Arlington, 13 N.J. Misc. 521 (Sup. Ct. 1935)).

The parties have cited several cases applying N.J.S.A. 18A:12-2 in support of their positions.

Board of Education of Sea Isle v. Kennedy, ___ N.J. Super. ___ (App. Div. 2007), involves the effect of a special education complaint that Kennedy, a board of education member, brought against the board on behalf of his classified child. In 2001 Kennedy was elected to the board. On June 29, 2003, Kennedy resigned from the board and, thereafter, he filed a due process complaint against the board, claiming that the board had failed to provide appropriate special education for his child, as required by the Individuals with Disabilities Education Act and

related laws. See 20 U.S.C.A. § 1415; N.J.A.C. 6A:14-2.7. On April 27, 2004, the parties entered into a stipulation settling their differences. During the settlement process, Kennedy was elected to another term on the board and, on April 28, 2004, he became president of the board. On March 1, 2005, Kennedy filed an application for emergent relief and enforcement of the stipulation of settlement, and on March 5, 2005, the board filed a petition with the Commissioner of Education seeking a declaratory ruling that, although the appellant filed the special education complaint on behalf of his child, under N.J.S.A. 18A:12-2 there was an impermissible conflict that disqualified him from board membership. N.J.S.A. 52:14B-8. The Commissioner concluded that in the special education claim against the board, Kennedy had "an interest of the most direct and personal nature." The Commissioner distinguished N.J.S.A. 18A:12-2, which determines whether an individual is qualified to sit as a member of a board of education, from the later School Ethics Act, N.J.S.A. 18A:12-24, which governs a board member's actions after assuming such an office, and concluded that N.J.S.A. 18A:12-24 does not create an exception to N.J.S.A. 18A:12-2's prohibition of service by a member with a conflict of interest. The Commissioner ordered Kennedy removed and directed the county superintendent to fill the vacancy in the April 2006 election. The Appellate Division, affirming, cited Aldom, supra, 42 N.J. Super. at 502, for the principle that an interest may be indirect, and cited Jackson Township Board of Education v. Acevedo, 92 N.J.A.R.2d (EDU) 163, for the principle that "[t]he pivotal issue is whether the board member's claim is intended to vindicate the public's interest or instead will accrue to the board member's personal benefit."

In Woodstown-Pilesgrove Regional Board of Education v. Ketas, 1979 S.L.D. 353, rev'd, State Board, 1980 S.L.D. 1563, aff'd per curium, Appellate Division, 1980 S.L.D. 1507, Ketas, formerly the board of education's secretary and business administrator, was a party to Superior Court litigation in which the board claimed recovery of funds it asserted had been improperly paid to him upon his retirement and, after his election to the board, he brought a counterclaim against the board for indemnification with compensatory and punitive damages. The board petitioned the Commissioner of Education, contending that pursuant to N.J.S.A. 18A:12-2 Ketas was ineligible to serve on the board. The Commissioner determined that the dispute was limited, that it did not constitute a continuing inconsistent interest, and that Ketas could perform all the duties of a board member, except that he should abstain from discussions and votes related to his litigation. The State Board cited Aldom, supra, 42 N.J. Super. at 502, for the principle that the

interest that disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. The State Board cited Vistocky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971), for the principle that lack of a conflicting interest is a qualification for board membership. The State Board of Education concluded that there was a clear conflict of interest, declared the seat vacant, and directed the county superintendent to fill the seat. The Appellate Division affirmed for the reasons the State Board expressed.

In Williams v. Ciliberto, 96 N.J.A.R.2d (EDU) 991, Ciliberto, a member of the Point Pleasant Board of Education, filed a petition with the Commissioner of Education asserting that the board should allow his granddaughter to attend the board's school system without payment of tuition, and he resisted the board's claim that he pay tuition (assessed pursuant to N.J.S.A. 18A:38-1 et seq.) for his granddaughter's attendance in the school system. The board submitted that, pursuant to N.J.S.A. 18A:12-2, Ciliberto was disqualified from serving as a member of the board and demanded his removal. The Commissioner cited Hogan v. Kearny Board of Education, 1982 S.L.D. 329, 344, for the definition of "claim" as "[t]o demand as one's own . . . cause of suit or cause of action . . . a demand for compensation or for payment." The Commissioner also cited Aldom, supra, 42 N.J. Super. at 502, where the court wrote that the interest that disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect and psychological or personal in nature. The Commissioner concluded that Ciliberto's act of conducting and continuing his litigation against the board, irrespective of the outcome of such litigation, constituted a conflict prohibited by N.J.S.A. 18A:12-2 and ordered him removed.

In Board of Education of Brick v. Mercer, 96 N.J.A.R.2d (EDU) 5, Christopher Mercer, then a student in the board's school system, suffered personal injuries at one of the board's schools in 1992. By 1993 Christopher had graduated from the board's high school and, thereafter, he enrolled in a technical school, he held employment, he paid his own automobile insurance and Edward Mercer, his father, did not pay any of his expenses. In 1993 Edward Mercer wrote two letters to the board's insurance carrier, asserting Christopher's claim for payment of medical expenses related to his injuries. In December 1993 an order was entered granting Christopher's motion for an order allowing a late notice of claim against the board. See N.J.S.A. 59:8-9. In April 1994 Edward Mercer was elected to serve as a member of the board.

In November 1994 Christopher filed his Superior Court complaint against the board. Edward Mercer and his wife released any and all claims they may have had against the board and its employees relative to Christopher's claim. In April 1994 the board filed a petition with the Commissioner of Education, citing N.J.S.A. 18A:12-2 and asserting that Edward Mercer was disqualified and should be removed from the board and that his abstention on the case or matters of insurance was insufficient to prevent removal. The Commissioner found no showing that Edward Mercer would benefit, either directly or indirectly, from Christopher's claims against the board, allowed him to retain his seat, and dismissed the board's petition.

In Board of Education of Wall v. Margadonna, EDU 2409-03, Initial Decision (April 25, 2003), dismissed as moot, Acting Comm'r (June 2, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, the board of education declined to offer Margadonna another contract as a nontenured teacher. She petitioned the Commissioner of Education, claiming that the board should afford her a hearing relative to whether it should have offered her another contract, and filed notice of a tort claim against the board. While her petition and claim were pending, despite N.J.S.A. 18A:12-2, she appeared on the ballot for election to the board and received votes sufficient to serve as a member of the board. The board notified her that she should notify it whether she would withdraw or dismiss her claim or decline a seat as a member of the board and the board filed a petition with the Commissioner. The Commissioner transmitted the case to the OAL, and while the case was before the OAL Margadonna refused to withdraw her petition or dismiss her claim and the board claimed she should be removed as disqualified. In the initial decision, the administrative law judge (ALJ) concluded that she had an interest in a contract or claim against the board, so that Margadonna was disqualified from election and service on the board, and he referred the matter to the county superintendent of elections to fill the membership consistent with N.J.S.A. 18A:12-15. Thereafter, a Deputy Commissioner notified Margadonna that she should elect whether to withdraw her petition and claim against the board and assume a seat on the board or maintain her claim and be precluded from taking a seat. Thereafter, Margadonna agreed to dismissal of her petition and claim against the board and the Acting Commissioner dismissed the board's case as moot, without reaching the initial decision.

In Jackson Township Board of Education v. Acevedo, 92 N.J.A.R.2d (EDU) 163,

Acevedo, a (presumably lawfully elected) member of the board of education, was a per quod plaintiff in a Superior Court complaint claiming damages from the board relative to his son's personal injuries suffered at one of the board's schools. The board petitioned for a declaratory judgment, citing N.J.S.A. 18A:12-2, and contended that Acevedo should either withdraw his lawsuit or forfeit his membership on the board. The Commissioner cited In re Bayless, 1974 S.L.D. 595, rev'd, St. Bd., 1974 S.L.D. 603, 605 (quoting N.J.S.A. 52:13D-23(e)(8)), and Elms v. Mt. Olive Township Board of Education, 1977 S.L.D. 713, for the conclusion that a board's employment of a spouse or close relative of a member does not, in itself, disqualify the member from a board seat. The Commissioner cited Scotch Plains-Fanwood Board of Education v. Syversten, Comm'r Decision (June 13, 1990), and Board of Education of Newark v. Brown, 1984 S.L.D. 671, aff'd, St. Bd., 1984 S.L.D. 683, to distinguish a board member's disqualifying per quod claim for personal interest against the board from a nondisqualifying claim made on behalf of the public's interest. The Commissioner noted that Acevedo had settled his case with no appeal available and concluded that Acevedo no longer had a conflict with the Board.

In Board of Education of Hawthorne v. Taliaferro, 94 N.J.A.R.2d (EDU) 197, Taliaferro's wife charged that the board of education wrongfully failed to reappoint her to coaching positions; in 1991, she filed a complaint in the Division of Civil Rights against the board; and, in 1992, she filed a notice of tort claim against the board, seeking monetary damages. Taliaferro was not a party to his wife's claims. In April 1993 Taliaferro was elected to serve as a member of the board, and in May 1993 the board filed a petition with the Commissioner of Education seeking a declaratory ruling that, pursuant to N.J.S.A. 18A:12-2, Taliaferro was disqualified from service on the board. The ALJ cited Township of Holmdel v. O'Connell, 1990 S.L.D. 674, and Ketas, supra, 1979 S.L.D. 353, rev'd, St. Bd., 1980 S.L.D. 1563, aff'd per curium, Appellate Division, 1980 S.L.D. 1507, as examples of claims by board members against boards for injuries to family members and found that Taliaferro's wife's claim of damages constituted a future pecuniary benefit to Taliaferro's family unit. Consequently, the ALJ, with whom the Commissioner fully concurred, concluded that Taliaferro was disqualified; ordered Taliaferro removed from the board; and ordered the seat filled by the county superintendent consistent with N.J.S.A. 18A:12-15.

The respondent here argues that his wife's claim against the BOE should not constitute an interest attributable to him that is sufficient for disqualification under N.J.S.A. 18A:12-2. The BOE responds that the relationship between a husband and wife is direct and personal in nature, a wife's claim constitutes a potential pecuniary benefit to a husband board member's family unit, and it is assumed that a husband would favor the interest of his wife in her claim against the board. Consequently, the claim of the respondent's wife, a BOE employee, against the BOE disqualified him from election to the BOE.

The respondent points out that his wife has now requested a dismissal with prejudice of her claim against the BOE and that even if he had an interest in his wife's claim against the BOE, in similar circumstances the Commissioner has determined that the member need not be disqualified and removed. The BOE responds that the above-cited statutes speak of qualification for election in the present, not the future tense. Therefore, where at the time of the election a candidate was disqualified from serving on a school board, his membership is "invalid from its inception, nunc pro tunc." Vistocky, supra, 113 N.J. Super. at 265. A candidate who, by operation of the statutes, is not legally qualified for election to a board of education may not escape disqualification by declaring an intention, if elected, to thereafter eliminate that disqualification (e.g., by resigning from employment with the board). In such circumstances, (1) the person is not legally qualify for election to the board of education; (2) the person's nominating petition is invalid, null and void; and (3) the person's name as a candidate for election to the board of education should be removed from the ballot relative to the upcoming election. Howell Township Bd. of Educ. v. Suchcicki, 93 N.J.A.R.2d (EDU) 157. Further, unlike the boards of education in the above-cited cases who demanded that respondents choose either to discontinue their claims or to decline to serve on the boards, the BOE is pursuing its contention that the respondent was disqualified and that he must be removed. Finally, the BOE submits that, as a matter of "compelling public policy," "[t]he law tolerates no mingling of self interest; it demands exclusive loyalty," and, consistent with the intent of N.J.S.A. 18A:12-2, in the circumstances of this case the respondent was disqualified from election to the BOE and he must be removed from membership. Aldom, supra, 42 N.J. Super. at 500-01, citations omitted.

There is no record here that either party requested the School Ethics Commission's advice on whether the respondent's per quod claim disqualified him. In any event, consistent with

Kennedy, supra, ___ N.J. Super. ___ (App. Div. 2007), the School Ethics Commission's above-described advice that the respondent's participation in labor contract negotiations with unions other than his employer would not violate N.J.S.A. 18A:12-24(c) does not also constitute a determination that his wife's claim against the BOE does not disqualify him from election to or from service on the BOE.

As noted above, education and elections in New Jersey are highly regulated. It is well established that everyone is presumed to know the law. Widmer v. Township of Mahwah, 151 N.J. Super. 79, 83 (App. Div. 1977); In re Krah, 130 N.J. Super. 366 (App. Div. 1974); Suchcicki, supra, 93 N.J.A.R.2d (EDU) at 157-58. The BOE does not allege that the respondent wrongfully concealed his wife's claim before the election, but wrongful intent is not essential to his disqualification under the above-cited statutes.

Consistent with the above-cited statutes and the circumstances of this case, the respondent was not qualified for election, his election must be declared null and void, and he must be removed from BOE membership.

Respondent's Claim for Attorney's Fees

The general rule is that each party bears his or her own attorney's fees and costs in the absence of express authorization by statute, court rule or contract. Balsley v. North Hunterdon Bd. of Educ., 117 N.J. 434, 443 (1990); In re Thomas, 278 N.J. Super. 580, 284-85 (App. Div. 1995); see also N.J.A.C. 1:1-1.3(a) and R. 4:42-9(a), which states that, subject to specific exception, "[n]o fee for legal services shall be allowed in the taxed costs or otherwise."

Public policy encourages citizens to run for election to public office, and, while serving in such offices, to express themselves freely, "without fear of economic loss." Quick v. Bd. of Educ. of Old Bridge, 308 N.J. Super. 338, 341-42 (App. Div. 1998), citations omitted.

Consistent with the above-described public policy, N.J.S.A. 18A:12-20 states:

> Whenever a civil, administrative, criminal or quasi-criminal

> action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in N.J.S. 59:10-4. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

The respondent's de facto membership on the BOE has resulted in his being subjected to this litigation and his incurring attorney's fees in his defense. Jones v. Kilbeck, 119 N.J. Super. 299 (App. Div. 1972). Consistent with the above-described public policy, N.J.S.A. 18A:12-20 is to be liberally applied in the context of civil litigation and the "outcome" of this case is "irrelevant"; N.J.S.A. 18A:12-20 "protects both successful and unsuccessful litigants" in cases of this kind and the respondent is entitled to have his attorney's fees borne by the BOE. Quick, supra, 308 N.J. Super. at 341-43. (No finding of fact is necessary on the respondent's allegation that because he pursued fiscal reform he incurred the wrath of the school administration and caused the BOE to bring this petition. However, such vigilance by a public official should be encouraged.)

Finally, I note that actions taken by a board of education before the removal of a de facto member shall not be invalidated solely on the basis of the conflict of interest established in the case resulting in the order of removal. Williams v. Ciliberto, supra, 96 N.J.A.R.2d (EDU) at 994 (citing Kimball v. Hendee, 57 N.J.L. 307, 309 (S. Ct. 1894)); Oliver v. Jersey City, 63 N.J.L. 634 (E. & A. 1899); Pijeaux v. Bd. of Educ. of Orange, 94 N.J.A.R.2d (EDU) 345, 346; Monsees v. Bd. of Educ. of Bloomingdale, 1982 S.L.D. 1409; Egan v. Brody, 1970 S.L.D. 153.

The record and the legal arguments submitted are sufficient for an order on the BOE's claims and on the respondent's defense and his claim for attorney's fees. Given the conclusions above and orders entered below, no other issue remains.

ORDERS

Consistent with the above, I **ORDER** the respondent removed from office as a member of the BOE.

I refer to the county superintendent of schools the matter of filling the membership of the BOE. N.J.S.A. 18A:12-15.

I **GRANT** the respondent's claim for attorney's fees and any costs conditioned upon the submission to the BOE of an itemized and certified statement of services and costs.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 23, 2007

DATE

JOHN R. TASSINI, ALJ

mph

EXHIBITS

For Petitioner:

P-A Workers' Compensation Employee's Claim Petition, Houser v. BOE, filed May 25, 2005

P-B Respondent's Nominating Petition, Nominating Statement, Candidate's Acceptance/Oath of Allegiance, for Annual School Election, February 25, 2006

P-C Respondent's Required Oath for School Board Members, May 1, 2006

P-D Record of Appearance in Workers' Compensation case, Houser v. BOE, April 2, 2007

P-E Letter from Gilmore & Monahan, P.C., April 23, 2007

P-1 Certification of Falkowski

For Respondent:

R-1 Certification of respondent

R-A Respondent's Nominating Petition, etc. (same as P-B)

R-B Respondent's Required Oath for School Board Members (same as P-C)

R-C Letter from Mulvaney Coronato & Brady, November 10, 2006

R-D Letter from State of New Jersey, Department of Education, January 5, 2007

R-E Workers' Compensation Employee's Claim Petition (same as P-A)

R-F Record of Appearance in Workers' Compensation case (same as P-D)

R-G Letter from Gilmore & Monahan (same as P-E)

R-H School Ethics Commission Decision, Gorman and Splendorio v. Sarno, Barnegat Board of Education, unsigned and undated

R-I Letter from respondent's wife to Workers' Compensation Court, May 3, 2007

R-J Letter from respondent's wife's attorney to Workers' Compensation Court, May 11, 2007

R-K Letter from respondent's wife's attorney to Workers' Compensation Court, May 14, 2007, with proposed "Order of Dismissal, with Prejudice"

309-07

OAL DKT. NO EDU 632-07
AGENCY DKT. NO. 20-1/07

IN THE MATTER OF THE TENURE	:	
HEARING OF STACY DEMBROWSKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
SOMERS POINT, ATLANTIC COUNTY.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement, Approved Leave of Absence and Resignation, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. For the reasons which follow, the Commissioner is compelled to reject the parties' proposed agreement.

Upon such review, the Commissioner cannot accept the proposed settlement as recommended by the OAL. Initially, the Commissioner emphasizes that, pursuant to *N.J.A.C.* 6A:3-5.6(a), once tenure charges are certified to her, such charges may be settled only with her approval, and that any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards expressly established for this purpose by the State Board of Education. *In re Cardonick*, 1990 *S.L.D.* 842, 846. Specifically, a proposed settlement must: 1) be accompanied by documentation as to the nature of the charges; 2) include an explanation of the circumstances justifying the settlement or withdrawal; 3) evidence the consent of both the charged and the charging parties; 4) indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest;

and 6) indicate, where the charged party is a teaching staff member, that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible action against the staff member's certificate.

In this matter, the parties have – most seriously – failed to set forth on the record the nature of the charges and the circumstances justifying settlement, notwithstanding the well-established principle that, having once taken up the burden of tenure charges, a board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* N.J. Superior Court, Appellate Division, January 30, 1986. The Commissioner notes that this principle is no less applicable where the charged party may be retiring from employment with the charging district, and is of particular concern to the Commissioner where the charges – as here – involve charges of unfitness to be a teacher due to alleged involvement with illegal substances and alleged commission of an assault. Compounding this omission, the parties have further failed to acknowledge the Commissioner's duty to refer this matter to the State Board of Examiners pursuant to *Cardonick, supra*, and *N.J.A.C.* 6A:9-17.1 et seq. While the Commissioner does not preclude the possibility of settlement in this matter, she cannot meet her own obligation to the schools and children of this State without first and foremost being assured that the parties' proposed settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Additionally, the Commissioner observes that the Board President has signed the settlement agreement on behalf of the Board, stating that he has "full authority to act on behalf of and to bind the Board to the terms set forth in [the] agreement." (Settlement Agreement at 8) However, the Commissioner cannot accept this representation in the absence of a Board resolution approving the settlement and designating the Board President to sign the written agreement on its behalf, or, in the alternative, signing of the agreement by the Board attorney, who is the Board's duly authorized representative in this litigation.

Moreover, the Commissioner cautions the Board, with respect to Term #3 of the proposed agreement, that any disclosure of information regarding respondent's employment with the district must comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, stating, in pertinent part, that the following employment information shall be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation and the reason therefor;* and the amount and type of any pension received ***. (emphasis added) *N.J.S.A.* 47:1A-10

The Commissioner further reminds the parties that the filing of tenure charges, tenure charge documents, and any record of or determination related to these, are also a matter of public record. See *Williams v. The Board of Educ. of the Atlantic City Public Schools et al.*, 329 *N.J. Super.* 308 (App. Div. 2000); see also *N.J.A.C.* 1:1-14.1(a).

Finally, the Commissioner observes that Term 1B of the proposed agreement requires effectuation prior to final agency approval, contrary to *N.J.A.C.* 1:1-19.1. In this regard, the parties are reminded that parties to proposed settlements act at their peril when

including terms requiring effectuation prior to the Commissioner's approval, since the Commissioner may ultimately disapprove the term(s) in question.

Accordingly, the proposed settlement and the Initial Decision of the OAL recommending its approval are hereby rejected, and this matter is remanded to the OAL for expansion of the record and revision of the Settlement Agreement consistent with the concerns expressed above. If the parties are unwilling or unable to agree on such expansion and modification, the tenure charges shall proceed to plenary hearing.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/02/07
Date of Mailing: 8/02/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 632-07
AGENCY DKT. NO. 20-1/07

IN THE MATTER OF THE TENURE HEARING OF STACY DEMBROWSKI,

Louis J. Greco, Esq., for petitioner

Ned P. Rogovoy, Esq., for respondent

Record Closed: June 11, 2007 Decided: June 12, 2007

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

This matter was transmitted to the Office of Administrative Law on February 7, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

JUN 19 2007

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2007 JUN 11 P 1:14

SETTLEMENT AGREEMENT,
APPROVED LEAVE OF ABSENCE AND RESIGNATION

This Settlement Agreement, Approved Leave of Absence and Resignation (the "Agreement"), is entered into this 6th day of June, 2007, by and between STACY DEMBROWSKI a/k/a STACY GEORGE ("Ms. Dembrowski George") and the SOMERS POINT BOARD OF EDUCATION, ATLANTIC COUNTY (the "Board") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Somers Point Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Ms. Dembrowski George" shall mean and include Stacy Dembrowski a/k/a Stacy George and any and all of her heirs, executors, administrators, successors, predecessors, assigns, agents, representatives and privies. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Ms. Dembrowski George's employment by the Board.

WITNESSETH:

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming and incapacity against Ms. Dembrowski George pursuant to N.J.S.A. 18A:6-11 and said charges were certified and are pending under Agency Docket No. 20-1/07 and OAL Docket No. EDUTH 00632-2007S; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which the Board may have against Ms. Dembrowski George; and

WHEREAS, the Board acknowledges and agrees that this Agreement shall cause the Board to voluntarily dismiss, waive and withdraw any and all administrative actions of any kind against Ms. Dembrowski George and the Board has agreed to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges with prejudice;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) Ms. Dembrowski George agrees that upon signing this Agreement and by signing her Resignation which is attached hereto as **Appendix A**, she is irrevocably resigning her employment with the Board effective at least by June 30, 2008 or sooner pursuant to the remaining terms of this Agreement.

(B) As a result of the tenure charges being certified and contested as represented in the prior introduction, Ms. Dembrowski George's pay was stopped as of January 18, 2007 and in light of this contested case, was not due to begin until on or about May 18, 2007. However, for all parties to avoid the litigation of the contested case before an administrative law judge, the Board agrees to place Ms. Dembrowski George on a retroactive paid leave of absence from January 18, 2007 through June 30, 2008 subject to the following terms and conditions:

Ms. Dembrowski George shall receive a retroactive payroll check on June 1, 2007 representing all retroactive pay from January 18, 2007 through June 1, 2007. Ms. Dembrowski George's wages will continue under this paid leave of absence from June 1, 2007 through January 18, 2008. Both sides realizing that since Ms. Dembrowski

George is a 10-month employee, she shall not receive any payroll compensation for the period July 1, 2007 through August 31, 2007 and that her payroll compensation will then begin as it would a regular contract teacher on September 1, 2007 and continue through January 18, 2008, and her status will be that she is on a paid leave of absence.

Benefits - In addition to her payroll benefits, Ms. Dembrowski George shall receive all of her benefits that are available from June 1, 2007 through June 30, 2008 even though she shall not receive any additional compensation after January 18, 2008.

The continuation of benefits is conditioned on Ms. Dembrowski George not obtaining other employment wherein health insurance benefits are available through her employment. Therefore, if during the period of June 1, 2007 through June 30, 2008, should Ms. Dembrowski George obtain gainful employment and that employment provides health insurance coverage equal to the one provided by the Board, she shall immediately notify the Board and the Board's obligation to provide benefits shall cease prior to any expiration of any time period. In no event shall Ms. Dembrowski George be on payroll past January 18, 2008, even if she has no other benefits and if she has no other health insurance as of January 18, 2008, her status will convert to an unpaid leave of absence with benefits until June 30, 2008 when that status shall cease.

In no event will the Board have any obligation to provide benefits to Ms. Dembrowski George beyond June 30, 2008, no matter what are the circumstances.

Ms. Dembrowski George shall receive the compensation for her retroactive paid leave of absence regardless of any other employment that she obtains during the period so that if she becomes employed after June 1, 2007 and before January 18,

2008, she shall be entitled to her payroll check during that period.

2. Ms. Dembrowski George, for the consideration given by the Board as set forth above, which she acknowledges is adequate and satisfactory to her, hereby commits as follows:

(a) Ms. Dembrowski George irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Ms. Dembrowski George has ever had or now has against the Board in connection with her employment with the Board, the resignation of her employment, compensation and/or benefits with the Board and the charges. Ms. Dembrowski George further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by her and which seeks personal, equitable or monetary relief for her against the Board, including but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income

Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment, discrimination; employee benefits; collective bargaining agreement; and the termination of employment; and any other claim arising from or relating to Ms. Dembrowski George's employment. Ms. Dembrowski George understands that she is not releasing any claims she may have to enforce the provisions of this Agreement. This release covers both claims that Ms. Dembrowski George knows about and those she may not know about, except for claims (i) that may arise after the date Ms. Dembrowski George executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Ms. Dembrowski George has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Ms. Dembrowski George further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of reasonable attorneys' fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

(b) The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 20-1/07, OAL

Docket No. EDUTH 00632-2007S, with prejudice in light of Ms. Dembrowski George's Agreement to resign for the consideration specifically paid and leave of absence granted to her by the Board. In executing this Agreement, Ms. Dembrowski George understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and that notwithstanding, the Commissioner's decision with regard to the tenure charges, the remaining promises and covenants between the parties that are contained in this Agreement are enforceable upon the execution of the Agreement.

3. With respect to any inquiries directed to the Somers Point School Board's Department of Human Resources regarding Ms. Dembrowski George's status, the Board shall have the responsibility only as provided below. If any inquiries are made, there will be a neutral reference and **Appendix B** shall be read to the inquiring party.

4. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board or Ms. Dembrowski George. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which the Board or Ms. Dembrowski George has ever had or now has against each other arising out of or relating to her employment with the Board.

5. This Agreement may not be changed orally and no modification, amendment

or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the Board.

6. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this Agreement. This is an integrated document.

7. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect and to that end, the provisions of this Agreement are declared to be severable.

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in the Superior Court for the State of New Jersey, County of Atlantic.

8. Ms. Dembrowski George agrees that she shall be responsible for her own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

9. In executing this Agreement, Ms. Dembrowski George has had an opportunity to speak to her attorney and has relied upon the legal advice of her attorney as to the terms of this Agreement, which have been completely read by her and explained by her attorney, and those terms are fully understood and voluntarily accepted.

10. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Ms. Dembrowski George and the Board.

11. This Agreement shall become effective immediately following the execution by Ms. Dembrowski George and the Board.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

AGREED AND ACCEPTED:

Stacy Dembrowski a/k/a Stacy George Date: 6/6/2007

Subscribed & sworn to before me
this 6th day of June, 2007

Notary Public
Attorney at N.J.

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

WALT WILKINS, Board President Dated: May 24, 2007

Witness:

Louis J. Greco

, Business Administrator/
Board Secretary

APPENDIX A

Resignation of Stacy Dembrowski George

To the Somers Point Board of Education, Atlantic County:

I, Stacy Dembrowski, a/k/a Stacy George, hereby resign my employment with the Somers Point Board of Education, Atlantic County, effective June 30, 2008.

Stacy Dembrowski, a/k/a Stacy George

Subscribed & sworn to before me
this 6th day of June, 2007.

Ted Rogovoy
Attorney at N.J.

APPENDIX B

Joint Statement of
Somers Point Board of Education, Atlantic County

Ms. Dembrowski George is on a paid leave of absence, but is not precluded from employment due to her paid leave status. She will not be re-employed by the Board after her leave expires and all disagreements were resolved amicably.

311-07

OAL DKT. NO. EDU 6550-06
AGENCY DKT. NO. 271-8/06

DAWN PETERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the "Settlement Agreement and General Release" and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/06/07

Date of Mailing: 8/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6550-06

AGENCY DKT NO. 271-8/06

DAWN PETERMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY,

Respondent.

Jason E. Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum, & Friedman, attorneys)

John E. Collins, Esq., for respondent (Parker McCay, attorneys)

Record Closed: June 20, 2007 Decided: June 21, 2007

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter involves petitioner's appeal to the Board of Education for her return to her tenured position. Thereafter, the case was transmitted to the Office of Administrative Law (OAL) on September 8, 2006, for determination as a contested

case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and was assigned to the undersigned Administrative Law Judge (ALJ) for hearing.

Settlement Agreement and General Release, along with the Board Resolution indicating the terms thereof is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 21, 2007
DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

Fax 6/22/07

Mailed to Parties:

JUN 2 6 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/mmp

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner
Dawn Peterman

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2007 JUN 20 A 11: 23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DAWN PETERMAN, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY, Respondent.	: OFFICE OF ADMINISTRATIVE LAW : : DOCKET NO. EDUOA 06550-2006S : AGENCY DOCKET NO. 271-8/06 : : : : : **SETTLEMENT AGREEMENT AND GENERAL RELEASE** : :

The parties to this matter, Dawn Peterman and the Board of Education of the Township of Union, Hunterdon County, having reached an agreement to amicably resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and general release and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement and general release, and that if any of the terms of this agreement and general release are rejected by the Commissioner of Education, this agreement and general release shall be deemed null and void, and that in such event, neither parties' position in relation to the petition of appeal shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the petition of appeal, provided that nothing in this paragraph or in

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ATTORNEYS AT LAW

this agreement and general release shall, in such event, preclude the parties from agreeing to a new, revised, or modified settlement agreement and general release, provided that such agreement and general release is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement and general release, the petitioner shall withdraw the petition of appeal.

3. The parties agree that in consideration of the mutual execution of this settlement agreement which provides for a release given by petitioner, respondent will within one (1) month of the approval of this settlement agreement by the Commissioner of Education pay petitioner $34,738. This amount represents the approximate difference in salaries petitioner earned and will earn from employment with another school district from September 1, 2006 through June 30, 2007, and for the next two successive school years, 2007-2008 and 2008-2009, and what petitioner would have earned if she remained employed with respondent over the same time period.

4. In exchange for the consideration set forth herein, petitioner hereby agrees to release and forever discharge respondent, its individual members, successors, assigns, and agents from any and all past, present, and future claims, suits, actions at law or in equity of any kind, in any form, that she may have against them, and agrees that execution of this settlement agreement shall serve as full and final satisfaction of same, except for any claims arising under the Teachers' Pension & Annuity Fund statutes, N.J.S.A. 18A:66-1 et. seq., and any claims arising from a breach of this settlement agreement or any provision thereof. Petitioner represents that she is

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unaware of any claims arising under these exceptions as of the date she executes this settlement agreement, and specifically releases the following claims as to respondent:

(a) Any claims which Petitioner asserted, or which could have been asserted, in the petition brought before the Commissioner of Education, Agency Reference No. 271-8/06, OAL Docket No. EDUOA 06550-2006S; and

(b) Any civil or administrative claims which Petitioner could assert now, or in the future, resulting from any action or failure to act occurring prior to the time Petitioner signs this settlement agreement, under any provision of any law, common or statutory, of the United States, New Jersey, or any other state, city, county or locality.

5. Petitioner voluntarily and willingly enters into this settlement agreement without any duress or coercion. Petitioner agrees that her successors shall be bound by the releases and all other provisions of this settlement agreement, including the right to receive payment from respondent pursuant to paragraph 3 of this settlement agreement.

6. By settling this matter, petitioner acknowledges that she is waiving her right to a hearing before the Office of Administrative Law and Commissioner of Education, in which she could seek adjudication on the merits of the petition of appeal. Petitioner further acknowledges that she understands and agrees to the terms of this agreement and that she is satisfied with the legal representation that she received in this matter.

7. The parties agree that in the event that the Commissioner of Education does not accept any provision of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for a hearing without prejudice to either parties' position and without waiver of any of either parties' legal rights.

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ATTORNEYS AT LAW

8. The respondent board of education hereby authorizes the president of the board of education to sign this settlement on its behalf and approves the terms of this settlement as acknowledged by the attached resolution.

Michael Sroka, President of the Union Township Board of Education

STATE OF NEW JERSEY :
:SS
COUNTY OF HUNTERDON :

I certify that on May 29, 2007, Michael Sroka, President of the Union Township Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

John E. Collins
An Attorney at Law of the State of New Jersey

Dawn Peterman, Petitioner 6/14/07

STATE OF NEW JERSEY :
:SS
COUNTY OF HUNTERDON :

I certify that on ~~May~~ June 14, 2007, Dawn Peterman, petitioner in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

MARCELLA A PAPARIELLO
MY COMMISSION EXPIRES 02/03/09

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RESOLUTION

WHEREAS, a legal dispute has arisen between the Union Township Board of Education and Dawn Peterman; and

WHEREAS, the Union Township Board of Education desires to settle the dispute while denying all liability;

NOW, THEREFORE BE IT RESOLVED, that the Union Township Board of Education approves the settlement agreement, which is attached hereto. The Union Township Board of Education also authorizes its President to execute said agreement and approves the payment of $34,738.00 to Dawn Peterman in settlement of all claims which she asserted, or could have asserted, in her petition of appeal filed with the Commissioner of Education bearing Agency Reference No. 271-8/06 and OAL Docket No. EDUOA 06550-2006S.

I certify that this is a true copy of a Resolution adopted by the Union Township Board of Education on May 29, 2007.

Board Secretary

313-07

KURT WALTON, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF NEWTON, SUSSEX COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner claimed tenure rights to the position of principal in respondent's district. Petitioner had been promoted from vice principal to interim principal for the period from April 14 to June 30, 2004, after the previous principal submitted a letter of resignation that was effective June 30, 2004. Petitioner was subsequently appointed principal for the 2004-2005 and 2005-2006 school years. He was notified in February 2006 that his services as principal would be terminated on June 30, 2006. Respondent Board claimed that petitioner had not served the requisite amount of time to earn tenure in the position of principal.

The ALJ found that summary decision is appropriate in this matter, as there are no material facts in dispute and the only issue to be resolved is whether the time petitioner spent as interim principal may be counted toward acquisition of tenure in the position of principal. The ALJ also found, *inter alia*, that: tenure law requires that a "true vacancy" exist before any time spent working as an interim staff member may be counted toward tenure; tenure did not accrue in the instant matter until the incumbent principal's employment was officially severed on the effective date of his resignation, June 30, 2004; *N.J.S.A.* 18A:28-6(a) requires a minimum of two consecutive years of service to acquire tenure following a promotion, but the employee must be reemployed for at least one day following the required period of service; petitioner was appointed and served in the position of principal for exactly two years; petitioner was not reemployed for at least one day following that period, and therefore did not acquire tenure in the position of principal. The ALJ concluded that the petition should be dismissed.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that petitioner has no tenure rights in the position of principal, and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner noted that *N.J.S.A.* 18A:28-6(a) does not confer tenure upon reaching the two-year mark, but rather after the completion of the two-year probationary period.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 8, 2007

313-07

OAL DKT. NO. EDU 7628-06
AGENCY DKT. NO. 179-5/06

KURT WALTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] After full and independent consideration, the Commissioner adopts the Initial Decision as the final decision in this case.

Petitioner served as interim principal of Halsted Middle School (HMS) in respondent's district from April 14, 2004 to June 30, 2004. As the Administrative Law Judge (ALJ) explained, pursuant to *Williams v. Board of Education of the City of Orange*, 1987 *S.L.D.* 997, 1000 *aff'd* State Board, 1988 *S.L.D.* 2534, and later cases, petitioner's time served as interim principal before the effective terminus of the resigning principal's employment may not be counted toward tenure.

On May 25, 2004, respondent appointed petitioner principal of HMS for the calendar year of July 1, 2004 to June 30, 2005. Petitioner was reappointed for the next school year, *i.e.,* July 1, 2005 to June 30, 2006, but was provided with notice on February 17, 2006 that his services as HMS principal would be terminated on June 30, 2006, and would not be renewed.

[1] No exceptions to the Initial Decision were filed with the Commissioner.

The issue before the ALJ was whether petitioner had served long enough in the position of principal to have accrued tenure.

The statute governing the controversy is *N.J.S.A.* 18A:28-6. That statute provides, in pertinent part:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter . . . shall not obtain tenure in the new position until after: (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose . . . .
>
> [Emphasis added.]

As explained above, respondent notified petitioner in February 2006 that his service as principal would end on June 30, 2006, at which time petitioner would have completed no more than two years in the position.[2] The statute does not confer tenure upon reaching the two-year mark in a position. Tenure is achieved after the completion of the two-year probationary period. If tenure were automatically achieved at the end of the probationary period, the phrase "after (a) the expiration of a period of employment of two consecutive calendar years" would be rendered meaningless, a result that the Commissioner cannot endorse. *See, e.g., State v. Reynolds*, 124 *N.J.* 559, 564 (1991) (A construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided)

Further, as recognized by the New Jersey State Board of Education in *Gregory R. Martucci v. Board of Education of the City of Linden, Union County,* Dkt. No. SB 108-95, decided December 4, 1996, precedent exists establishing that the language of *N.J.S.A.* 18A:28-5(a), which is substantially the same as the language of *N.J.S.A.* 18A:28-6(a), dictates that "a teaching staff member acquires tenure only after employment in a tenure-eligible

[2] Petitioner does not allege that the respondent board fixed an abbreviated time requirement for petitioner to obtain tenure in the position of principal.

position for the requisite period." (*Ibid.* at 7) The State Board approved of the precedent, observing that it constituted sound educational policy:

> Were we to hold otherwise, district boards would be forced to terminate the contracts of calendar year employees in order to prevent tenure acquisition. We find no justification for the disruption to the school system that such a result would cause. Nor can we justify the additional expense that would be inevitable in those cases where payment must be made to the employee under the employment contract following his termination while, at the same time, the district would be required to pay for his replacement. (*Id.* at 7-8)

Accordingly, the Commissioner adopts the Initial Decision, as supplemented herein, as the final decision in this case. The petition is dismissed.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 8/08/07

Date of Mailing: 8/08/07

[3] The Commissioner concurs with the ALJ that under *N.J.S.A.* 18A:28-6, petitioner retains tenure rights to his previous position in respondent's district, at the salary he would have received had he not been promoted, including any increases to which he would have been entitled.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 7628-06
AGENCY DKT. NO. 179-5/06

KURT WALTON,
Petitioner,
v.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF NEWTON, SUSSEX COUNTY,
Respondent.

David Nash, Esq., for petitioner, Kurt Walton (New Jersey Principals and Supervisors Association)

Allan P. Dzwilewski, Esq, for respondent, Board of Education of the Township of Newton, Sussex County, (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: March 27, 2007 Decided: May 10, 2007

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF THE CASE

Kurt Walton had acquired tenure as an Assistant Principal in the Newton School District.

The resignation of the principal of Halsted Middle School effective June 3, 2004 was submitted on March 30, 2004.

Walton was appointed interim principal of Newton Middle School for the period between April 13, 2004 and June 30, 2004.

The issue to be resolved in this matter is whether Walton's service between April 13, 2004 and June 30, 2004 accrue toward his tenure. The facts in this matter are not in dispute and cross-motions for summary decision have been filed.

FACTS

I **FIND** the facts of significance to be as follows:

1. The Petitioner was the vice principal of HMS from 9/1/01 to 4/13/04.

2. On 3/26/04, the principal of HMS, F. Scott Allshouse, submitted a letter of resignation to the Newton Board of Education (Board) indicating his intent to resign as principal as of 6/30/04.

3. On 3/30/04, the Board accepted Allshouse's resignation.

4. Allshouse executed an agreement with the Board, and did not report to work after 4/13/04, but remained on the payroll, and continued to hold the title until 6/30/04.

5. On 4/13/04, the Board appointed the Petitioner "interim" principal of HMS, for the balance of the school year (4/14/04 to 6/30/04), and he was paid an additional stipend of $1,500.

6. Petitioner performed all of a principal's duties during that time period.

7. On 5/25/04, the Board appointed the Petitioner principal of HMS for the calendar year 7/1/04 to 6/30/05.

8. Petitioner was reappointed from 7/1/05 to 6/30/06.

9. On 2/17/06, the Board notified the Petitioner that he would not be renewed as principal of HMS, and that his services as principal would be terminated on 6/30/06.

10. Petitioner filed the instant complaint on 5/17/06.

11. At all relevant times, the Petitioner has held the appropriate certifications to hold a principal position.

DISCUSSION

Summary decision is governed by N.J.A.C. 1:1-12.5(b), which provides that "if the papers and discovery which have been filed, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged . . . and the moving party is entitled to prevail as a matter of law," then summary decision should be entered in the moving party's favor. See Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); See Also Brill v. Guardian Ins. Co. of America, 142 N.J. 520 (1995) (holding that a material issue of fact exists when the papers and discovery, together with all the legitimate inferences therefrom, would require submission of the issue to a trier of fact). Courts do not easily grant these motions, and the standard is "applied with discriminating care, so as not to defeat the motion if the movant is justly entitled to [summary decision]." Judson, 17 N.J. at 74. The underlying rationale for summary decision is to provide a prompt, businesslike and inexpensive method of disposing of any cause which the movant clearly shows should be decided as a matter of law. Ibid. Here, the parties agree that there are no material issues of fact in dispute, and both have filed cross-motions for summary decision. The only question to be resolved is whether the time that the petitioner spent as "interim" principal may be counted toward the acquisition of tenure as principal, this is a legal issue.

Tenure Law

The Tenure Act, N.J.S.A. 18A:28-1 to 18, as interpreted by the New Jersey Supreme Court, states that an employee of a board of education is entitled to tenure if he or she works in a position for which a teaching certificate is required, holds the appropriate certificate, and has served the requisite period of time, provided that he or

she does not fall within a statutory exemption to tenure acquisition. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982).

> The statute governing the present matter is N.J.S.A. 18A:28-6, which provides, in relevant part:
>
> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> [(emphasis added).][1]

The statute requires a minimum of two consecutive calendar years of service to acquire tenure following a promotion or transfer. N.J.S.A. 18A:28-6(a). But, for tenure to accrue under N.J.S.A. 18A:28-6(a) the employee seeking tenure must be reemployed for at least one day following the required period of service. See Picogna v. Cherry Hill Board of Education, 143 N.J. 391, 393 (1996) (interpreting N.J.S.A. 18A:28-5(a)); Dues v. Board of Education of the Twp. of Irvington, 97 N.J.A.R.2d (EDU) 616 (interpreting N.J.S.A. 18A:28-6(a)); see also Martucci v. Bd. of Ed. of the City of Linden, 96 N.J.A.R.2d (EDU) 109, rev'd on other grounds, St. Bd. (Dec. 4, 1996) (Where the State Board held that reemployment in the position after the two-year statutory period is necessary in order to support a claim of tenure.[2]). But, tenure will not be acquired, by staff who fall within the purview of N.J.S.A. 18A:16-1.1. See Spiewak, supra, 90 N.J. at 81.

---

[1] The Court in Spiewak interpreted the requirements of N.J.S.A. 18A:28-5, the initial tenure accrual statute. Its analysis is equally applicable to N.J.S.A. 18A:28-6, the promotional tenure statute. See, e.g. Martucci v. Bd. of Educ. of the City of Linden, 96 N.J.A.R.2d (EDU) 109, aff'd, Commr., (October 25, 1995), rev'd on other grounds, St. Bd. (December 4, 1996).

[2] The State Board also emphasized "that in contrast to N.J.S.A. 18A:28-5, any teaching staff member to whom N.J.S.A. 18A:28-6 applies retains his tenure rights in his previous position." Martucci, supra, St. Bd. (Dec. 4, 1996).

N.J.S.A. 18A:16-1.1 permits school boards to hire long-term substitutes[3] who will not acquire the tenure and benefits that the board would otherwise be required to provide. But, this statute has been construed to apply only where the incumbent is "absent," rather than where there is a "vacancy." See Lammers v. Bd. of Educ. of the Borough of Point Pleasant, 134 N.J. 264, 268 (1993) (citing Sayreville Educ. Assn. v. Bd. of Educ. of the Borough of Sayreville, 193 N.J. Super. 424, 428 (App. Div. 1984)). In Sayreville, the Appellate Division reversed the State Board of Education and held that school boards may not employ long-term substitutes to fill vacancies, in part, because where there is a true vacancy, denial of tenure and benefits would subvert the school laws. 193 N.J. Super at 428-29. By contrast, the court also noted that if a board were required to provide substitutes with "all of the statutory and contractually mandated benefits of regular staff membership" during another's absence, the equally objectionable problem of duplicative benefits would arise, and so the court distinguished between the two terms. Id. at 430. Sayreville explicitly interpreted the term "absence" to mean that the "[position] . . . is not vacant, but only temporarily unoccupied by its incumbent," whereas a "vacancy" exists where the incumbent has "terminated his employment." Ibid. In Lammers, the New Jersey Supreme Court came to a similar conclusion; an "absence" exists where the incumbent is "ultimately scheduled to return to the position," as in a leave of absence, and a "vacancy" exists when the incumbent "leaves the position permanently, as in the case of a resignation or retirement." 134 N.J. at 268. Thus, tenure law requires a "true vacancy" to exist before any time spent working as an "interim," "acting," or "substitute" staff member may be creditable for tenure purposes.

Other decisions have clarified the meaning of "vacancy" in cases where the incumbent notifies the board of his intent to resign, and actually leaves the position before the effective date of resignation. In 1988, the State Board of Education (State Board) affirmed the proposition that a resignation creates a vacancy as of its effective date, not the incumbent's date of departure. Williams v. Bd. of Educ. of the City of Orange, 1987

[3] A "substitute" can be either a substitute teacher, or another staff member "acting" in a tenurable position; the label of "acting" or "interim" will not prohibit a principal or teacher from crediting time spent performing all the duties of a position toward tenure, so long as the position is vacant. See Jannarone v. Bd. of Ed. of Asbury Park, 1976 S.L.D. 526 (criticized by Lustberg v. Bd. of Educ. of the Borough of Tenafly, EDU 07080-03, Initial Decision (February 27, 2004), aff'd Commr., (April 12, 2004), aff'd St. Bd. (September 1, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

S.L.D. 997, 1000, aff'd St. Bd., 1988 S.L.D. 2534. In that case, an incumbent teacher tendered a letter of resignation in March, with an effective date of May 15th, but left before that date. The State Board affirmed that because the employment relationship continued, no vacancy occurred until May 15th. Ibid. Similarly, in Donnelly v. Bd. of Educ. of the Borough of Hasbrouck Heights, the State Board affirmed the ALJ's decision that despite the incumbent's absence, a vacancy did not occur until the employment relationship was severed. EDU 7770-99, Initial Decision (October 29, 2001), rev'd on other grounds, Commr. (December 17, 2001), rev'd on other grounds, St. Bd. (November 6, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>. There, the incumbent principal did not report to work after April 1, 1996, but he retained the title and remained on the payroll until April 30th. Ibid. The petitioner assumed the incumbent's duties as "acting" principal on April 2nd, but did not receive tenure credit until May 1st, the day after the incumbent's official severance.[4] Ibid. In Lustberg v. Bd. of Educ. of the Borough of Tenafly, the ALJ reached a similar conclusion on the question of whether a vacancy occurs when a resignation becomes effective, or when it is accepted by the board. EDU 07080-03, Initial Decision (February 27, 2004), aff'd, Commr., (April 12, 2004), aff'd, St. Bd. (September 1, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. There, the petitioner was a long-term substitute covering for a tenured teacher on a pre-approved one-year maternity leave. Ibid. In February, the incumbent responded to a letter from the board inquiring as to whether she would return for the 2000-01 school year, to which she replied "I will not return in September 2000." Ibid. Since her letter, did not specify an effective date of resignation, the ALJ, Commissioner and State Board all found that, because her leave of absence had been approved until June 30th, her employment relationship continued until June 30th, and no vacancy occurred before that date. Ibid.

Webb v. Bd. of Educ. of the Twp. of Willingboro appears to support the proposition that in some cases, where equity weighs in the petitioner's favor, a vacancy before severance may be found. 96 N.J.A.R.2d (EDU) 423, aff'd in part, rev'd in part on other grounds, Commr. (January 25, 1996), rev'd and remanded, St. Bd. (December 4, 1996). However, following the initial decision and Commissioner's decision finding that the petitioner had gained tenure before the incumbent's official resignation, the State Board

[4] It is interesting to note that at all three levels of review, the decision makers agreed that "at the latest" a vacancy occurred as of May 1, 1996, suggesting that a vacancy could have occurred sooner, but the issue was not discussed.

reversed that finding and determined that tenure did not begin to accrue until after the incumbent's severance. Ibid. The petitioner in this case primarily relied upon the first and second Webb decisions in its summary decision brief, **but did not address the State Board's reversal.** The facts of this matter show that the incumbent's employment was not officially severed until June 30th, the effective date of his resignation. The following day, the petitioner was appointed principal of HMS, and served for exactly two years. The applicable case law requires the incumbent's employment to be effectively terminated before a vacancy can occur. Therefore, no vacancy occurred while the petitioner was "interim" principal, and none of that time may be counted toward tenure.

CONCLUSION

There are no material facts in dispute. Tenure did not accrue because the position was not vacant until the incumbent's employment was officially severed. Before the severance date, the petitioner was merely substituting for the incumbent. Following the severance date, the petitioner was appointed, and served as principal for exactly two years, but was not reemployed for at least one day following that period. Therefore, there was no vacancy until July 1st; petitioner has not satisfied the requirements for tenure

ORDER

The petition of Kurt Walton seeking tenure in the position of principal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAY 10 07
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: May 10, 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 14 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

314-07

OAL DKT. NO. EDU 11590-06
AGENCY DKT. NO. 388-10/06

FRANK J. CANCELLIERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement and General Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/09/07

Date of Mailing: 8/09/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 011590-06

AGENCY DKT. NO. 388-10/06

FRANK J. CANCELLIERI,

Petitioner,

v.

BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Beth L. Finkelstein, Esq. for petitioner

M. Murphy Durkin, Esq., for respondent (Durkin & Durkin, attorneys)

Record Closed: June 22, 2007 Decided: June 25, 2007

BEFORE **JESSE H. STRAUSS**, ALJ:

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on December 6, 2006 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. As a result of several conferences, the parties settled the matter.

On June 22, 2007, the parties submitted the attached copy of the Settlement Agreement and General Release and the Board's Resolution.

Having reviewed the record and the settlement terms, I **FIND**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 25, 2007
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 6-28-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN 28 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the Essex County Vocational-Technical School District (the "Board") and Frank J. Cancellieri ("Cancellieri"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about September 16, 1969, Cancellieri became employed by the Board pursuant to a contract of employment; and,

WHEREAS, in February 1998, Cancellieri began holding various administrative positions; and,

WHEREAS, on July 28, 2003, Cancellieri was appointed to the position of Interim Superintendent; and,

WHEREAS, Cancellieri retired on June 30, 2006 and sought payment for both unused accumulated sick and vacation days; and,

WHEREAS, the Board paid Cancellieri for unused sick days but not for unused vacation days; and,

WHEREAS, on or bout October 24, 2006, Cancellieri filed a petition seeking payment for his unused vacation days; and,

WHEREAS, the matter was docketed before the Office of Administrative Law as OAL Docket Number EDU 11590-2006N; and,

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute so as to avoid expending future resources and to eliminate the uncertainties of litigation; and,

WHEREAS, the Board and Cancellieri deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; and,

WHEREAS, the Board and Cancellieri are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board," as used herein, shall, at all times, mean the Board of Education of the Essex County Vocational-Technical School District, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Cancellieri," as used herein, shall mean Frank J. Cancellieri, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. Cancellieri shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as EDU 11590-2006N, subject to the approval of this Settlement and Release Agreement by the Office of Administrative Law and the Commissioner of Education.

4. Within thirty (30) days of execution of the Settlement Agreement, or July 1, 2007, whichever is later, by all parties, and approval of this Settlement Agreement by the Office of Administrative Law, the Board shall pay Cancollieri the lump sum of Sixteen-Thousand, Five-Hundred, One Dollars and Five Cents ($16,501.05) and the Board acknowledges and agrees that said payment is in full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by Cancellieri arising from his employment by the Board including, but not limited to, violation of his civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 *U.S.C.* §§1981, 1983, 1985, 1986 and 1988, Title 18A of the New Jersey Statutes; Titles 6 and 6A of the New Jersey Administrative Code, the New Jersey Tort Claims Act *N.J.S.A.* Title 59, the Fourth and Fourteenth Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not. Cancellieri and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Cancellieri or on his behalf, or by his attorneys, heirs, successors or assigns, against the Board. Specifically excluded from this release are Cancellieri's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations and any rights he may have for indemnification by the Board, pursuant to *N.J.S.A.* 18A:16-6 and 6.1:

5. Cancellieri hereby acknowledges and agrees that he further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Cancellieri does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect his decision to enter into this Settlement Agreement and General Release.

6. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.

7. Cancellieri and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board.

8. In any action commenced against by either party to enforce the provisions of this Settlement Agreement, the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

9. Cancellieri specifically acknowledges that the payment referred to in Paragraph 4 hereof constitutes any and all additional consideration not otherwise owed to him for this Settlement Agreement and General Release. Cancellieri agrees that he shall not seek any further amount from the Board other than the amount stated in Paragraph 4.

10. This Settlement Agreement and General Release contains the full agreement of Cancellieri and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Cancellieri and the Board, which consent must be signed by Cancellieri and the Board, or their duly authorized agents.

11. The waiver by Cancellieri and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

12. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

13. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

14. Cancellieri and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interests of this Settlement Agreement and General Release.

15. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

16. In entering into this Settlement Agreement and General Release, Cancellieri has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted.

IN WITNESS WHERE OF, Cancellieri and the Board have hereunto set their hands.

FRANK J. CANCELLIERI

WITNESS: Angelita Campoverde

Date: 6/8/07

BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT

WITNESS: Deborah A. Pinto

Date: May 30, 2007

Essex County Vocational Schools
BOARD OF EDUCATION

/. EDWIN D. LEAHY, O.S.B.
PRESIDENT

ADRIANNE DAVIS
VICE PRESIDENT

MEMBERS
SALVATORE CARNOVALE
ANTHONY MOLINARO
LUIS A. QUINTANA
M. TERESA RUIZ
JAMES SOUDER

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IVAN L. HOLMES
INTERIM SUPERINTENDENT

VINCENT McFADDEN
ASSISTANT SUPERINTENDENT/
FOR BUSINESS

DEBORAH A. PINTO
BOARD SECRETARY

M. MURPHY DURKIN
BOARD ATTORNEY

THIS IS A CERTIFIED TRUE COPY of a Resolution adopted at the Regular Board Meeting of the Essex County Vocational Schools' Board, held on Monday, April 30th, 2007.

* *

SETTLEMENT, ACTION FILED BY FRANK J. CANCELLIERI

WHEREAS, Frank J. Cancellieri has filed an Action against the District, which action is presently pending before the Office of Administrative Law as OAL Docket Number EDU 11590-2006N. This action, in part, seeks the entry of a judgment against the District for alleged outstanding amounts due and owing Mr. Cancellieri as a result of his employment within the District. The appropriate answer and/or response of pleadings have been filed to protect the District's interest. Mr. Cancellieri through his Counsel has conveyed an offer to settle the outstanding litigation in the sum of $16,501.05. The terms of the settlement agreement are fully set forth in the Settlement Agreement and General Release, which is attached hereto. The Superintendent has reviewed this matter with Board Counsel and believes it will be in the District's best interest that the litigation is settled pursuant to the terms of the Settlement Agreement, as referenced above.

BE IT RESOLVED, that upon the recommendation of the Superintendent, the Board hereby authorizes the appropriate Board Personnel and/or Board Counsel to execute the Settlement Agreement and General Lease to settle the action filed by Frank J. Cancellieri, which is presently pending before the Office of Administrative Law, under Docket Number EDU 11590-2006N. A copy of the Settlement Agreement and General Lease is attached hereto and incorporated herein, as if fully set forth.

Resolution Approved: Yes, 4; No, 0; Abstain, 0

ATTEST:

Deborah A. Pinto

Deborah A. Pinto
Board Secretary

DAP/mas
June 6th, 2007

312-07

OAL DKT. NO. EDU 7075-07
AGENCY DKT. NO. 166-6/07

SUNNY SIDE ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the OAL of have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons expressed at length in her oral decision rendered at hearing, that petitioner has failed to meet the criteria requisite to grant of emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6. In particular, the Commissioner notes that petitioner has: 1) demonstrated no harm that cannot be adequately redressed by monetary damages should petitioner ultimately prevail;[1] 2) made no showing that the law is settled in its favor or that it has a reasonable likelihood of success on the merits, since applicable rule and contractual terms both plainly provide for recoupment – through withholding of scheduled payments where warranted – of unexpended or inappropriately

[1] It is here noted that petitioner's contract has not been renewed for the 2007-08 school year and that only one day of the 2006-07 school year remained on the date of hearing.

expended Abbott moneys;[2] and 3) shown no interest sufficient to outweigh the interest of respondent in ensuring that public moneys – particularly scarce Abbott funds – are properly spent.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief pending plenary hearing, is adopted for the reasons expressed therein. This matter shall proceed at the OAL in accordance with the intentions of the parties and the ALJ.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/06/07

Date of Mailing: 8/07/07

[2] It is here noted that – although petitioner appeared to anticipate filing such a challenge in the near future – as of the date of hearing, no challenge had yet been raised to the results of the audit underlying respondent's actions.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 07075-07
AGENCY DKT. NO. 166-6/07

SUNNY SIDE ACADEMY,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Hillary A. Fraenkel, Esq., for petitioner (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys)

Charlotte Kitler, General Counsel, for respondent

BEFORE **MARGARET M. MONACO**, ALJ:

On or about June 14, 2007, petitioner Sunny Side Academy filed a Petition of Appeal against the respondent, the State-Operated School District of Jersey City (the District), challenging the withholding of monies from petitioner's monthly payments in May and June 2007 in an approximate amount of $356,000. In connection therewith,

petitioner requests emergent relief and filed a letter brief in support of its position. The Department of Education transmitted the matter to the Office of Administrative Law where, on June 21, 2007, it was filed for determination as a contested case. On June 25, 2007, the District submitted a letter brief in opposition to petitioner's emergent relief application. On the same date, the undersigned heard oral argument of counsel, along with testimony by Anthony Grazioso, the President of Sunny Side Academy.

Having considered the documentation and testimony submitted on behalf of the parties; and having heard the arguments of counsel (Hillary Fraenkel, Esq., appearing for petitioner and Charlotte Kitler, Esq., appearing for respondent); and for good cause shown, I **CONCLUDE** that, for the reasons more particularly set forth in the undersigned's oral decision rendered on June 25, 2007, petitioner has failed to meet the standards to grant emergent relief as set forth in N.J.A.C. 6A:3-1.6(b) and Crowe v. DeGioia, 90 N.J. 126 (1982). Specifically, I **CONCLUDE** that, for the reasons set forth in the undersigned's oral decision on June 25, 2007, petitioner has failed to demonstrate that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Accordingly, I **ORDER** that petitioner's motion for emergent relief be and hereby is **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 26, 2007
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

315-07

IN THE MATTER OF THE TENURE HEARING OF BEVERLY JONES, TRENTON SCHOOL DISTRICT, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In September 2005, petitioning school district certified tenure charges of insubordination and unbecoming conduct against respondent, a tenured history teacher. Respondent denied the charges, and the matter proceeded to hearing at the OAL in October and November 2006, at the conclusion of which counsel and the judge explored settlement possibilities and a framework for a possible settlement was established. On November 21, 2006, counsel for the Board drafted and sent to respondent a written settlement agreement, and requested – together with counsel for the respondent – adjournment of the additional scheduled hearing dates. Respondent's counsel advised counsel for the Board on November 27, 2006 that respondent accepted the settlement terms as memorialized. On the same date, the Board approved the settlement agreement as drafted. Board counsel notified the judge that an agreement had been reached, and that respondent's attorney had advised that his client had also approved the settlement. Over two weeks later, however, respondent's attorney advised Board counsel by letter that his client would not accept the proposed settlement as written.

The ALJ found that: New Jersey has a strong public policy in favor of settlements; it is not necessary that an agreement to settle litigation be in writing; in the instant matter, the respondent's attorney advised that respondent had approved the draft settlement agreement on November 27, 2006, the Board approved the settlement on November 27, 2006, and the terms of the negotiated and the written agreement were the same. The ALJ concluded that the terms of the draft agreement adopted by the Board on November 27, 2006 constitute the terms of the agreed upon settlement that binds both parties, subject to approval by the Commissioner.

The Commissioner concurred with the findings of the ALJ and adopted the Initial Decision as the final decision in this matter, noting, however, that petitioner's enforcement motion is denied in that it is not within the jurisdiction of the Commissioner to enforce settlements.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 9, 2007

OAL DKT. NO. EDU 8618-05S
AGENCY DKT. NO. 290-10/05

IN THE MATTER OF THE TENURE HEARING OF BEVERLY JONES, TRENTON SCHOOL DISTRICT, MERCER COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the "Draft" Settlement Agreement which stands at the heart of this controversy, the Initial Decision of the Office of Administrative Law (OAL), a partial transcript, and both the respondent's exceptions and petitioner's reply exceptions to the Initial Decision have been reviewed.[1] The Commissioner adopts the Initial Decision for the reasons set forth therein, and for the reasons that follow.

On the basis of the facts presented to him at the April 30, 2007 hearing on petitioner's motion to enforce a settlement that petitioner maintains exists concerning tenure charges brought against respondent, the Administrative Law Judge (ALJ) found that such a settlement does exist. More specifically, the ALJ recounted that at the conclusion of tenure proceedings on November 15, 2006, the parties, in his presence, explored settlement possibilities, and a "framework for a possible settlement was arrived at." (Initial Decision, p. 2) According to a January 11, 2007 certification by petitioner's counsel, Thomas W. Sumners, submitted in support of the motion to enforce the settlement, respondent's counsel, Arnold S. Cohen, had advised on November 15, 2006 that respondent would accept the terms of that settlement framework. (January 11, 2007, Certification of Thomas W. Sumners, Jr., #3)

[1] The transcript of the April 30, 2007 hearing states that the first of the two tapes provided to the transcriber was blank. The Commissioner notes that, pursuant to *In re Morrison,* 216 *N.J. Super.* 143 (App. Div. 1987), any party seeking to challenge an Administrative Law Judge's fact-finding is required to provide relevant portions of the transcript to the agency head.

Sumners' Certification further stated that on November 21, 2006, after memorializing the settlement terms formulated on November 15, 2006, he emailed them to Cohen in the form of a draft settlement agreement. (Sumners Certification, #6) That proposed settlement agreement included a provision requiring respondent to retire effective June 30, 2007. (Sumners Certification, Exhibit B)

The next day, November 22, 2006, Michael T. Barrett, Esq. – an attorney representing respondent in a related proceeding before the New Jersey Public Employment Relations Commission (NJPERC) – wrote to NJPERC withdrawing respondent's charges against petitioner "as part of a global settlement between the parties." (Sumners Certification, Exhibit C) In addition, Sumners certified that on November 27, 2006, Cohen advised him that the terms of the draft settlement agreement emailed to him on November 21, 2006, were acceptable to respondent. (Sumners Certification, #8)

On the evening of November 27, 2006, petitioner voted to accept the terms set forth in the draft settlement agreement. (Sumners Certification, #9) Sumners conveyed the acceptance to Cohen by telephone on the following day, November 28, 2006. (Sumners Certification, #10) The OAL was also advised by telephone and by letter, faxed to the OAL and emailed to Cohen. (Sumners Certification, #11 and Exhibit D)

On December 15, 2006, two and one half weeks after Cohen conveyed respondent's acceptance of the settlement terms and petitioner approved them, Cohen wrote to Sumners stating that his client – the respondent – would not execute the settlement. In the letter, Cohen acknowledged that he had told Sumners that the terms in the settlement agreement approved by the petitioning board of education were acceptable to respondent. (Sumners Certification, Exhibit E)

None of the foregoing facts were disputed by respondent. She agreed, in a January 29, 2007 certification, that she had authorized Cohen to enter into settlement discussions. (Certification of Beverly Jones, #2) However, she stated in the certification that it was her understanding that she "could reject the settlement at any time prior to actually executing the Settlement Agreement." *(Ibid.)* She acknowledged that she "had 'tentatively' agreed to the terms of the agreement." (Jones Certification, #3) However, she related that "after speaking with friends, relatives and clergy, [she] decided not to accept the agreement as written." (*Ibid.*)

At the April 30 hearing, respondent admitted that she had seen the written settlement agreement. (T31) Cohen conceded that before petitioner had voted to ratify the settlement agreement, he had communicated to Sumners that the terms in the written agreement were acceptable to his client. (T12-13)[2] Accordingly, petitioner justifiably relied upon that communication in accepting the terms by formal vote. *See, e.g., Davidson v. Davidson*, 194 *N.J. Super.* 547, 552 (Ch. Div. 1984) ([I]t is the clear policy of our courts to recognize acts by attorneys of the court as valid and presumptively authorized and, unless the contrary appears, it will be presumed that a stipulation was duly authorized, *citing Bernstein & Loubet, Inc. v. Minkin*, 118 *N.J.L.* 203 (E&A 1937)).

Respondent argued at the hearing that since the settlement document was marked 'draft' it was not real. (T44)[3] She stated that her refusal to sign the settlement agreement flowed, among other things, from a reluctance to retire on June 30, and from concerns about protection from retaliation. (T31-32) She suggested that she had articulated those concerns to Cohen, but neither respondent nor Cohen could remember <u>when</u> it was that respondent had first

[2] The Commissioner notes that Cohen's testimony was not given under oath.
[3] Respondent's testimony was also not given under oath.

advised Cohen that she did not wish to settle the case on the terms set forth in the Settlement Agreement. *See, e.g.,* T34; T49-50.

Respondent does not dispute that settlements are favored in New Jersey. However, she argues in her exceptions that her refusal to sign the written settlement agreement was proof of the lack of a meeting of the minds that is necessary to establish an oral contract. While acknowledging that generally, under New Jersey case law, the lack of a formal signed document is not a bar to a conclusion that a contract exists, respondent urges that two facts in this case demonstrate the absence of respondent's consent to the settlement terms.

First, respondent points to Cohen's hearing testimony that he may have said the following to Sumners: 'knowing Beverly, things could change until the agreement is signed.' Sumners recalled no such caution, and no writing containing such language was submitted to the OAL. Respondent relies upon this purported remark as proof that the parties never entered into an agreement. The Commissioner agrees with the ALJ, however, that if, in fact, Cohen made such a remark, it was not a specific message that his client was unhappy with any of the settlement terms proposed in this case, but rather a general 'musing' about respondent's past behavior. Such a musing cannot serve as the basis for concluding that there was no meeting of the minds about the settlement of respondent's tenure charges.

Second, respondent contends – as she did at the hearing – that because the written settlement agreement had the word 'draft' printed at the top and had not yet been approved by petitioner, it was not a final agreement; it could not signify intent to enter into a binding agreement. The Commissioner concludes that to accept such an argument would be to ignore well established precedent.

The 'draft' agreement contained the same terms that the parties had agreed to during their November 15, 2006 negotiations. No material term was changed between the time that Cohen was given the draft agreement and conveyed his client's acceptance of same, and the time that petitioner voted to accept it. And no objections were voiced by respondent or Cohen on November 28, 2006, when Sumners wrote to the ALJ and Cohen advising that petitioner had approved the settlement. Indeed, no objections were raised during the two weeks thereafter.

Thus, on November 27, 2006, there was a meeting of the minds. The holding in *Weichert Co. Realtors v. Ryan,* 128 *N.J.* 427, 435 (1992), upon which respondent relies – *i.e.* that the lack of agreement on essential terms of a contract and lack of intent by all parties to be bound by the agreement terms precludes the establishment of a contract – is inapposite to the present controversy. In *Weichert*, it was found that a contract for a real estate broker's fee did not exist because one of the defendant buyers had made multiple objections to the proposed commission percentage. As a result of those clear objections to an essential term, no contract was formed.[4]

By way of contrast, there was no indication in the present controversy of respondent's discomfort with the retirement provision of the settlement until after the settlement contract was established. The Commissioner refers to the ALJ's recognition that "[a]t the hearing neither Ms. Jones nor Mr. Cohen could recall exactly on what date she had first advised Mr. Cohen that she was not willing to settle the case on the terms that were contained in the written agreement" that she had reviewed. (Initial Decision, p. 4) The only item in the record that sheds light on that issue is the above referenced December 15, 2006 letter from Cohen to Sumners.[5]

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[4] The plaintiff broker, however, ultimately received relief based upon the doctrine of quantum meruit.

[5] Respondent's citation to *Dunn v. Elizabeth Board of Education, 96 N.J.A.R.* 2d (EDU) 279, does not help her. In that decision, no facts were presented describing the settlement communications, or lack thereof, between the parties. It was simply disclosed by the ALJ that the Elizabeth Board of Education had voted to approve some

Even where there is no writing in the nature of the document that Sumners prepared, but the parties agree upon the essential terms of a settlement – with the expectation that the mechanics will be "fleshed out" in a writing to be thereafter executed – the settlement will be enforced, notwithstanding the fact that a document fails to materialize due to a party's subsequent repudiation. *Lahue v. Pio Costa, III, et al.*, 263 *N.J. Super.* 575, 596 (App. Div.), *certif. denied,* 134 *N.J.* 477 (1993). *See, also, Williams v. Vito, et al.*, 365 *N.J. Super.* 225, 232 (Law Div. 2003) (The manifestation of assent may be made wholly or partly by spoken words, and the existence of an enforceable contract is not negated by the fact that subsequent writings are contemplated.)

In the present case, a writing which included all essential terms did exist, was reviewed by respondent and, according to respondent's counsel, was approved. To reject that written settlement, simply because the word "draft" appears on the pages, when an oral agreement would have sufficed to establish a contract, would require the Commissioner to elevate form over substance. The Commissioner declines to do so.

Nor does the Commissioner agree with respondent's contention that *N.J.A.C.* 1:1-19.1 requires anything more for a viable settlement than what was done in this case. *N.J.A.C.* 1:1-19.1(a) obliges the parties to disclose to the ALJ the full settlement terms in writing or "orally, by the parties or their representatives." There is no dispute that the ALJ was apprised of the settlement terms formulated in his chambers on November 15, 2006, committed to writing on November 21, 2006, approved (according to Cohen) by respondent before November 27, 2006, and approved by petitioner on the evening of November 27, 2006.

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settlement terms, and that there was no writing memorializing a settlement agreement. Thus, no parallels can be drawn between Dunn's conduct or intent regarding the formulation *vel non* of a settlement contract, and respondent's conduct in the present case.

N.J.A.C. 1:1-19.1(b) states, in pertinent part, that

> if the judge determines from the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the judge shall issue an initial decision, incorporating the full terms and approving the settlement.
>
> (Emphasis added.)

The ALJ determined from the certifications, documentary evidence and representations at the April 30, 2007 hearing that the settlement was voluntary at the time it was consummated, and that – as stated in respondent's January 29, 2007 certification – it was after respondent spoke with "friends, relatives and clergy" that she changed her mind. *N.J.A.C.* 1:1-19.1 does not require that respondent specifically state under oath that the settlement was voluntary. The ALJ may determine from the entirety of the sworn testimony (including certifications) of all the parties whether a voluntary settlement exists.

In consequence of the foregoing, the Commissioner adopts the determination of the OAL that a settlement was reached on November 27, 2006, consisting of the terms memorialized in the document attached as Exhibit B to the January 11, 2007 Sumners Certification. However, because it is not within the jurisdiction of the Commissioner of Education to enforce settlements, petitioner's enforcement motion is denied.

IT IS SO ORDERED.[6]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/09/07

Date of Mailing: 8/09/07 Faxed: 8/09/07

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DETERMINING EXISTENCE OF AND APPROVING SETTLEMENT OF TENURE CHARGES
OAL DKT. NO. EDU 08618-05S
AGENCY DKT. NO. 290-10/05

IN THE MATTER OF THE TENURE OF BEVERLY JONES, CITY OF TRENTON, MERCER COUNTY.

Thomas W. Sumners, Jr., Esq., for petitioner Trenton Board of Education (Sumners and George, attorneys)

Arnold Shep Cohen, Esq., for respondent Beverly Jones (Oxfeld Cohen, attorneys)

Record Closed: April 30, 2007 Decided: May 8, 2007

BEFORE **JEFF S. MASIN,** ALJ:

The Trenton Board of Education certified tenure charges against Beverly Jones to the Commissioner of Education on September 26, 2005. The charges included insubordination, unbecoming conduct, failure to abide by the District's organizational policy and to abide by administrative directives. The Commissioner transferred the contested case to the Office of Administrative Law on November 7, 2005. Thereafter,

attempts to resolve the case occurred through the summer of 2006, without success. The file was transferred to this judge on October 13, 2006. Hearing dates had been established and the hearing commenced on October 18, 2006, and continued on October 24 and November 15, 2006. At the conclusion of the November 15 session, counsel and the judge explored settlement possibilities and a framework for a possible settlement was arrived at. It was recognized that the Board of Education would have to approve the settlement, as would Ms. Jones. Hearing dates scheduled for November 20, 21 and 27, 2006, were adjourned in order to allow the proposal to be placed in writing and for approvals to be obtained. As a result of events to be detailed herein, on January 16, 2007, the Board moved to enforce the settlement agreement. This motion resulted from Mr. Cohen's advice to Board counsel on December 15, 2006, that his client would not accept the settlement condition that she retire as of June 30, 2007. While no signed settlement agreement exists, the Board contends that based upon the events to be discussed, a binding oral contract exists between the parties settling the tenure charges, subject, as are all tenure settlements, to the approval of the Commissioner of Education. Indeed, since enforcement of settlements is not within the authority of either the Commissioner or the OAL but lies with the judiciary, the purpose of this motion is to determine the existence of a binding settlement. At my direction, a hearing was held on April 30, 2007, at which I questioned the attorneys and Ms. Jones about the events surrounding the settlement.

Following the discussions on November 15, Mr. Sumners, counsel for the Board, drafted a written settlement agreement. On November 17, he wrote this judge, advising that he would be presenting a settlement proposal to the Board at its November 27 meeting and that he and Mr. Cohen therefore requested the adjournment of the November 20, 21 and 27 hearing dates. Based upon this joint request, the hearing dates were adjourned. In his Certification of January 11, 2007, filed with the Board's motion, Mr. Sumners represented that Mr. Cohen had advised him after the November 15 discussions that this client would accept the settlement and that he had advised Cohen that he would recommend the settlement to the Board at its November 27 meeting. On November 21, 2006, Mr. Sumners e-mailed to Mr. Cohen a proposed settlement agreement. Part of the proposal involved the resolution of a pending Unfair

Labor Charge pending before the Public Employment Relations Commission ("PERC"). On November 22, Michael Barrett, Esq., who represented the Trenton Education Association and Ms. Jones in that proceeding, wrote a letter to PERC advising that the Unfair Labor Practice Charge was withdrawn "as part of a global settlement between the parties." Mr. Sumners also represents that on November 27, Mr. Cohen advised him that the written settlement agreement e-mailed to him on November 21 was acceptable to Ms. Jones. Among other provisions this written document contained a clause requiring that Ms. Jones submit a letter of retirement effective June 30, 2007.

Mr. Sumners presented the settlement to the Board of Education on the evening of November 27 in executive session. The Board agreed to accept the settlement as drafted. On November 28, Mr. Sumners called Mr. Cohen and my office and advised that the Board had accepted the settlement. He also wrote to me, advising that the Board had approved the terms and that he had advised Mr. Cohen, who "advised that his client has also approved the settlement agreement." He noted that the parties "are in the process of executing the settlement agreement and finalizing [Jones'] placement when she returns to work." However, on December 15, 2006, Mr. Cohen wrote to Mr. Sumners,

> Ms Beverly Jones has notified me that she will not accept the settlement that the Board of Education approved. I recognize that I told you that the terms that were approved by the Board were acceptable to Ms. Jones, and that the language in the Settlement Agreement that you prepared was likewise acceptable. However, Ms. Jones told me that she does not want to agree to a date certain for the retirement.
>
> [12/15/06 letter from Arnold S. Cohen, Esq., to Thomas W. Sumners, Jr., Esq. (Exhibit E)]

In her written certification of January 29, 2007, offered in response to the motion to enforce the settlement, Ms. Jones reported that she "understood that she could reject the settlement at any time prior to my executing the Settlement Agreement. I told Mr. Cohen that I had tentatively agreed to the terms of the agreement. However, after speaking with friends, relatives and clergy, I decided not to accept the agreement as

written." At the hearing neither Ms. Jones nor Mr. Cohen could recall exactly on what date she had first advised Mr. Cohen that she was not willing to settle the case on the terms that were contained in the written agreement. Ms. Jones thought that she had called and had left a voice mail message, but could not be sure when she had done so. She stated that she had previously been a union representative and was often unhappy with the language contained in draft documents. While she acknowledged that she had seen the written settlement agreement and had acknowledged to Cohen that its terms were acceptable, the document was itself marked "**DRAFT**" and she perceived it as just that. A draft was "not real," and she wanted to receive the official document. She "would never enter into an oral agreement with the Board." She had given Mr. Cohen permission to negotiate, but not to enter into a contract without her signature. Not only did she have concerns about the retirement provision, but she also had concerns that there was no "non retaliation" language (the agreement did contain a provision that "neither party, nor any person, organization, or entity on their behalf will file any charge, claim, or lawsuit against either party based upon the fact that petitioner filed tenure charges or that respondent defended those charges.").

No written documents have been offered regarding the extent of any authority conveyed by Ms. Jones to Mr. Cohen concerning his ability to negotiate on her behalf or any limitations to that authority. Mr. Cohen's communication to Mr. Sumners of December 15th contains no reference to any reservation by Jones of a right to reject a settlement agreement which he states she had approved, including the very language of the written agreement as drafted by Sumners. At hearing, Cohen offered that he thinks he might have said to Sumners something of the tenor of "knowing Beverly, things could change until the agreement was signed," but he could not point to any writing incorporating any such reservation or caution and Sumners did not recall such a statement.

The Board contends that having presented the terms of the settlement in a writing that incorporated the very terms tentatively reached after the November 15th hearing to Cohen and his client and having received from Cohen assurance both before and after the agreement was presented to the Board that it was acceptable and having

then been told after communicating to Cohen the news that the Board had accepted the agreement as written that the agreement as set forth in the written document was acceptable to Jones, that an oral contract exists between the parties. The respondent argues in response that given the usual manner in which written settlement agreements are first drafted and then signed by the parties before the settlement becomes final and are, in some cases, placed on the record in open proceedings, Ms. Jones retained the right to refuse the terms up to the point when she would have actually signed the agreement. The Board replies that this is a case of "buyer's remorse," in which Ms. Jones, having negotiated a settlement through highly experienced counsel, gave him her acceptance of the agreement and of its written formulation, without any objection to any of the terms, and then, only after her counsel had, based upon her expressed approval, assured the Board counsel that the written document accepted by the Board was acceptable to his client, and only after listening to others, decided to back out of the agreement. And there is no evidence to support any other conclusion than that the rejection was only communicated to Cohen on the 15th of December, some two weeks after Cohen had assured Sumners that his client had accepted the terms of the written agreement.

DISCUSSION

New Jersey has a "strong public policy in favor of settlements. Department of Public Advocate v. N.J. Board of Public Utilities, 206 N.J. Super. 523, 528 (App. Div. 1985); Bistricer v. Bistricer, 231 N.J. Super. 143, 147 (Ch. Div. 1987). This doctrine "ranks high in our public policy." Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.), certif. den. 35 N.J. 61 (1961); Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div.), certif.. den. 94 N.J. 600 (1983). It is of such importance that a court should "strain" to uphold such settlements. Dept. of Public Advocate, 206 N.J. Super. at 528. It is not necessary that an agreement to settle litigation be in writing. An oral agreement may incorporate the terms of a fully enforceable contract between the parties. Pascarella, supra., citing Green v. John H. Lewis & Co., 436 F.2d 389 (3rd Cir. 1971). And the fact that an agreement is to later be reduced to writing makes the agreed upon oral contract no less enforceable, so long as the parties intended themselves to be

bound by the terms of the oral agreement. Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 374 (App. Div. 1975). In Comerata v. Chaumount, Inc., 52 N.J. Super. 299, 305 (App. Div. 1958), the court said

> Parties may orally, by informal memorandum, or by both agree upon all the essential terms of a contract and effectively bind themselves thereon, if that is their intention, even though they contemplate the execution later of a formal document to memorialize their undertaking.
>
> [Ibid.]

The court in Pascarella wisely noted that "[I]f later reflection were the test of the validity of such an agreement, few contracts of settlement would stand." Pascarella, supra,190 N.J. Super. at 126.

In the present matter, the attorneys for the parties entered into discussions after the third day of hearing to determine if an acceptable resolution to the tenure case could be reached. They did so with, it must be said, some encouragement from the presiding judge. They reached a tentative set of agreements and departed the hearing. Thereafter, Mr. Sumners drafted a written agreement intended to incorporate the very terms negotiated by the attorneys on behalf of their respective parties. Importantly, before ever presenting the draft to his client, Sumners sent it to Mr. Cohen for review and received Cohen's agreement that it properly included the intended agreement. Even more significant, once his client had advised him in executive session that it would accept the terms as presented to it in writing in the draft document, Sumners advised Cohen of that approval and Cohen, without any specific reservation or objection to any term of the agreement, advised that both he and his client were satisfied with the settlement as presented in the writing and as approved by the Board at its executive session. Thus, it is undisputed that as of November 28, 2006, the Board had approved the agreement and Ms. Jones had also approved it, as written, and had so advised her attorney who proceeded to represent her approval to Sumners. As the essential terms of the negotiated and the written agreement were the same and neither Ms. Jones nor Mr. Cohen, acting on her behalf and with her expressed approval, voiced any dissension from the written terms, I **CONCLUDE** that there was a meeting of the minds

and an intention to be bound by those terms. Mr. Cohen's statement at hearing that he may have said that with Beverly it isn't over until its signed was, I conclude, if indeed he said it, not an expression of any specific discontent on her part about any term or condition of the written document, but was only a general musing concerning his knowledge that she was a difficult client who had balked in the past regarding prior settlement efforts. But nowhere in writing or orally did he caution or advise Sumners that the agreement as written down, approved by the Board and by his client as it was written, was not intended to be finalized except by a signed agreement. Instead, between November 28th and December 15th, both he and Jones were silent about any discontent. It appears that at some time after the 28th Jones, having discussed the matter with others, developed an objection to what she had already agreed to do, that is, to retire as of June 30, 2007. This late discontent is a case of "remorse" over what she had agreed to do, a not at all uncommon event after parties compromise their positions in the course of settling an oft-times contentious litigation, as indeed the Pascarella court recognized, supra., 190 N.J. Super. at 126. If Jones is allowed to back out of this agreement, such a step would undermine the strong public policy noted above and would damage the ability of attorneys and the courts and administrative forums to rely on the stated agreements of parties to end litigation. Given the acceptance of the written terms as communicated to her counsel and to her, I need not "strain" to uphold the existence of this settlement.

It is true that the great majority of settlements involving tenure charges and other Department of Education matters litigated at the OAL are resolved with written agreements and these are signed by either the pro se party or counsel for the private party and by the attorney for the board or through the presentation of a board resolution adopting the settlement. But the law clearly contemplates that a binding agreement can be created prior to and indeed without such formalities, if the parties have, by informal means, established their agreement to the terms of the settlement and their intent to be bound. Since the Board here actually saw and approved the written draft there is no reason to be concerned that had Ms. Jones not balked on December 15th that a written agreement signed by Mr. Sumners and/or with a board resolution would not have

followed. Jones' belated attempt to undo what she had agreed to do in a manner that connoted her acceptance and intention to be bound should not overturn this settlement.

For the reasons expressed, I **CONCLUDE** that the terms of the "draft" agreement constitute the terms of the agreed upon settlement that binds both parties, subject to approval by the Commissioner. In that regard, having sat on this case for three days of hearings and being familiar with the allegations and the proofs presented up to that point, I had advised counsel for the parties as to the strengths and weaknesses of their cases to that point as I saw them and encouraged them to determine if a mutually satisfactory outcome could be negotiated. When presented with the terms of the agreement as negotiated on the 15th, I generally approved them, at that time subject to their being reduced to writing and approved by the parties, actions which I find did happen. The charges here do not involve any allegations of abuse or immoral conduct. Ms. Jones was no doubt a dedicated teacher, but was possibly vulnerable for at least the manner if the not the substance of some of the actions she undertook. At the same time the Board's policies and rules could perhaps have been criticized. A negotiated resolution, which provides for a separation of the parties and allows Ms. Jones to retire after many years of effective service without any findings against her is a very reasonable and acceptable outcome, albeit understood that it gives neither party all that they might hope to achieve after a full hearing. I **FIND** that nothing here violates the Cardonick standards and recommend that the Commissioner approve the settlement. In re Cardonick, 1990 S.L.D. 842, 846.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 8, 2007
DATE

JEFF S. MASIN, ALJ

Date Received at Agency:

May 9, 2007

Mailed to Parties:

MAY 11 2007

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment (Settlement Agreement)

EXHIBITS FOR MOTION

FOR PETITIONER:

Certification of Thomas W. Sumners, Jr., Esq., dated November 11, 2006

Exhibit A-Letter dated November 17, 2006 to ALJ Masin

Exhibit B-Proposed Settlement Agreement

Exhibit C-Letter dated November 22, 2006 from Michael T. Barrett, Esq.

Exhibit D-Letter dated November 28, 2006 to ALJ Masin

Exhibit E-Letter dated December 15, 2006 from Arnold S. Cohen, Esq.

FOR RESPONDENT:

Certification of Beverly Jones

Letter dated December 19, 2006 from Arnold Shep Cohen, Esq., to ALJ Masin

DRAFT

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

	: BEFORE THE COMMISSIONER OF
	: EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE	:
TENURE CHARGES AGAINST	: AGENCY DOCKET NO. 290-10/05
BEVERLY JONES, BOARD OF	: OAL DOCKET NO. EDUTH 8618-2005S
EDUCATION OF THE CITY OF	:
TRENTON, MERCER COUNTY	: ***SETTLEMENT AGREEMENT***
	:

This Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and Respondent, Beverly Jones.

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 290-10/05, OAL Docket No. EDUTH 8618-2005S; and

WHEREAS, the charges allege insubordination/unbecoming conduct by failure to abide by district organizational Policy No. 2121 through the transmission of various e-mails during the time period June 4, 2004 – May 6, 2005 to her supervisor, Melvin O. Cummings, and other Board administrators; and

WHEREAS, the charges allege insubordination/unbecoming conduct by failure to abide by directives to supervise her classroom in violation of Policy No. 5142; and

WHEREAS, the charges allege insubordination/unbecoming conduct by failure to follow administrative directives to cease spreading rumors and untrue statements about Mr. Cummings and Board administrators; and

WHEREAS, the charges allege insubordination by failure to follow administrative directives to cease from loitering in the main office of Sherman Avenue School; and

EXHIBIT B

WHEREAS, the charges allege insubordination by failure to follow administrative directives in violation of Board Policy No. 4201 regarding the use of cell phones during work hours; and

WHEREAS, the charges allege unbecoming conduct regarding the unacceptable use of the Board's radio system; and

WHEREAS, the charges allege unbecoming conduct regarding unprofessional conduct towards a school district guidance counselor, Sharron H. Coleman; and

WHEREAS, the charges allege unbecoming conduct on numerous dates from September 10, 2004 through May 4, 2005 by transmitting e-mails which were derogatory about fellow staff and supervisors; and

WHEREAS, the charges allege unbecoming conduct in violation of Board Policy No. 5131.7 regarding the possession of a weapon or dangerous instrument by a student; and

WHEREAS, the charges allege unbecoming conduct by harassing a student; and

WHEREAS, the charges allege that based upon the allegations, Respondent should be dismissed for insubordination/unbecoming conduct and suspension without pay for 120 days following certification of the charges; and

WHEREAS, the Respondent denies the allegations that her conduct as alleged by the Board constitutes unbecoming conduct on the grounds that they cannot be supported by facts based upon a preponderance of evidence, and even if there may be some factual support for the allegations which all occurred during the 2004-05 school year, they do not constitute unbecoming conduct as defined by law, and moreover, if it was determined that some of her conduct was not consistent with the law or district policy, her tenure should not be terminated in light of her prior experience in the district as a teacher over the course of almost thirty (30) years of employment in the district; and

WHEREAS, the parties acknowledge that there is good cause which is relevant to and warrants this settlement agreement, in particular that:

1. Respondent denies all the charges and intends to present credible evidence as set forth above to refute the charges;

2. The parties recognize that they both have strengths and weaknesses to their particular positions in support of and in denial of the tenure charges, and as a result of the parties' assessment of their respective positions, each party recognizes that they may or may not convince the Commissioner of Education to accept their respective positions;

3. Respondent understands that the Commissioner, pursuant to ***N.J.A.C.*** 6A:9-17.11, has the authority to refer tenure decisions to the State Board of Examiners for possible revocation of certification; and

4. The expeditious resolution of this matter will save both parties the cost and uncertainty of continued litigation.

NOW, THEREFORE, in consideration of the foregoing, the parties agree that the matter should be resolved based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against Respondent.

2. Respondent shall be returned to employment and she shall be entitled to back pay when the Petitioner suspended Respondent without pay as a result of the certification of the tenure charges.

3. Respondent shall submit a letter of retirement effective June 30, 2007.

4. The parties agree and covenant that neither party, nor any person, organization, or other entity on their behalf will file any charge, claim, or lawsuit against either party based upon the fact that Petitioner filed tenure charges or that Respondent defended those charges.

5. The parties recognize that each of them had input into drafting this agreement and agree that if there should arise a dispute as to its terms, this agreement shall not be construed against either party based upon the identity of its drafter(s).

6. The parties understand that this agreement is contingent upon the approval of Administrative Law Judge Jeff S. Masin and the Commissioner of Education, and if such approval is denied, the terms and contents of this agreement shall not be admissible in any legal or administrative proceedings of any nature, and will be without prejudice to their positions in such proceedings, and that in such event the parties may again attempt to settle the matter in a manner which is satisfactory to the Commissioner of Education.

7. The parties request that the tenure hearing be held in abeyance in order to obtain the approval of this settlement agreement by Administrative Law Judge Jeff S. Masin and the Commissioner of Education.

8. The parties warrant that this agreement is entered into voluntarily, without any duress, or without any other promises or agreement not expressed herein, and with the understanding that neither party is compelled to do so, and that by entering into this agreement, each party waives their right to a hearing and disposition on the merits of the charges.

Robert M. Revelle President, Trenton Bd. of Ed.	Date	Nancy Swirsky Board Secy., Trenton Bd. of Ed.
Beverly Jones Respondent	Date	Arnold S. Cohen, Esq. Attorney for Respondent

TWS:rmm/11/21/06

316-07

#316-07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In May 2007, the petitioning school district served an Order to Show Cause upon respondent – a tenured English and Journalism teacher – requiring respondent to show cause why an order should not be entered suspending her certificate, pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8, for resigning without providing the 60-day notice required by her contract, and by law. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and are sufficient to justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 10, 2007

AGENCY DKT. NO. 137-5/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Sills Cummis Epstein & Gross

Respondent: No appearance by or on behalf of Lisa Kovalovich Whitmore

This matter was opened before the Commissioner of Education on May 23, 2007 by way of an Order to Show Cause served by petitioner, Paramus Board of Education, upon respondent, Lisa Kovalovich Whitmore, requiring respondent to show cause why an order should not be entered suspending her teaching certificate, pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8, for resigning without providing the amount of notice required by her contract with respondent, and for failing to provide the 60 days notice required by law. By notice dated May 23, 2007, the Bureau of Controversies and Disputes (the Bureau) acknowledged receipt of proof of service upon respondent of the order to show cause.

On June 26, 2007, the Bureau sent respondent a final notice, via regular and certified mail, directing respondent to file an answer within ten days. The final notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. A signed receipt for the notice sent by certified mail was returned on July 2, 2007, and the notice sent by regular mail was not returned.

No answer to the order to show cause has been filed as of this date.

As stated above, the final notice to respondent clearly advised that if an answer was not filed within ten days of receipt of same, each allegation in the papers supporting the order to show cause would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Commissioner now concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order suspending respondent's teaching certification. Accordingly:

IT IS ORDERED that summary decision is granted to petitioner, and respondent's teaching certification is suspended for a period of one year pursuant to *N.J.S.A.* 18A:26-10 and.18A:28-8.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 8/10/07

Date of Mailing: 8/10/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

318-07

OAL DKT. NO. EDU 484-07
(EDU 6160-06 ON REMAND)
AGENCY DKT NO. 224-6/06

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
MADELAINE P. GLACKEN, EDISON :
TOWNSHIP SCHOOL DISTRICT :
MIDDLESEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

The record, Stipulation of Settlement and Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/07

Date of Mailing: 8/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 484-07

AGENCY DKT. NO. 224-6/06

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MADELANE P. GLACKEN, EDISON TOWNSHIP SCHOOL DISTRICT, MIDDLESEX COUNTY.

Mary H. Smith, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Stephen E. Klausner, Esq., for respondent

Record Closed: July 9, 2007 Decided: July 13, 2007

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 30, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Dismissal (J-1) indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms thereof and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement has been ratified by the Board of Education by way of an adopted resolution (P-1).

3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 13, 2007
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

Fax 7/17/07

JUL 18 2007
DATE

Mailed to Parties:
[redacted]
OFFICE OF ADMINISTRATIVE LAW

jh

EXHIBITS

Joint exhibit:

J-1 Stipulation of Settlement and Dismissal

J-1 Enid 7/9/07

RECEIVED
2007 JUN 26 A 11: 25
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

WILENTZ, GOLDMAN & SPITZER P.A.
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for the
Edison Township Board of Education

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

AGENCY DOCKET NO. 224-6/06
OAL DOCKET NO. EDUOR 00484-2007S

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF MADELAINE P. GLACKEN, SCHOOL DISTRICT OF EDISON, MIDDLESEX COUNTY.	:	**STIPULATION OF SETTLEMENT AND DISMISSAL**

The Edison Township Board of Education ("Board") and Madelaine P. Glacken ("Glacken") agree as follows:

W I T N E S S E T H:

WHEREAS, on or about June 13, 2006, the Board filed an application with the Commissioner of Education seeking an Order to Show Cause in connection with the Teaching Certification of Glacken, Agency Reference Number 224-6/06; and

WHEREAS, the Commissioner of Education transmitted the matter for a hearing before the Office of Administrative Law, OAL Docket No. EDUOR 00484-2007S (the "Action"); and

WHEREAS, prior to a hearing being held before the Office of Administrative Law, the parties reached an amicable resolution to the issues in dispute; and

WHEREAS, the parties agree that submission of this Stipulation of Settlement ("Stipulation") will constitute a complete and final disposition of any potential claims each party may have brought against the other; and

WHEREAS, this Stipulation must be approved by the Board prior to being effective or final;

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. Dismissal of the Action. After the effective date of this Stipulation, the Board will withdraw, with prejudice, its pending application before the Commissioner of Education for an Order to Show Cause.

2. No Future Employment. Glacken agrees that she has no right to or expectation of employment or re-employment with the Board or any of its successors in interest, subsidiaries, divisions, affiliates, or associates, and that Glacken will not apply to or seek employment with any such entity at any time after the effective date of this Stipulation.

3. Release and Waiver. In consideration of the aforesaid terms and conditions of this Stipulation, and except as prohibited by law, Glacken, personally and for her estate and/or her heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Glacken's employment and/or association with releasees.

Glacken generally waives, releases and gives up any and all claims arising from or relating to her employment and/or association with releasees based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law, except as prohibited by law.

Except as prohibited by law, Glacken specifically waives, releases and gives up any and all claims arising from or

relating to her employment and/or other relationship and/or association with releasees, based upon any act, event, or omission occurring before the effective date of this Stipulation, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law, expressly including, but not limited to, any potential claims (including individual and class action claims) relating to:

- Title VII of the Civil Rights Act of 1964, as amended;
- Sections 1981 through 1988 of Title 42 of the United States Code, as amended;
- The Employee Retirement Income Security Act of 1974, as amended;
- The Immigration Reform Control Act, as amended;
- The Americans with Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended;
- The Fair Labor Standards Act, as amended;
- The Occupational Safety and Health Act, as amended;
- The Family and Medical Leave Act of 1993;
- The Equal Pay Act, as amended;
- The New Jersey Law Against Discrimination, as amended;
- The New Jersey Minimum Wage Law, as amended;
- The Equal Pay Law for New Jersey, as amended;
- The New Jersey Worker Health and Safety Act, as amended;
- The New Jersey Family Leave Act, as amended;
- The New Jersey Conscientious Employee Protection Act, as amended;

- The New Jersey Employer-Employee Relations Act, as amended;
- Any anti-retaliation provision of any statute or law including common law;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;
- Any provision of any federal or state constitution;
- Any public policy, contract, tort, or common law;
- Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and
- Attorneys' fees, litigation costs, medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature arising out of Glacken's employment with the Board.

4. No Claims Permitted/Covenant Not to Sue. Glacken agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to her employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Glacken from an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Glacken from contacting the Equal Employment Opportunity Commission ("EEOC"); however, if Glacken signs this Stipulation, she will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Glacken, it shall be dismissed with prejudice upon presentation of this Stipulation, and Glacken shall reimburse releasees for the costs, including attorneys' fees, of defending any such action.

5. Attorneys' Fees. Glacken and her attorney agree that Glacken will bear her own costs and attorneys' fees which she has incurred in connection with the Action and that no amounts shall be sought by or owed to Glacken or her attorney in connection with this matter.

6. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by releasees in connection with this settlement, constitutes an admission by releasees of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Glacken's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that releasees have entered into this Stipulation to conclude this litigation and avoid costs and expenses attendant thereto. Releasees specifically reiterate their denial of any legal liability or obligation to Glacken or any other person.

7. Entire Agreement/Sought Assistance of Counsel. This Stipulation contains the sole and entire agreement between the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Glacken represents and acknowledges that, prior to executing this Stipulation, she consulted with her counsel (Stephen E. Klausner, Esq., LLC, by Stephen E. Klausner, Esq.), that she had ample time to do so, that she obtained the advice of her counsel prior to making the decision to execute this Stipulation, and that she has not relied upon any representation or statement not set forth in this Stipulation made by any other party thereto, or their counsel or representatives, with regard to the subject matter of this Stipulation. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

8. Severability. The parties agree that if any Court declares any portion of this Stipulation unenforceable, the remaining portions shall be fully enforceable.

9. Counterparts and Applicable Law. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey, venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that Glacken breaches this Stipulation and releasees are successful in an action against her, Glacken shall

be liable for the attorneys' fees and costs incurred by releasees with respect to any such action.

10. Revocation. Glacken will have twenty-one (21) days from her receipt of this Stipulation to consider its terms before signing it. Once Glacken signs this Stipulation, she shall have seven (7) days to revoke this Stipulation or it shall become binding and in full force and effect seven (7) days after Glacken signs it. Any revocation within the seven (7) day period must be submitted, in writing, to Mary H. Smith, Esq., Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095 and must state "I hereby revoke my acceptance of this Stipulation." The revocation must be personally delivered to Mary H. Smith, or mailed to Mary H. Smith, and postmarked within seven days of execution of the Stipulation. This Stipulation shall not become effective or enforceable until after the revocation period has expired. If the last day of the revocation period is a Saturday, Sunday, or legal holiday in New Jersey, then the revocation period shall not expire until the next following day which is not a Saturday, Sunday, or legal holiday.

11. Notices. Unless otherwise specified herein, any notices sent in connection with this Stipulation shall be sent as follows:

As to Glacken:

Stephen E. Klausner, Esq., LLC
Stephen E. Klausner, Esq.
P.O. Box 1012
Somerville, NJ 08876

As to the Board:

Mary H. Smith, Esq.
Wilentz, Goldman & Spitzer P.A.
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095

12. Effective Date. This Stipulation shall not become effective or enforceable until the revocation period has expired, the Board has approved this Stipulation by resolution and the Honorable John Schuster III, A.L.J. has incorporated the full terms of this Stipulation into an initial decision approving the settlement.

13. Voluntary Agreement. Glacken hereby acknowledges that she is signing this Stipulation voluntarily of her own free will and not under duress or coercion of any kind. She understands and agrees that she knowingly and voluntarily has decided to enter into this Stipulation and release any and all potential claims against the Board after thoroughly reviewing this Stipulation with her attorney.

14. Board Approval. This Stipulation must be approved by the Board by resolution prior to being effective or final.

15. Approval of Administrative Law Judge and Commissioner of Education. Pursuant to N.J.A.C. 1:1-19.1, this Stipulation is subject to the approval of the Honorable John Schuster III, A.L.J. and the Commissioner of Education prior to being effective or final.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS STIPULATION AS FOLLOWS:

WITNESS:
STEPHEN E. KLAUSNER, ESQ., LLC

BY: Madelaine P. Glacken
MADELAINE P. GLACKEN

DATED: 6/6/07

BY:
STEPHEN E. KLAUSNER, ESQ.

DATED: 6/6/07

EDISON TOWNSHIP
BOARD OF EDUCATION

BY:
DAVID J. DICKINSON
Board President

DATED:

ATTEST:
EDISON TOWNSHIP
BOARD OF EDUCATION

BY:
DANIEL P. MICHAUD
Business Administrator/
Board Secretary

DATED:

P-1
Enid
7/9/07

Stipulation of Settlement

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools and the Business Administrator/Board Secretary, the Edison Township Board of Education approves the previously submitted Stipulation of Settlement in the matter entitled In the Matter of the Suspension of the Teaching Certification of Madelaine P. Glacken, School District of Edison, Middlesex County, Agency Docket No. 224-6/06, OAL Docket No. EDUOR 00484-2007S, and authorizes the Board President, the Board Business Administrator/Board Secretary and the Board attorney to take all necessary and appropriate steps to implement the aforesaid Stipulation of Settlement.

THIS IS CERTIFIED TO BE A TRUE AND COMPARED COPY OF A RESOLUTION ADOPTED BY THE EDISON TOWNSHIP BOARD OF EDUCATION ON 6/18/07.

SECRETARY

RECEIVED
2007 JUL -9 A 11: 13
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

319-09

OAL DKT. NO. EDU 10928-04
AGENCY DKT. NO. 367-10/04

LYNN KRASER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/07

Date of Mailing: 8/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10928-04
AGENCY DKT. NO. 373-10/04

LYNN KRASER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 20, 2007 Decided: July 23, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 16, 2005, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and Resolution indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

7-23-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 7-26-07

Mailed to Parties:

JUL 26 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

SSE C & K
ATTORNEYS-AT-LAW

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLC

TEN JAMES STREET • FLORHAM PARK • NEW JERSEY 07932 TEL: 973.301.0001 FAX: 973.301.0203

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Jean S. Lidon
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WWW.SSECK.COM

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of counsel
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Kathleen W. Hofstetter
Scott A. Elk[2]
Miguel A. Maza[5]

1-Also member of FL Bar
2-Member of FL Bar only
3-Also member of NY Bar
4-Also member of PA Bar
5-Also member of PR Bar
6-Also member of CA Bar
7-Also member of D.C. Bar
8-R.1:40 Qualified Mediator
9-Also member of CO Bar

Please Reply to Florham Park Office.

July 17, 2007

Via Lawyers Service
Honorable J. Howard Solomon, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RECEIVED
2007 JUL 20 A 7:59
OFFICE OF ADMINISTRATIVE LAW

Re: Lynn Kraser v. Mount Olive Board of Education
OAL Docket No. EDUOA 10928-2004N
Agency Reference No: 367-10/04

Dear Judge Solomon:

Enclosed please find the Certified Resolution of the Board of Education approving the settlement in the a above matter.

Thank you for your consideration.

Respectfully,

Marc H. Zitomer

MHZ:jd
Enclosure
c: Nancy Oxfeld, Esq.

JUL 1 3 2007

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE MORRIS COUNTY, NJ AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Mount Olive in the County of Morris, New Jersey, convened in regular session on Monday, June 25, 2007 at 6:30 p.m. at the Board/Administration Building, 89 Route 46, Budd Lake, NJ, 07828.

The following members of the Board of Education were present:

William Robinson, President	
Daniel Amianda	Anthony Giordano
Bruce Bott	Robert Mania
Kathryn Criscuolo	Anthony Strillacci
Rene Gadelha	Mark Werner

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2007 JUL 20 A 7:5

The following members of the Board of Education were absent:

None

The following resolution was offered by Mr. Strillacci, seconded by Mr. Werner, and adopted by the Board of Education by the following roll call vote:

TITLE OF RESOLUTION: STIPULATION OF SETTLEMENT AND RELEASE

RESOLUTION: **Resolved**, that the Board hereby approves the Stipulation of Settlement and Release in the matter, Lynn Kraser v. Mount Olive Board of Education, OAL Docket No. EDUOA10928-2004N, Agency Reference No. 367-10/04, which is currently before the Commissioner of Education, in the amount of $7,500.00; and

Be it Further Resolved, that the Board President is hereby authorized to execute the Stipulation of Settlement and Release in the above matter on behalf of the Board and a copy thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: Mr. Amianda, Mr. Bott, Mrs. Criscuolo, Mrs. Gadelha, Mr. Giordano, Mr. Mania, Mr. Robinson, Mr. Strillacci, Mr. Werner

NOES: None

STATE OF NEW JERSEY }
}ss
COUNTY OF MORRIS }

I, Lynn Jones, Secretary to the Board of Education of the Township of Mount Olive, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the Minutes of the meeting of the Board of Education of said district duly called and held on June 25, 2007 has been compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Mount Olive Township Board of Education and is a true, complete copy thereof and of the whole of said original Minutes, so far as the same relates to the subject matter referred to in said Board of Education this 28th day of June, 2007.

Lynn M. Jones
Board Secretary

Lynn Kraser,
Petitioner,
v.
Mt. Olive Township
BOE,
Respondent

Commissioner
of Education

OAL Docket No.
EDU 10858-04
Agency Docket
No. 367-10/04

Settlement
Agreement

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The Respondent will pay Petitioner $7500 in full settlement of this matter,

2. The Petitioner waives all claims that could have been raised in this matter and will execute an appropriate release,

3. This settlement does not represent an admission by either party, cannot be used by either party in any future proceeding and is executed as a good faith effort by all to resolve the issues,

End.

J-1

4. This agreement is subject to approval by the Board of Education, and, once approved by the Board of Education, the parties agree a more formal settlement agreement will be executed upon Board approval.

Oxfeld Cohen PC
Attys for Petitioner
By: [redacted]
Nancy I Oxfeld
Dated: 6/15/07

Schwartz Simon Edelstein Celso & Kessler LLC
By: Marc Zitomer
Dated: 6/15/07

Lynn Kraser,
Petitioner,
v.
Mt. Olive Township
BOE,
Respondent

Commissioner
of Education

OAL Docket No.
EDU 10828-0
Agency Docket
No. 367-10/0

~~Settlement~~
Agreement

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

(1) The Respondent will pay Petitioner $7500 in full ~~settlement~~ of this matter,

(2) The Petitioner waives all claims that could have been raised in this matter and will execute an appropriate release,

(3) This ~~settlement~~ does not represent an admission by either party, cannot be used by either party in any future proceeding and is executed as a good faith effort by all to resolve the issues,

End.

J-1

④ This agreement is subject to approval by the Board of Education, and, once approved by the Board of Education, the parties agree a more formal settlement agreement will be executed upon Board approval.

Oxfeld Cohen PC
Attys for ~~Petitioner~~
By: [redacted]
Nancy I Oxfeld
Dated: 6/15/07

Schwartz Simon Edelstein Celso & Kessler LLC
By: [signature]
Marc Zitomer
Dated: 6/15/07

320-07

OAL DKT. NO. EDU 3303-01
AGENCY DKT. NO. 39-2/01

ROBERT D. REDDINGTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edley

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/07

Date of Mailing: 8/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3303-01
AGENCY DKT. NO. 39-2/01

ROBERT D. REDDINGTON,

Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, attorneys)

John G. Geppert, Jr., Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: June 20, 2007 Decided: June 29, 2007

BEFORE **RICHARD McGILL,** ALJ:

Robert D. Reddington filed a petition with the Commissioner of Education requesting a determination that he should receive his full salary for one year without loss of sick time in accordance with N.J.S.A. 18A:30-2.1. The matter was transmitted to the Office of Administrative Law on April 18, 2001, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement and Release. Respondent also submitted a copy of its resolution approving the settlement at a meeting on May 1, 2007.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 29, 2007
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 7-3-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL - 3 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
Tel. (973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent, Board of
Education of the City of East Orange.

ROBERT D. REDDINGTON, Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REFERENCE NO. 39-2/01 OAL DOCKET NO. 03303-2001N **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Board of Education of the City of East Orange (hereinafter the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Robert D. Reddington, whose address is 132 Shunpike Road, Springfield, New Jersey 07081 (hereinafter the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, Petitioner was previously employed by the Board as a teaching staff member; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about February 20, 2001, pursuant to N.J.S.A. 18A:30-2.1, seeking payment from the Board for his full salary for one year without charging same to his accumulated sick leave bank, together with any other remedy which is deemed just and equitable under the circumstances; and

WHEREAS, on or about March 7, 2001, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Twelve Thousand Dollars ($12,000.00) in full and complete satisfaction of any and all claims and amounts Petitioner is claiming to be due and owing to him from the Board.
2. This settlement amount will be paid in a check made payable to Robert Reddington, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education. The Board will issue a 1099 tax form to Petitioner.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject

matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed

in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE RESPONDENT BOARD OF EDUCATION OF THE CITY OF EAST ORANGE:

By: _____
Bibi Stewart-Garvin, Board President

Date: 6/15/07

By: _____
Jamie Adams, Witness

PETITIONER:

_____
Robert D. Reddington

Date: 5/23/07

Sworn and subscribed before me this
23 day of May, 2007

_____
Notary Public

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, May 1, 2007 at 6:10 p.m.

The following members of the Board were present:

Ms. Theresa A. Combs, Mr. Reginald Davis, Mr. J. Garfield Jackson, Jr., Mr. Everett Jennings, Mr. Vernon Pullins, Jr., Mr. Arthur L. Wright, and Mrs. Bibi Stewart Garvin

The following resolution was offered by Mr. Arthur Wright, duly seconded by Mr. Reginald Davis and adopted by the Board of Education:

Resolution Approving the Settlement of Litigation Involving Robert D. Reddington

BE IT RESOLVED, upon the recommendation of Board Counsel and the Superintendent of Schools, that the Board of Education of the City of East Orange hereby approves the Stipulation of Settlement and Release in the matter Robert D. Regginton v. Board of Education of the City of East Orange, Agency Reference No. 39-2/01, OAL Docket No. EDU 03303-2001N, which is currently before Administrative Law Judge Richard McGill, in the amount of $12,000.00.

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Stipulation of Settlement and Release in the above matter on behalf of the Board and a copy thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 7
NOES: 0

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Victor R. Demming, Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, May 1, 2007, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 7th day of June 2007.

Victor R. Demming
Victor R. Demming, Board Secretary

321-07

321-07

DAVID HERRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a Montclair resident, contended that respondent Board's actions in hiring two new school principals in 2004 violated procedural requirements. The parties filed initial pre-hearing memoranda, and respondent filed a reply. The petitioner made no further submissions to the OAL; after one telephone communication in February 2005, the OAL's repeated attempts to contact petitioner by telephone and by mail were unsuccessful.

The ALJ found that, given the procedural history of this matter and petitioner's lack of response to final communications to the parties in June 2007, the petitioner has failed to reasonably prosecute his case. The ALJ concluded that the petition should be dismissed.

The Commissioner concurred with the ALJ, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 13, 2007

OAL DKT. NO. EDU 11076-04
AGENCY DKT. NO. 282-8/04

DAVID HERRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Commissioner adopts the Initial Decision as the final decision in this matter for the following reasons.

It appears that after his filing of a prehearing brief in December 2004, petitioner made no further submissions to the OAL. After one telephone communication on February 4, 2005, further attempts by the OAL to contact petitioner by telephone were unsuccessful. A letter dated March 11, 2005, to petitioner from the Administrative Law Judge (ALJ) assigned to the matter elicited no response. A letter to petitioner from the ALJ dated April 12, 2006, was returned unopened and marked "Forward Time Expired - Return to Sender."

No change of address was submitted by petitioner to the OAL. On June 29, 2007, the ALJ wrote once more to petitioner at his address of record advising that she had determined to issue a decision dismissing his case. No response from petitioner was forthcoming.

The Commissioner concurs with the ALJ that the petitioner has failed to properly prosecute his petition. Accordingly, the petition is hereby dismissed, pursuant to *N.J.A.C* 1:1-14.6(j) and (p). *See also, e.g., J.M.R., o.b.m. T.G. and K.G. v. Board of Education of the Township of Ewing, Mercer County*, OAL DKT. NO. EDU 6269-04, decided by the Commissioner October 13, 2005, where a petition was dismissed for lack of prosecution because the petitioner failed to attend a hearing, was advised by the ALJ in a July 18, 2005 letter that her petition could be dismissed for lack of prosecution, but failed to file any response with the OAL or Department of Education until September 2005, after the Initial Decision of the OAL dismissing her petition had been issued.

IT IS SO ORDERED.[1]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/07

Date of Mailing: 8/14/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11076-04

AGENCY DKT. NO. 282-8/04

DAVID HERRON,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OFMONTCLAIR,

Respondent.

David Herron, petitioner, pro se

Jennifer Mazawey, Esq., for respondent (Genova, Burns & Vernoia, attorneys)

Record Closed: June 29, 2007 Decided: June 29, 20007

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

David Herron, in the capacity of a resident of the Township of Montclair (Montclair), filed a petition with the State Department of Education (DOE), requesting a determination that actions by the Montclair Board of Education (respondent) hiring Gail L. Clarke (Clarke) and Vito A. D'Aleonzo (D'Aleonzo) as Principals of the District's Watchung Elementary School and the Glenfield Middle School, respectively, violated

certain procedural requirements, and requesting related relief. Respondent filed an answer, and the DOE transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

The parties filed initial pre-hearing memoranda, and respondent filed a reply. Subsequent attempts to communicate with the parties were unsuccessful, as no communications were filed by, or on behalf, of petitioner, and he was not accessible via telephone. A letter dated 12, 2006 from this judge to petitioner, requesting that he advise if he intended to continue with his case, was returned by postal authorities with a notation "RETURN TO SENDER". No additional communications were received by, or on behalf of, petitioner, as referenced in final communications to the parties on June 29, 2007.

FINDINGS OF FACT

The procedural history set forth hereinabove is incorporated herein. Additionally, I **FIND** that petitioner has failed to reasonably prosecute his case.

DISCUSSION

The Commissioner of the DOE generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9.

The powers of an Administrative Law Judge (ALJ) presiding over a contested case hearing include utilization of "sanction powers to ensure the proper conduct of the parties and their representatives", and the ALJ may take other actions for the proper, expeditious, and fair conduct of a hearing, development of the record, and rendering of a decision. N.J.A.C. 1:1-14.6(j) & (p). The regulations promulgated by the OAL shall, generally, be construed so as to achieve just results, simplicity in procedure, fairness, and the elimination of unjustifiable expense and delay. Id. at § 1.3 (a).

Based upon the foregoing, I am persuaded that petitioner's case should be dismissed.

CONCLUSION

I **CONCLUDE** that petitioner's case, relevant to the petition he filed in this matter with the DOE, should be dismissed.

ORDER

It is hereby **ORDERED** that the petition filed by petitioner with the DOE, contesting action by respondent appointing Clarke and D'Aleonzo as Principals of the District's Watchung Elementary School and the Glenfield Middle School, respectively, be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 29 2007
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Date Received at Agency: 7-9-07

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL - 9 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

#323-07R

OAL DKT. NO. EDU 3322-07
(EDU 5789-06 ON REMAND)
AGENCY DKT. NO. 129-3/06

L.M., on behalf of minor children, J.M., J.M., AND J.M.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and General Release, and the Initial Decision on Remand issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/07
Date of Mailing: 8/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03322-07
AGENCY DKT. NO. 129-3/06
(remand EDU 05789-06)

L.M. ON BEHALF OF MINOR CHILDREN
J.M., J.M., & J.M.
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,
Respondent.

Linda Morris, pro se

Malachi J. Kenney, Esq. apearing for respondent,
(*Kennedy, Gross, Kovats, Pruchnik, Campbell & Parton*)

Record Closed: July 6, 2007 Decided: July 10, 2007

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 12, 2007, on remand from Commissioner's Decision dated February 14, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A telephone conference was scheduled for May 15, 2007. Prior to the date of the conference, the parties settled the matter. On July 6, 2007 the undersigned received a Stipulation of Settlement, General Release and a certified portion of the official minutes of the Randolph Township Board of Education public meeting which was approved by the Board of Education.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their authorized representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 10, 2007
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 7-13-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 13 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

KENNEY, GROSS, KOVATS AND PARTON
The Courts of Red Bank, Bldg. 8
130 Maple Avenue, P.O. Box 8610
Red Bank, New Jersey 07701
(732) 530-7500
Attorneys for Respondent

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L.M. o/b/o Minor Children, J.M., J.M. and J.M., Petitioner, v. RANDOLPH TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY, Respondent.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDU 03322-2007N** **AGENCY REF NO. 129-3/06** **THE HON. CARIDAD F. RIGO, ALJ** **STIPULATION OF SETTLEMENT AND GENERAL RELEASE**

The Randolph Township Board of Education (the "District") having its administrative offices at 25 School House Road, Randolph, New Jersey 07869 and Linda Morris (the "Petitioner" or "Parent"), residing at 24 Mapledale Avenue, Roxbury, New Jersey 07876, desiring to settle this matter in an amicable manner, hereby set forth their full agreement as follows:

WITNESSETH

WHEREAS, J.M., J.M. and J.M. are minor children who were enrolled in the public schools of the Township of Randolph, County of Morris during the 2005-2006 school year; and

WHEREAS, the Randolph Township Board of Education (the "Board") is charged with the operations of the public schools of the Township of Randolph, County of Morris, a K-12 school system, pursuant to Title 18A of the New Jersey Statutes; and

WHEREAS, the Board on March 8, 2005, made a final determination of ineligibility concerning the enrollment of J.M., J.M. and J.M. in the Randolph Township Schools; and put Petitioner on notice of that action on March 14, 2005; and

WHEREAS, the Petitioner appealed from that determination to the Commissioner of Education on March 31, 2005;

NOW, THEREFORE, for the considerations specified below, the parties set forth the following mutual covenants and agreements:

1. That Petitioner voluntarily dismisses the above-captioned Petition of Appeal with prejudice and acknowledges that J.M., J.M. and J.M. are no longer domiciled in the Township of Randolph and are not eligible to attend any Randolph Township Public Schools.

2. As a result of that voluntary dismissal, the Respondent District's Final Determination of Ineligibility remains valid and in effect.

3. In consideration for Petitioner's action to dismiss the Petition of Appeal, Respondent Board of Education waives the claims for tuition set forth in its Answer to the Petition and the Petitioner shall not be compelled to pay tuition for her non-resident children who were enrolled in the Randolph Township Public Schools after March 8, 2006.

4. This Stipulation of Settlement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the Respondent District or the Petitioner Parent and shall not be referred to in any subsequent proceedings by any party other than to enforce its terms. In the event that this Stipulation of Settlement is not fully executed and approved by all parties hereto, it shall become null and void and shall neither constitute an admission of any party nor be referred to by any party in any subsequent legal proceeding for any purposes whatsoever.

5. The parties acknowledge that, as a matter of law, this Stipulation of Settlement cannot take effect unless and until approved by a formal vote of the Randolph Township Board of Education at a public meeting;

6. No later than thirty (30) days after the execution of this Stipulation of Settlement, the Stipulation of Settlement shall be filed with the Administrative Law Judge presiding over this case, the Honorable Caridad F. Rigo, ALJ, along with a copy of the Board of Education Resolution approving this Stipulation of Settlement, so that the Court may issue a Final Decision approving the terms and conditions of this Stipulation of Settlement.

7. The Petitioner, appearing *pro se*, acknowledges that she has reviewed this Stipulation of Settlement in detail and fully understands its requirements and limitations.

8. The Petitioner hereby states that she is signing this Stipulation of Settlement voluntarily of her own free will and not under duress or coercion of any kind.

9. This Stipulation of Settlement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

10. If, during the term of this Stipulation of Settlement, it is found that a specific clause or clauses of the Stipulation is/are illegal under Federal or State law, then the remainder of this Stipulation of Settlement not affected by Federal or State ruling shall remain in full force and effect.

11. All parties are bound by this Stipulation of Settlement and each of its provisions. Anyone who succeeds to the rights and responsibilities, such as their successors and assigns, are also bound. This Stipulation of Settlement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes officials, representatives, employees, agents, attorneys, successors and assigns.

12. In further consideration for this Stipulation of Settlement, the Petitioner and Respondent District agree that, following the full execution of this Stipulation of Settlement, they will keep all terms of this Stipulation of Settlement completely confidential. Notwithstanding anything to the contrary herein, it is expressly understood and agreed that, following the full execution of this Stipulation of Settlement, neither the Petitioner, the Respondent District, the Respondent District's staff, nor their attorneys will take any action to publicize the terms and nature of this Stipulation of Settlement, except that disclosure is permitted: (1) as necessary with regard to any proceedings for the enforcement of the Stipulation of Settlement; (2) to the students' immediate family, attorneys, agents and pertinent Respondent District staff, who shall agree not to disclose the facts of or any of the terms of this Stipulation of Settlement as if they were a party to it; (3) as may be required by any court of agency of competent jurisdiction; and (4) as may be required by law.

13. The Stipulation of Settlement contains the full and complete agreement of the parties hereto with respect to its subject matter, that it supercedes any prior or contemporaneous representations, whether oral or written, and that it may not be modified or amended except by a written instrument signed by all parties hereto.

14. In consideration for the above, the Petitioner agrees that the terms of this Stipulation of Settlement shall constitute a full and complete settlement of all claims she made or could have made, individually or jointly, in the above-captioned Due Process proceeding against the Randolph Township Board of Education.

15. In consideration for the above, the Respondent District agrees that the terms of this Stipulation of Settlement shall constitute a full and complete settlement of all claims it made

or could have made, individually or jointly, in the above-captioned Due Process proceeding against the Petitioner arising out of any claims for back tuition.

16. In consideration for the above, the Petitioner agrees to waive her right to pursue reasonable attorney's fees pursuant to the IDEA (20 U.S.C. § 1415(e)(4), § 615 (i)); as well as all other Federal and State statutes providing for the reimbursement of reasonable attorney's fees and costs related to the Petitioner's request for Due Process.

17. The Petitioner agrees to accept the above-cited conditions in return for a full release of the claims set forth in the request for Due Process having the Docket No. EDU-03322-2007N and EDU-05789-06.

18. The Respondent District agrees to accept the above-cited conditions in return for a full release of the claims set forth in the Answer to the request for Due Process having Docket No. EDU-03322-2007N and EDU-05789-06.

IN WITNESS WHEREOF, the undersigned put their signatures on this _____day of June, 2007.

FOR PETITIONER

Linda Morris
LINDA MORRIS

DATE: 6/12/07

FOR RESPONDENT
RANDOLPH TOWNSHIP BOARD OF EDUCATION

Christine Carey
CHRISTINE CAREY, PRESIDENT

DATE: 6/21/07

Witness:

Michael S. Neves
MICHAEL S. NEVES, BOARD SECRETARY

BOARD OF EDUCATION
OF THE TOWNSHIP OF RANDOLPH
MORRIS COUNTY, NEW JERSEY
as recorded in the official minute book

The Board of Education of the Township of Randolph in the County of Morris, New Jersey, convened in public session on **June 18, 2007** in the Center Grove Elementary School Library, Millbrook Avenue, Randolph, New Jersey.

Christine Carey - President
Ethan Blynn - Vice President

The following Board Members were present: Ethan Blynn , Claire Keller, Barbara Levinson , Gregory Mark , Maria Martorana, All Matos ,Amy Sachs , Douglas Weisberger and Christine Carey.

Ethan Blynn made a motion seconded by Gregory Mark and carried unanimously by roll call vote to approve the following :

ACCEPTANCE OF SETTLEMENT AGREEMENT

RESOLVED, the Randolph Township Board of Education accept a Settlement Agreement, **L.M.** o/b/o minor children J.M., J.M. and J.M., as outlined in **Finance Exhibit # 8,** attached hereto and made a part of the minutes.

ROLL CALL VOTE: **AYES: 9**
NO: 0
ABSTAIN: 0

STATE OF NEW JERSEY)

COUNTY OF MORRIS) ss

I, **Michael S. Neves,** Secretary, of the Board of Education, of the Township of Randolph, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of **June 18, 2007** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Randolph Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relates to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this day of **June 28, 2007.**

SEAL

BOARD SECRETARY

324-07

J.A.M., ON BEHALF OF MINOR CHILD, C.A.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, who resides within respondent's school district, contested respondent's determination that his brother, C.A.M., is ineligible to attend Morris Hills schools, claiming C.A.M. is not living with his parents in Colombia, South America, because of an "economic and personal problem". Respondent sought tuition reimbursement for the alleged period of ineligible attendance.

The ALJ found that: C.A.M. was not properly domiciled in respondent's school district as required under *N.J.S.A.* 18A:38-1(a); no legitimate proof was submitted by petitioner that he is the legal guardian of his brother; and petitioner failed to demonstrate a family or economic hardship that would render the parent unable to support or provide care for their son. The ALJ concluded that C.A.M. is neither domiciled in respondent's district nor living in the home of someone domiciled in the district due to family or economic hardship, and granted the Board's application for tuition in the amount of $5,163.84, plus $78.24 per day for each day of C.A.M.'s attendance in the district after June 6, 2007.

Upon a full and independent review of this matter, the Commissioner adopted the Initial Decision as the final decision, and directed that petitioner be assessed tuition for C.A.M.'s period of ineligible attendance, as set forth by the ALJ.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 15, 2007

OAL DKT. NO. EDU 3948-07
AGENCY DKT. NO. 66-3/07

J.A.M., ON BEHALF OF MINOR CHILD, C.A.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that petitioner has failed to demonstrate C.A.M.'s entitlement to a free public education in respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to remit to respondent tuition in the amount of $5,163.84, plus $78.24 per day for each day of C.A.M.'s attendance after June 6, 2007.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/07
Date of Mailing: 8/15/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3948-07
AGENCY DKT. NO. 66-3/07

J.A.M. o/b/o MINOR CHILD, C.A.M.,
Petitioner,
v.
BOARD OF EDUCATION OF MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

J.A.M., pro se

Joanne L. Butler, Esq., (Schenck, Price, Smith & King, attorneys)

Record Closed: June 6, 2007 Decided: July 13, 2007

BEFORE **IMRE KARASZEGI, JR.,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, J.A.M., a resident of the Township of Rockaway, appeals the determination of respondent Board of Education of the Morris Hills Regional School district (Board) that C.A.M., petitioner's brother, is ineligible to attend school in the district. The Board answered that the application has not shown a family or economic hardship which would render the parent unable to support or provide care for the child. N.J.S.A. 18A: 38-1(b). The Board also

indicated that the application does not establish that C.A.M. is not residing with petitioner solely for the purpose of attending district schools or that the petitioner will be supporting the pupil gratis. Respondent requests tuition reimbursement for the alleged period of ineligible attendance.

By letter of March 5, 2007, the Board notified the petitioner of its determination. On March 6, 2007, the Commissioner received an appeal from J.A.M. and on April 2, 2007, an Answer was filed on behalf of the Board. On April 23, 2007, the Commissioner of the Department of Education transmitted this matter as a contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on June 6, 2007 and the record closed on the same date.

EVIDENCE

On February 12, 2007, J.A.M., C.A.M.'s brother, attempted to enroll C.A.M. in the Morris Hills Regional School district. J.A.M. is a resident of Rockaway Township and the parents of J.A.M. and C.A.M. live in the Republic of Colombia, South America. Petitioner submitted an Affidavit of Resident and an Affidavit of Parent/Guardian in support of the enrollment application. He indicated in the Affidavit of Resident that he was not the legal guardian of C.A.M. Petitioner testified that he "never obtained court ordered custody." Therefore, I am compelled to **FIND** as **FACT** that C.A.M. was not properly domiciled in the Morris Hills Regional School district as required under N.J.S.A. 18A:38-1(a) because no proof was submitted by the petitioner, either in February 2007 or at this hearing, that he is the legal guardian for his brother, C.A.M. Petitioner did submit a document, allegedly signed by the parents of C.A.M. and notarized in the Republic of Colombia on January 18, 2007 and titled "special authorization" which gives petitioner the authority to "represent us on any matter with the schools and hospital" as well as "legal custody" of C.A.M. I **FIND** that this "special authorization" document does not confer legal guardianship on the petitioner because it was never presented to or endorsed by a judge either as a court custody order or in a guardianship proceeding in the courts of the Republic of Colombia or the United States of America.

On February 26, 2007, a second Affidavit of Parent/Guardian was provided to petitioner for completion by C.A.M.'s parents because petitioner affirmed that he completed the first such affidavit by "mistake". The second Affidavit, allegedly completed by the parents in Colombia, states that the reason C.A.M. is not living with his parents is because of an "economic and personal problem." The affidavit also lists "security reason in Colombia" as the reason why the parents are "not capable of supporting or providing care for the child due to family or economic hardship." Petitioner testified that his father is a "farmer" and is working but his "mother does not" work. J.A.M. admitted that his parents "can't pay anything" for his brother, C.A.M. He affirmed however, that two younger siblings, ages eight and eleven, live with his parents in Colombia. Petitioner also indicated that he sends his parents "$200 every two weeks." Aside from noting "economic and personal problem" and "security reason" in the affidavit, no testimony or documentation in support of these statements was provided. I **FIND** that J.A.M. failed to "demonstrate a family or economic hardship, which would render the parent unable to support or provide care for the child."

LEGAL DISCUSSION

New Jersey provides that "public schools shall be free to . . . any child who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a minor child follows that of her parents. P.P.M. on behalf of S.S. v. Bd. of Ed. of the South Orange-Maplewood School District, http://lawlibrary.rutgers.edu/oal/html/initial/edu01839-031.html. However, an exception exists under the following circumstances enumerated in N.J.S.A. 18A:38-1(b)1:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as

> a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Thus, to meet the statutory requirement for the admission to the schools of a district of a child whose parent or parents do not live in the district, the evidence must show that; (1) petitioner is domiciled within the district; (2) petitioner is supporting the child gratis; (3) the child's parents are not capable of supporting or caring for her due to family or economic hardship, and (4) the child is not residing with petitioner solely for the purpose of receiving a free public education in the district. The requirement of the parents to substantiate the last two of the above elements is reiterated in N.J.A.C. 6A:22-3.2(a)1i, which provides that a student is not eligible to attend school in a district unless:

> The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

Where the above elements are not met, the resident shall be assessed tuition computed on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance. N.J.S.A. 18A:38-1(b)1.

If the school board determines that the evidence does not support the validity of the claim of the resident for admission of a child whose parents or guardian do not live in the district, it may deny admission to the child and the resident may appeal to the Commissioner

for a hearing. The resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in [the statute]." N.J.S.A. 18A:38-1(b)1. A petitioner must establish not only a family hardship but one that renders the parents not capable of caring for their child. H.K and G.K on behalf of minor children J.K. and C.K. v. Board of Education of the Township of Cherry Hill, Camden County, http://lawlibrary.rutgers,edu/oaldecisions/initial/edu673-97.html.(1998). The evidence in this case shows that petitioner is domiciled within the district and is supporting C.A.M. gratis. However, although petitioner's parents list "economic and personal problem" and "security reason in Colombia" as reasons indicative of the hardship facing them, those statements, without any elaboration or explanation merely state a conclusion and provide nothing as to the nature of the hardship. Despite the parent's statement in the "special authorization" document that "At this time is not possible for us to be with the minor due to work matters," petitioner has not presented any evidence, testimonial or documentary, that might substantiate either a family or economic hardship which renders the parents incapable of providing care or support for C.A.M.

I **CONCLUDE** that C.A.M. is neither domiciled in the Morris Hills regional school district or living in the home of someone domiciled in the district due to family or economic hardship.

The Board is entitled to recover tuition from a parent of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2) The Notice of Final Ineligibility letter dated March 5, 2007 calculates the annual tuition as $ 14,083. The per diem rate is $78.24. ($14,083.00 for one year divided by 180 days pursuant to N.J.A.C. 6a:22-6) There have been approximately 66 days of ineligible attendance. Accordingly, the total due the Board through June 6, 2007, the date of the hearing, is $5,163.84.

ORDER

I hereby **ORDER** that the Board's decision to remove C.A.M. from the Morris Hills Regional School district is **AFFIRMED**. I further **ORDER** that the Board's application for

tuition reimbursement is hereby **GRANTED** in the amount of $5,163.84, plus $78.24 per day for each day C.A.M. attends school in the district after June 6, 2007.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 13, 2007

DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 7/16/07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

Jb/sej

APPENDIX

WITNESSES

Petitioner

J.A.M.

Respondent

Manuel E. Deus

EXHIBITS

Joint

J-1 Autorizacon Especial document in Spanish language
J-2 English translation of Special Authorization document (J-1)

Petitioner

None

Respondent

R-1 Affidavit of Parent/Guardian by J.A.M. C.
R-2 Affidavit of Resident by J.A.M.
R-3 Affidavit of Parent/Guardian by J.A.M.
R-4 Notice of Ineligibility letter to J.A.M. dated March 5, 2007

325-07

BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BARBARA A. PAOLINI AND ROBERT PAOLINI,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board filed a complaint seeking reimbursement from respondents of the cost of tuition pertinent to the period of ineligible attendance of respondents' minor child between 1998 and 2005. The case was scheduled for hearing, but was adjourned after the parties represented that the case was settled. Proposed settlement agreements were submitted in 2006, but never finalized. The parties were notified by the ALJ in March 2007, by letter, that the settlement agreements required amendment and proper signatures. Having received no response to this letter, the ALJ sent a second letter dated June 26, 2007 advising the parties that if he received no response by July 13, 2007, he would enter an order dismissing the case.

The ALJ found that the parties have essentially settled their differences and do not wish to continue the case. Accordingly, he concluded that the case should be dismissed pursuant to *N.J.A.C.* 1:1-14.6(p).

The Commissioner concurred with the ALJ that the parties no longer wish to pursue this matter, and that it is therefore appropriately dismissed. The Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 15, 2007

OAL DKT. NO. EDU 10199-05
AGENCY DKT. NO. 280-10/05

BOARD OF EDUCATION OF THE TOWNSHIP OF SHAMONG, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BARBARA A. PAOLINI AND ROBERT PAOLINI,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that the parties no longer wish to pursue this matter and that it is, therefore, appropriately dismissed.

Accordingly, the Initial Decision of the OAL, dismissing the Petition of Appeal, is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/07

Date of Mailing: 8/15/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10199-05

AGENCY DKT. NO. 280-10/05

BOARD OF EDUCATION
OF THE TOWNSHIP OF SHAMONG,

Petitioner,

v.

BARBARA A. PAOLINI
& ROBERT PAOLINI,

Respondents.

Roger A. Barbour, Esq., for petitioner (Barbour & Barbour, attorneys)

John T. Kelley, Esq., for respondent Barbara A. Paolini (Kelley, Wardell, Craig, Anin & Baxter, attorneys)

Robert Paolini, respondent pro se

Record Closed: June 13, 2007 Decided: July 17, 2007

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

In this case, petitioner Board of Education (BOE) of the Township of Shamong claimed

tuition from respondents Barbara A. Paolini and Robert Paolini for their children's alleged attendance in the BOE's school system. The parties have essentially settled their differences and they do not wish to continue this case and, for the reasons detailed below, the case is dismissed.

PROCEDURAL HISTORY

On October 13, 2005, the BOE filed with the Department of Education a petition (with exhibits) for tuition and certification of service of the petition on the respondents. N.J.S.A. 18A:6-9. On October 21, 2005, respondent Barbara A. Paolini's attorney so filed her answer and certification of service. The Department then transmitted the case to the Office of Administrative Law (OAL), where it was filed on December 16, 2005. N.J.S.A. 52:14B-2(b). The case was assigned to Administrative Law Judge Richard Wells, who scheduled it for a hearing. On June 20, 2006, respondent Barbara A. Paolini's attorney filed papers in support of a motion relative to discovery demands and, on June 26, 2006, Judge Wells entered an order governing discovery. Thereafter, the parties represented that the case was settled, so the hearing scheduled for the case was adjourned.

The parties submitted the attached proposed settlement agreements, Judge Wells was elevated to the Superior Court, and, in my letter to them, dated March 1, 2007, I wrote the following:

> Judge Wells has left this office to serve in the Superior Court and I am reviewing this case's file.
>
> As you know, settlement agreements between the BOE and Barbara Paolini and Robert Paolini were submitted to Judge Wells. The agreements both contain a paragraph "5.", which states that the parties agree and acknowledge that the settlement agreements are confidential, and the parties agree not to disclose any information regarding the agreements, except to their attorneys. I believe that the private parties could agree to such language. However, relative to the BOE, I do not see how these agreements would be excepted from the usual right to access to public records under law, including the Open Public Meetings Act and the Right to Know Law. N.J.A.C. 10:4-6 to -21; N.J.S.A. 47:1-1 to -13. See also South Jersey Publishing Co. v. N.J. Expressway Auth., 124 N.J. 478 (1991). Consequently, I believe that paragraph "5." should be

> amended to state, e.g., that the respondent agrees and acknowledges that he/she will not disclose any information regarding the agreements except to the attorneys, etc. (The BOE will be subject to law applicable to such records.) I believe this amendment could be accomplished by marking up paragraph "5." and initialing the amendment. I am enclosing copies of the agreements with suggested mark-up, I suggest that you initial the amended paragraph "5.", circulate it for initialing, and submit it to me. I request that Mr. Barbour see to this.
>
> Also, N.J.A.C. 6A:3-1.13(d) requires that, when a district board of education is a party to a proposed settlement, the signature of the BOE's attorney or the BOE's resolution authorizing the settlement is necessary to show that the BOE consented to the settlement. All of the copies of the settlement agreement in the file between the Shamong BOE and Robert Paolini have been signed by Mr. Barbour. However, all copies of the settlement agreement between the Shamong BOE and Barbara A. Paolini have not been signed by Mr. Barbour and I ask that Mr. Barbour sign all the copies of it. I am returning the copies for that purpose also.
>
> After the settlement agreements are amended, initialed, etc., and submitted to me, you could withdraw the claims for relief and requests for hearing and the Office of Administrative Law's Clerk would then transmit the case back to the Department of Education or, if you wish, I could issue an initial decision approving the settlement agreements. N.J.A.C. 1:1-19.2. I ask that you discuss this with one another and advise me which you would like to do.

In my letter to the parties, dated June 26, 2007, I wrote that I had no response to my letter, dated March 1. 2007 and that, if by June 13, 2007, I had no such response, I would enter an order dismissing the case. Having no response to date, I am entering this order, dismissing the case.

FINDINGS OF FACT

The parties have essentially settled their differences and they do not wish to continue this case.

CONCLUSIONS OF LAW

Given the circumstances described above, this case should be dismissed. N.J.A.C. 1:1-14.6(p).

ORDER

I **DISMISS** the BOE's claims and this case.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 17, 2007
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Date Received at Agency:

JUL 20 2007

DATE

Mailed to Parties:

[redacted]
OFFICE OF ADMINISTRATIVE LAW

mph

326-07

Y.E.S. ACADEMY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner applied to respondent for approval as a private school for the disabled, pursuant to *N.J.A.C.* 6A:14-7.1, beginning in January 2006. Petitioner successfully completed Section I of three sections of the application process – qualification of the program – but was rejected in Section II based upon the results of the required needs assessment survey, in which only 16 of the necessary minimum of 24 potential public school district referrals were identified as viable by the Ocean County Review Panel (OCRP). Petitioner sought emergent relief to continue development of the proposed school based on survey results submitted subsequent to the Department's determination to deny Y.E.S. Academy's application.

The ALJ granted the motion for emergent relief, concluding that the matter meets the four standards for granting relief pursuant to *Crowe v.* DeGioia, 90 N.J. 126 (1982). The ALJ found respondent's interpretation of governing regulations to be excessively demanding and burdensome to the petitioner, and recommended that the Office of Special Education Programs be directed to accept petitioner's additional potential placements for resubmission to the OCRP. The ALJ concluded that no further proceedings in this matter are necessary.

Upon careful and independent review, the Commissioner rejected the ALJ's recommended order, finding that petitioner cannot prevail on the merits of its underlying claim, thereby necessitating the dismissal of the petition. The Commissioner concluded that petitioner is seeking an exception to the requisites of the process which is not granted to other applicants; to compel the OSEP to accord preferential treatment to one applicant over others serves to compromise the integrity of the application process. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 15, 2007

OAL DKT. NO. EDU 4665-07
AGENCY DKT. NO. 169-6/07

Y.E.S. ACADEMY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	DECISION
RESPONDENT.	:	

The record of this matter, including an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on July 12, 2007, and the Order Granting Emergent Relief issued by the OAL have been reviewed. The Department advised the parties – by letter dated July 18, 2007 – that it was proposing to consider the OAL Order as an Initial Decision since it appears to resolve this matter in its entirety and, therefore, offered the parties an opportunity to submit exceptions and replies in accordance with *N.J.A.C.* 1:1-18.4. The Office of Special Education Programs (OSEP) submitted exceptions to which the petitioner duly replied.

Upon careful review of the record and full consideration of the parties' exception submissions, the Commissioner determines to reject the Administrative Law Judge's (ALJ) recommended order. In her Order, which in essence was an Initial Decision, the ALJ concludes, for purposes of emergent analysis, that petitioner has satisfied the requirements of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982),[1] entitling it to the grant of its emergent application; she, therefore,

[1] In order to prevail on emergent relief, a petitioner must clearly demonstrate: 1) That it will suffer irreparable harm if the requested relief is not granted; 2) That the legal right underlying its claim is settled; 3) That it has a likelihood of prevailing on the merits of the underlying claim; and 4) That when the equities and interests of the parties are balanced, petitioner will suffer the greater harm if the requested relief is not granted. (*N.J.A.C.* 6A:3-1.6(b))

recommends that OSEP be directed to accept petitioner's additional potential placements for resubmission to the County Review Panel, thereby effectively deciding the contested issue between the parties. In determining to reject the ALJ's recommended decision, the Commissioner concludes that it is clear that petitioner cannot prevail on the merits of its underlying claim, necessitating dismissal of its petition.

The instant record evidences the following:

- Phase Two of the application process to establish an approved private school for the disabled requires that the applicant mail a Needs Assessment Survey form to chief school administrators in public school districts. The applicant must then complete and submit to OSEP a Needs Assessment Survey Summary, which indicates the districts it has contacted. Districts are instructed to mail completed surveys directly to OSEP.

- Petitioner's survey results from Barneget and Brick were received by OSEP in January and February, 2007. As these results, a total of 26, satisfied the *minimum* number of potential placements to proceed – i.e., 24 – the information was subsequently forwarded to the Ocean County Review Panel (OCRP) to verify the potential placements and to ensure that there are no other appropriate programs currently available to serve these students.

- Upon its review in April 2007, the OCRP determined that there were only a total of 16 viable potential public school district referrals, far short of the minimum 24 potential public school district referrals necessary to proceed. Additionally, OCRP documented the availability of existing programs that could accommodate the 16 students identified.

- As a consequence of these review results, OSEP – by written communication dated May 10, 2007 – informed petitioner that there was no need for its program and denied petitioner approval to move on to Phase Three of the application process.

- Prior to the May 10, 2007 formal denial letter, but subsequent to OSEP's informal notification to petitioner that its potential placements did not meet the minimum requisite number to proceed, OSEP received Assessment Survey Results from Upper Township in Cape May County, dated May 1, 2007, identifying 7 potential placements. OSEP refused to forward these 7 additional potential placements to the OCRP for its review.[2]

---

[2] It is noted that OSEP's acceptance of these 7 additional potential placements would have brought petitioner's total potential placement number to 23, still short of the requisite *minimum* number which would allow its application to proceed.

- On June 12, 2007, over a month after OSEP's official denial letter to petitioner, Atlantic City in Atlantic County sent survey results identifying 7 potential placements, which the OSEP refused to forward to the OCRP for review.[3]

Initially, the Commissioner is fully cognizant that OSEP's Application to Establish an Approved Private School for the Disabled packet (Exhibit R-2) unequivocally advises applicants that if they receive a denial at any point during the application process, they are permitted only *one* opportunity to re-apply, following a minimum of twelve months from the date of the original submission. (Exhibit R-2 at 5). Consequently, the Commissioner appreciates that any additional denials to the one here would be fatal to petitioner's application to be a service provider. Notwithstanding this, the Commissioner concludes that petitioner acted at its own peril when it submitted only 26, two more than the required minimum number of acceptable prospective participants, for the OCRP's review. It was entirely foreseeable that at least a few of these prospects could be eliminated for any number of reasons, leaving petitioner's application short of the minimum requirement for potential participants. Subsequent to the panel review – when it was determined that petitioner's application was 8 students short of the minimum requisite number, thereby necessitating rejection – petitioner sought to compel OSEP to "alter" the rules of the process for them by overlooking the denial of their application and allowing the continued submission of documentation to shore up their deficient submission.[4] As such, petitioner is seeking an exception to the requisites of the process for itself not granted to other applicants, which is blatantly unfair to those who have "played by the rules." Moreover, to compel the OSEP to accord such preferential treatment to one applicant over others serves to compromise the integrity of the whole application process, and this cannot be permitted.

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[3] OSEP claims it did not actually receive these results until after Judge Wauters' Order of July 12, 2007, although Atlantic City states they were sent in June 12, 2007. (OSEP's Exceptions at 8)

[4] As pointed out by OSEP in its exceptions, this could conceivably allow the Phase Two process to go on indefinitely until 24 potential placements are ultimately verified, a result not only lacking fairness but justification.

Accordingly, the Initial Decision Order of the OAL is rejected for the reasons expressed above, and the instant Petition of Appeal is hereby dismissed. Because the Commissioner's decision resolves this matter without need for further proceedings, the Clerk of the OAL is requested to return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/07

Date of Mailing: 8/15/07

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4665-07
AGENCY DKT. NO. 169-6/07

YES ACADEMY,
Petitioner,
v.
STATE BOARD OF NEW JERSEY
BOARD OF EDUCATION,
Respondent.

Paul J. Carr, Esq., for petitioner

Melissa Dutton, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: July 12, 2007 Decided: July 13, 2007

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

PROCEDURAL HISTORY

Petitioner YES Academy filed a Motion for Emergent Relief to the Office of Special Education, New Jersey Department of Education. It was forwarded to the Office of Administrative Law on June 26, 2007. It was scheduled for an oral argument on July 6, 2007 but was adjourned due to both attorneys scheduled vacations the week of July

2, 2007. On July 9, 2007, a settlement conference occurred. On July 12, 2007, oral argument was heard.

ISSUE

Whether the motion for emergent relief should be granted to YES Academy for the Office of Special Education to accept the 30 potential student referrals in the Needs Assessment Survey and submit it to the County Review Panel for verification.

FACTUAL DISCUSSION

Mr. Carr, attorney for YES Academy, provided these facts.

Petitioner has applied to respondent for approval of a private school for the disabled, pursuant to N.J.A.C. 6A:14-7.1 on or about January 2006.

After receiving a checklist with negative comments, petitioner withdrew its first application agreeing to start from the beginning with a new application.

Petitioner submitted a second application which was also rejected with comments and a similar checklist.

Thereafter, petitioner appealed to the Commissioner of Education under OAL Docket No. EDU 654-06. The appeal was assigned to Judge Stephanie M. Wauters, and then Judge Richard F. Wells.

Subsequent to a conference with Judge Wauters and a two-day hearing before Judge Wells, the appeal was resolved favorably to the petitioner and the appeal was withdrawn.

Thereafter, petitioner was notified by respondent that although the application was approved for the compliance review and the quality panel review, the application was rejected once again after the county review phase.

According to the procedural steps promulgated by respondent, and required by law, N.J.A.C. 6A:14-4, petitioner presented the minimum of 24 potential placements which allowed the application to be sent to the county review panel stage. Prior to completion of the county review report, respondent advised petitioner that the 24 potential placements were reduced to 17 leaving the number deficient. However, before the completion date of that report, petitioner secured additional potential placements numbering 7 from Cape May County. Further, petitioner secured 6 additional placements from Atlantic County.

In spite of more than required potential placements, respondent took the position that the additional placements will not be reviewed and the original rejection will stand.

DAG Melissa Dutton explained the three phases of the application process for approval as a private receiving school for students with disabilities pursuant to N.J.A.C. 6A:14-7.2. Phase I, regarding qualification of the program, of the application process was successfully completed. Phase II, which is sent to all Ocean County superintendents of schools, requires a needs assessment survey to be accepted by OSEP and Ocean County Review Panel. Phase III includes approval of a projected budget, and facility and staff information regarding certifications and licenses and a criminal history review. On May 10, 2007, Roberta Wohle, Director, Office of Special Education Programs (OSE), sent a letter to Mr. Carr denying OSEP's approval of YES Academy. The needs assessment survey was reviewed by the Ocean County Review Panel (OCRP). It determined "that public school districts have not indicated sufficient need for the proposed program in Ocean County," due to less than the required 24 potential student referrals. Sixteen student referrals from two districts remained. (R-1). It also stated, "[P]lease be reminded that applicants may re-apply one time, following ... twelve months from the date of original submission." (R-1).

On June 29, 2007, Cecelia Downey, Manager of the Bureau of Program Review and Approval of OSEP, sent a letter to Mr. Carr informing him of ... "the more expeditious way of processing the reapplication would be to submit a request to reapply using the previously approved program description and related materials. Since those materials have already been reviewed for regulatory compliance and program quality, the process would then begin by completing a new needs assessment survey." (A-1).

On July 9, 2007, DAG Dutton informed Mr. Carr that OSEP would not accept his client's formerly submitted needs assessment survey results as part of its re-submission. YES Academy was denied approval to operate as a private school for disabled students based upon the results of the County Review Panel "... OSEP cannot accept the previously submitted needs assessment survey results as the results are time sensitive and may have significantly changed since their original submission ... (YES Academy) must complete a new needs assessment survey to be reconsidered by the Ocean County Review Panel ...." (A-2).

DAG Dutton argued the following pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982) and N.J.A.C. 6A:3-1.6. First, if irreparable harm exists for applicant, it brought it on itself because no approval to operate was given. Any teachers who quit their current employment to work at this program did so at their own detriment. In addition, there is no harm to students since their needs are already being served in an IEP program. Second, the issue before the Court is not settled law. This is an issue of first impression since the regulations were never challenged in court. Third, there is no proof of success on the merits. Fourth, the application process is not completed with Phase 3 yet to be done. The application must be submitted nine months prior to the expected opening of the school as explained in the application packet. (R-2).

The State will suffer harm if it goes through the process without all needed information. In addition, when the school opens, there may not be 24 students, thereby not conforming to the regulations. Furthermore, no board resolution was passed for YES Academy to use its building so if it is lost, it would not be irreparable harm to YES Academy. Finally, all four factors of Crowe v. DeGioia must be met; and YES Academy

has not met the two factors of success on the merits and irreparable harm. Consequently, YES Academy should just reapply.

At the emergent relief hearing, respondent's position was that YES Academy must reapply from the beginning of the process and respondent will accept Phase I qualification approval.

At the hearing, YES Academy amended its emergent relief request to be that OSEP incorporates the thirty potential students in the Academy's current needs assessment survey and that OSEP submits it to the Ocean County Review Panel for verification of (1) the potential students' appropriateness for this program and (2) the unavailability of existing Ocean County School programs to serve these students' needs.

TESTIMONIAL EVIDENCE

Mr. Joseph J. Ferrainola is the founder of the YES Academy. In January 2006, he submitted the application for approval to operate YES Academy in Barnegat Township as a private school for students with behavioral disabilities. His goal is to have up to 120 students in a special education program for middle to high school students with behavioral disabilities. Mr. Ferrainola has a master's degree in human services and certification in group dynamics, supervisory training, guiding group interaction and performance evaluation. Mr. Ferrainola was the Director of Special Education and Resource Management of the Glenn Mills schools in Pennsylvania. The schools had a highly successful unique program for students with behavioral problems with a very high graduation rate.

Mr. Ferrainola projected the school opening in the fall as a result of the settlement agreement with OSEP after two days trial with Judge Wells in April 2007. He hired Ms. Susan Stricker, former Director of Pinelands School Special Education for twenty-eight years, to assist with the application. Mr. Ferrainola has four special education teachers for the fall. Two teachers left their jobs for YES Academy, but cannot wait any longer. Two teachers are still holding out for a fall startup. Others are

waiting to give notice of termination to their current jobs to come with YES Academy. He has an agreement with Barnegat School District to lease the old Barnegat High School facility. The building is vacant and the District is waiting to open the special education school to help Barnegat with its problem children. However, the Board has already waited two years and has time limits. He also has a business plan in place with Commerce Bank who will finance the money for the school startup and payroll. If he fails to get the financing, it will be "fatal" to opening the school. The loss of the building will also be "fatal", as will the loss of the staff members. He stated that, "We are close to losing the staff."

LEGAL ANALYSIS

I. Standard For Granting Motion For Emergent Relief

Petitioner motioned for emergent relief regarding this matter. A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying the petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

The first prong of the Crowe test is disputed in this case. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Id. at 133. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Ibid. In this case, the petitioner contends that, in reliance on the negotiated settlement with the state after a two-day trial before Judge Wells, he has taken substantial steps to begin operating the

school in the Fall 2007 school year. Petitioner has already hired two employees who have left their previous occupations in anticipation of working at the petitioner's school. In addition, four employees are prepared to start working as soon as the school begins operating. Petitioner has already acquired a building that petitioner will lose if it is not put in use soon. Finally, the students, by being denied a successful program for behavioral disabilities, will be irreparably harmed if their enrollment is delayed until the following school year. All of these factors combined strongly suggest that petitioner will be irreparably harmed if emergent relief is not granted.

The second prong requires that the legal right underlying the petitioner's claim is settled. In this case, although there is no case directly on point, N.J.A.C. 6A:14-7.1 clearly settles the legal right of petitioner to operate as a receiving school.

The third prong of the Crowe test is also in dispute between the parties. Respondent claims that petitioner is not likely to prevail on the merits. In support of this claim, respondent alleges that petitioner only has a list of 16 potential students to be enrolled in petitioner's program, which falls short of the required minimum of 24 students. Petitioner replies by pointing out that they have acquired 14 additional students from surrounding townships, increasing the total number of potential students to 30. In response, respondent claims that it is too late to include the 14 new potential students, and that they must re-submit an application from the beginning. Petitioner argues that re-applying from the very beginning serves no purpose but to delay the process, which has been ongoing for approximately two years. Respondent then claims that the 16 students who are to be enrolled this fall have alternate accommodations prepared for them in other schools, although respondent did not provide any such evidence. In testifying on the record, the owner of YES Academy presented evidence regarding the qualifications of himself and the staff. He has already lined up a professional in behavioral disorders with 28 years of experience. He has also served as Director of Special Education in the Glen Mills Schools, which have been recognized as one of the top schools in the nation for behavioral disorders, according to the owner. Since the surrounding districts of Atlantic City, Cape May, and Barnegat all agree that this is an appropriate and unique program that is proven for students with behavioral problems, it seems likely that the county will agree as well.

The fourth prong of the test states that overall, the petitioner must suffer greater harm than the respondent if relief is not granted. In this case, it is clear that if the petitioner is denied relief, the school, the potential employees, and the potential students will all be seriously harmed. This is in contrast to the respondent, who in all probability will not be harmed to that extent, if at all, upon granting petitioner's motion.

II. Approval Procedures to Establish a New Receiving School

The regulations set out the approval procedures to establish a new receiving school. The regulations divide the procedures into three phases:

> (a) Prior to the establishment of a receiving school for students with disabilities, an application shall be submitted to the Department of Education according to the following schedule:
>
> 1. The applicant shall submit a description of the program and services to be offered which shall include, but not be limited to:
> i. The educational philosophy of the program;
> ii. Characteristics of the program, which shall include the number of students to be served, numbers and types of classes, number of school days, and daily hours in session;
> iii. The curriculum and materials including a description of how the core curriculum content standards will be implemented;
> iv. A mechanism for evaluating student progress and program efficacy; and
> v. The organizational structure, including projected number of personnel by title, job function and personnel requirements, including certification;
>
> 2. *A survey of need indicating the number, age range, types of students with disabilities to be served by the proposed programs/services and the reasons these students cannot be served in the resident district, supported by documentation from local public school districts. Documentation of local school districts surveyed shall be included. The Department of Education shall determine if the program to be provided by the receiving school is needed and shall notify the applicant of the decision no later than 90 calendar days after receipt of the needs assessment.*

i. Any appeal of a decision to deny approval may be made to the Commissioner of Education in accordance with N.J.A.C. 6A:3;

3. Additionally, each approved private school for students with disabilities shall submit:
i. An affidavit that its programs and services for students with disabilities are nonsectarian and in compliance with N.J.S.A. 18A:46-1 et seq., N.J.A.C. 6A:14, The Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 et seq.) and the Rehabilitation Act of 1973 (U.S.P.L. 93-112 Section 504, 29 U.S.C. § 794a);
ii. The administrative policies and procedures of the school;
iii. An assurance that necessary emergency procedures will be followed;
iv. A copy of the approval of the facility by the issuing agency, including a certificate of occupancy and certification of health and fire approval;
v. A copy of the certificate of incorporation;
vi. Staffing information which shall include a list of professional staff who will provide services. The list shall verify each individual's certification and license, if one is required, the function he or she will perform, and that a criminal history review pursuant to N.J.S.A. 18A:6-7.1 has been completed for the individual; and
vii. A projected budget in accordance with N.J.A.C. 6A:23-4.

[N.J.A.C. 6A:14-7.2 (emphasis added).]

After approximately two years, petitioners are currently in Phase II. The regulations cited by the state are not as harsh as the state is interpreting them to be. It is well established that statutes and regulations must be construed according to their own terms. State v. AA LaFountain Inc., 67 N.J. Super. 285 (Cty. Ct. 1961). The state has taken the relatively straightforward regulations and has made them excessively demanding and burdensome to petitioner. The state's implementing the regulation borders upon unreasonable conduct.

By securing 16 potential students and an additional 14 from surrounding districts, the petitioners have substantially complied with the regulations that require a minimum of 24 potential students. The state claims that petitioner must re-file from the beginning since the additional 14 students were not in the original application. It is quite apparent that the state is using meaningless strict procedural rules to delay petitioner's request,

even though petitioner has shown – by passing the first phase – that it is qualified to operate the school. In fact, it is the state's excessive delays of this process that may cause the withdrawal of students who are initially qualified.

Further, petitioner still has to complete Phase III, which will examine the petitioner's request scrupulously. Any issues regarding petitioner's qualifications should be examined at that point. It makes little sense and seems excessively unfair to abruptly end the process at this point after two years of time and effort, only to start the entire process over from the beginning. If that were to occur, petitioner would very likely lose the staff, the building, and the students – all of whom have been patient with this process for so long. Since the county has the resources and the duty to determine whether there are, in fact, alternate accommodations for the potential students, it makes sense to have the application forwarded to them to perform the verification.

CONCLUSION

I **CONCLUDE** that it is in the interest of justice to grant and I **GRANT** the motion for emergent relief. Petitioner will suffer serious irreparable harm if the emergent relief is not granted. Unfortunately, even if emergent relief is granted, petitioners still have to be approved by the county before Phase III can be completed. For the reasons noted above, it is unduly burdensome to petitioner to delay the process further. Therefore, the application including the 30 potential students should be submitted for verification by the county.

No further proceedings in this matter are necessary.

ORDER

It is hereby **ORDERED** that YES Academy's Motion for Emergent Relief is **GRANTED.**

OAL DKT. NO. EDU 4665-07

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 13, 2007
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

OAL DKT. NO. EDU 4665-07

APPENDIX

WITNESSES:

For Petitioner:

Joseph J. Ferrainola

For Respondent:

None

EXHIBITS:

For Petitioner:

P-1 Letter to Mr. Carr from Cecilia Downey dated June 29, 2007

P-2 Letter to Mr. Carr from DAG Melissa Dutton dated July 9, 2007

For Respondent:

R-1 Letter to Mr. Carr from Roberta Wohle dated May 10, 2007

R-2 Application Packet

328-07

#328-07

MIDDLETOWN EDUCATION ASSOCIATION ON BEHALF OF MEREDITH MCGEE AND NICOLE SANSONE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought re-employment and tenure for two non-tenured former teaching staff members – McGee and Sansone – on grounds that their termination was not for budgetary reasons, as stated by respondent Board. Respondent claims that the petition was filed outside of the 90-day time limit imposed by *N.J.A.C.* 6A:3-1.3(i). The parties mutually sought summary decision, providing stipulation of the facts of the matter.

The ALJ found, *inter alia*, that: the matter is appropriate for summary decision; the limitations period began on May 1, 2006, the date when the teachers learned they were losing their positions; and the teachers had the ability to question the reason for their termination through an informal hearing with the Board, but failed to request such hearing. The ALJ concluded that the petition is time-barred; granted summary decision in favor of respondent; and dismissed the petition.

Upon a full and independent review, the Commissioner concurs with the ALJ's grant of summary decision to the respondent, finding that the petition was filed well out of time. Notwithstanding the mandated dismissal of this matter on procedural grounds, the Commissioner additionally emphasized that a non-tenured teacher challenging a termination decision on the basis that the reasons provided by the Board are not supported by the facts is entitled to litigate that question only if the alleged facts – if true – would constitute a violation of constitutional or legislative-conferred rights. The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein, and dismissed the Petition of Appeal.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 16, 2007

OAL DKT. NO. EDU 12159-06
AGENCY DKT. NO. 437-11/06

MIDDLETOWN EDUCATION ASSOCIATION ON BEHALF OF MEREDITH MCGEE AND NICOLE SANSONE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

Petitioners' exceptions are a replication of their Motion for Summary Decision filed below. As the Commissioner determines that the arguments contained therein were fully considered and resolved by the Administrative Law Judge (ALJ) in her decision, these will not be revisited here.

Upon her full and independent review, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed well outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i) and petitioners have failed to set forth a legal or actual basis for waiving the timely filing requirement. In so determining the Commissioner is in full accord with the ALJ's conclusion:

> that the critical notice – the letter stating that the teachers would not be renewed for the coming year – was provided on May 1. That is the date they learned they were losing their positions. It was within the teachers' ability to seek an informal hearing from the Board, and they could have argued both the budgetary issue and their own qualifications. They may not have expected to succeed, but the informal hearing mechanism does not exist to guarantee success. Therefore, I also **CONCLUDE** that the filing was made more than 90 days after the notice and was time-barred. (Initial Decision at 8)

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein. Summary decision is granted to the Board and the Petition of Appeal is hereby dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/16/07

Date of Mailing: 8/17/07

[1] Notwithstanding the mandated dismissal of this matter on the procedural ground of untimeliness, the Commissioner is fully aware that a district board has virtually unlimited discretion in hiring or renewing non-tenured teachers. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447 (App. Div. 1982) "[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." *Id.* at 456. As such, where a non-tenured teacher challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislative-conferred rights. *Guerriero v. Board of Education of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd.* Docket #A-3316-85T6 (App. Div. 1986). To the extent petitioners allege a violation of the legislatively-conferred right to a "Donaldson hearing", embodied in *N.J.S.A.* 18A:27-4.1(b) and *N.J.A.C.* 6A:32-4.6, any such deprivation cannot be attributed to the Board. As noted above, petitioners failed to take the necessary action – which only they could have taken – to avail themselves of that right.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12159-06
AGENCY DKT. NO. 437-11/06

MIDDLETOWN EDUCATION ASSOCIATION
ON BEHALF OF MEREDITH MCGEE
AND NICOLE SANSONE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF MIDDLETOWN, MONMOUTH COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: May 29, 2007 Decided: July 12, 2007

BEFORE **LAURA SANDERS,** CHIEF ALJ:

STATEMENT OF THE CASE

The Middletown Township Education Association seeks re-employment and tenure of two nontenured teaching staff members, Meredith McGee and Nicole

Sansone, (collectively, "petitioners") on grounds that their termination was not for the reason stated by the Middletown Township Board of Education (the Board). The Board contends that the petitioners filed outside the 90-day time limit imposed by N.J.A.C. 6A:3-1.3(i) and, therefore, the filing must be dismissed. Further, the Board argues that even if it gave the teachers an erroneous reason for their termination, there is no remedy available to the teachers.

PROCEDURAL HISTORY

By letters served on May 1, 2006, Meredith McGee and Nicole Sansone, nontenured staff members of the Board, were notified that their employment with the Board would not be renewed the following school year due to budgetary constraints. On November 27, 2006, a petition of appeal was filed with the Commissioner of Education, who forwarded the matter as a contested case under N.J.S.A. 52:14B-2(b) to the Office of Administrative Law, where it was filed on December 15, 2006. The parties mutually sought summary decision, providing a stipulation of facts on May 11, 2007, and May 29, 2007. Petitioners dispute the validity of the non-renewal actions and seek re-employment and tenure with the Board.

STIPULATED FACTS

In the 2005-2006 school year the Board employed Meredith McGee as a resource-room teacher and Nicole Sansone as a district enrichment teacher. Both were employed through individual employment contracts for the term September 1, 2005, through June 30, 2006. Both received satisfactory performance reports during the 2005-2006 school year and satisfactory Annual Written Performance Reports at the conclusion of the 2005-2006 school year.

On May 1, 2006, both McGee and Sansone were served with letters from Middletown Township's interim superintendent of schools, Karen L. Bilbao, notifying them that their employment with the Board would not be renewed in the 2006-2007 school year. McGee acknowledged notification of non-renewal by executing a Contract

Non-Renewal Certification dated May 1, 2006. The certification was also signed by Thorne Middle School principal Victa C. McKenzie, the building administrator. Sansone similarly acknowledged notification of her non-renewal by execution of a Contract Non-Renewal Certification dated May 1, 2006. Sansone's certification was signed by New Monmouth Elementary School principal Linda A. Chadwick. In the letters, the interim superintendent of schools said:

> I am hereby notifying you that due to budgetary constraints, your contract is not being renewed for next year and that your employment is terminated as of June 30.

Based upon the letters, McGee and Sansone presumed that the reason for their non-renewal was budget constraints. The Middletown Township Education Association (the Association), the recognized bargaining representative for non-administrative teaching staff members and secretaries employed by the Board, made the same presumption.

The Association, McGee, and Sansone first became aware that petitioners' former positions had been filled by new teaching staff members (and not eliminated) at the beginning of the 2006-2007 school year, which commenced for teaching staff members on September 1, 2006.

The petitioners did not request a written Statement of Reasons for non-renewal. Neither did the Association on their behalf. Similarly, neither petitioners nor their representative made a written request for an informal appearance before the Board. No other reason besides the original notice citing budgetary constraints has been provided to petitioners.

Petitioners filed their petition on November 27, 2006.

LEGAL ANALYSIS

N.J.A.C. 1:1-12.5 provides that summary decision may be rendered if there is no genuine issue as to any material fact challenged, and the moving party is entitled to

prevail as a matter of law. See also Brill v. Guardian Ins. Co. of Am., 142 N.J. 520 (1995). In the present matter the parties have stipulated to the relevant facts in the case, leaving no genuine issue as to any material fact. I **CONCLUDE**, therefore, that the matter is appropriate for summary decision.

The legal disputes involve the following questions. First, is the Board entitled to decision because the petitioners failed to file this action within 90 days of the May 1 letter notifying them of the district's non-renewal for the coming year, or are petitioners not time-barred from seeking a remedy because the Board provided an erroneous reason for termination? Second, if the petitioners are not time-barred, does the Commissioner have authority to grant a remedy?

The Time Limitation

The time limitation at N.J.A.C. 6A:3-1.3(i) is as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Petitioners offer two alternative arguments with regard to the time bar. First, they contend that N.J.A.C. 6A:3-1.3(i) is a statute of limitations upon claims against school boards, and that the standard for determining when the statute has run is the same standard as that used for statutory and common law claims for willful, wanton, or grossly negligent conduct in civil litigation, i.e., it is subject to the discovery rule. As explained in Justice Rivera-Soto's partial concurrence, partial dissent, in Hardwicke v. American Boychoir School, 188 N.J. 69 (2006), the discovery rule in civil litigation is aimed at preventing the sometimes harsh result of a mechanical application of the statute of limitations, Martinez v. Cooper Hosp.-Univ. Med. Ctr., 163 N.J. 45, 51 (2000) (citing Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 426 (1987); Fernandi v. Strully,

35 N.J. 434, 449-50 (1961)). Essentially a rule of equity, the discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973).

Under that analysis, the question becomes when the petitioners should have discovered that they had the basis of an actionable claim. Petitioners argue that the May 1 notice of non-renewal was itself an injurious act, since by its deception it led them to believe that the Board was invoking its nearly unassailable right to lay off staff for economic reasons. Jamison v. Morris Sch. Dist., 198 N.J. Super. 411, 415 (App. Div. 1985). They rely on the reasoning of Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), for the proposition that a meaningful statement of reasons is not a piece of ephemeral window-dressing, but rather a due process right having genuine and significant value. In Donaldson, the Court characterized the need for a statement of reasons as being dictated by fairness and rightness. The Court explained that a teacher can learn from a statement of deficiencies, or can support an effort to obtain new employment by pointing to the fact that termination was not for performance-related reasons. Equally important, the Court cited the provision of the statement of reasons as "[o]ne of the best procedural protections against the arbitrary exercise of discretionary power." Donaldson, supra, 65 N.J. at 243 (quoting Davis, Administrative Law § 16.12, p. 585 (1970 Supp.)).

Laboring under the deception and believing that they had been given a reason for non-renewal, petitioners did not request either a Donaldson hearing or an informal meeting with the Board to probe the reasons for non-renewal. Thus, by blinding them to the real situation, the Board deprived them of a meaningful opportunity to contest the action, and therefore, they could not know their actual injury until September 1, when they discovered that others had replaced them. They then filed within the requisite 90 days. An alternative view would hold that the "final action" did not occur until the hiring of the new teachers on September 1. Petitioners argue that this view is supported by Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), in which the

Supreme Court found that, in relation to a tenured teacher subjected to a reduction in force, the actual action depriving him of an opportunity for rehiring occurred when a replacement teacher was hired, the board's letter subsequent to that being sufficient to put him on notice that his re-employment rights were being affected.

Finally, the petitioners contend that even if the 90 days is counted from May 1, the respondent should be estopped from asserting the time-bar defense. The Supreme Court recently reiterated that "manifest injustice provides an exception to the general rule" that "equitable estoppel is rarely invoked against a governmental entity." Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 20 (2006) (citations omitted). Petitioners point to Kaprow as support for the proposition that estoppel can be invoked against a board in relation to the 90-day filing requirement. The criteria for a claim of estoppel are, first, that the alleged conduct was conduct done under such circumstances that it was both natural and probable that it would induce action, and, second, that the party not only relied upon the conduct but did so to his or her detriment. Miller v. Miller, 97 N.J. 154, 163 (1984) (citing Fid. Union Trust Co. v. Essex County Mortg. Co., 130 N.J. Eq. 351 (1941)). Petitioners contend that the Board's action made it natural for them to be lulled into a false sense that the reason for termination was economic, and therefore virtually entirely within the Board's discretion. Having been lulled into believing they already had the reason, which would not provide a basis for them to file a successful challenge, they failed to challenge within the 90 days, an action clearly to their detriment.

Although the Board does not concede that it is appropriate to import the discovery rule into the 90-day requirement, the Board contends that even if it is imported, the 90 days was exceeded. The Board takes the view there was only one injury — the loss of employment — and that the injury was known on May 1, when the notices of non-renewal were delivered. In support, it cites Nissman v. Board of Education of Long Beach Island, 272 N.J. Super. 373 (App. Div.), certif. denied, 137 N.J. 315 (1994). In Nissman, the Appellate Division rejected a claim that injury was suffered on the date of the actual loss of the position, concluding instead that the actionable claim occurred on the date of the Board's notice of non-renewal injury. The

Board also points out that in Kaprow, supra, 131 N.J. 572, the Court held against the plaintiff for his failure to act within 90 days of the Board's notice to him. In this view, the petitioners here simply slept on their rights. They could have pursued the question of whether there was or was not a budget problem and whether the statement of reasons was erroneous or not. They simply evaluated their odds, decided not to spend the time and effort, and now regret that choice.

Moreover, there is a strong policy reason for a mechanistic view of the 90-day limitation. "Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." Kaprow, supra, 131 N.J. 572, 582.

Remedy

The Board's logic with regard to the 90 days is linked to the view that boards of education have such sweeping authority to terminate nontenured teachers that it does not really matter what the Board says or how the Board conducts itself. The Board relies on a long line of cases requiring a petition to be filed within 90 days of receipt of the notice of the action at issue and giving boards sweeping powers to terminate the services of a teacher who does not have tenure. "Absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Dore v. Bedminster Twp. Bd. of Educ., 185 N.J. Super. 447, 456 (1982). No matter how substantial the likelihood that the plaintiff would have obtained tenure, a wrongful termination that does not violate State or federal antidiscrimination laws will not result in tenure. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 402 (1996); Lally v. Clark Bd. of Educ., 96 N.J.A.R.2d (EDU) 784; Sheridan v. Pitman Bd. of Educ., EDU 8068-03, Initial Decision (October 18, 2004), modified, Comm'r (December 1, 2004), aff'd, St. Bd. (June 1, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>.

Two cases are particularly instructive. In Dore, supra, 185 N.J. Super. 447, the Appellate Division specifically noted that the statutory requirement of a Donaldson statement of reasons did not create new constitutional or legislative requirements with regard to tenured teachers, and that there simply was no authority in the Commissioner to order reinstatement or financial penalties for failure to comply with the requirement. As noted in Lally, supra, 96 N.J.A.R.2d (EDU) 784, the remedy is a proper statement of reasons.

Although petitioners cannot cite to any case in which the Commissioner was specifically found to have authority to order reinstatement and a set of circumstances in which reinstatement for a nontenured teacher was ordered and affirmed, they rely on Dore and Donaldson for the general rule that boards of education are prohibited from arbitrary and capricious behavior.

While there is some appeal to the general idea that boards of education, being public bodies, should have some duty of fair dealing and above-board conduct, I **CONCLUDE** that a review of the case law provides no remedy except a revised statement of reasons for a nontenured teacher who is not renewed. I **CONCLUDE** that the critical notice — the letter stating that the teachers would not be renewed for the coming year — was provided on May 1. That is the date they learned they were losing their positions. It was within the teachers' ability to seek an informal hearing from the Board, and they could have argued both the budgetary issue and their own qualifications. They may not have expected to succeed, but the informal hearing mechanism does not exist to guarantee success. Therefore, I also **CONCLUDE** that the filing was made more than 90 days after the notice and was time-barred.

ORDER

As petitioners' filing is outside the time limitations of N.J.A.C. 6A:3-1.3(i), I hereby **ORDER** dismissal with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 12, 2007
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

Date Received at Agency:

JUL 17 2007
DATE

July 12, 2007
Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

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329-07

#329-07

L.D.R., ON BEHALF OF MINOR CHILDREN, T.M. AND P.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's determination that T.M. and P.M. – minor children under the temporary custody of the petitioner – are not eligible for a free public education in respondent's school district. Petitioner, who resides in East Orange, argued that the children were living with her while their father was incarcerated, but she wanted the children to remain in their respective Maplewood schools for the sake of continuity until their father returns and resumes custody. The Board counterclaimed for tuition. Petitioner failed to appear at the hearing.

The ALJ found that the petitioner had reasonable notice of the hearing in this matter, but failed to appear and did not provide any explanation for her nonappearance. The ALJ concluded that the petitioner has abandoned the matter, ordered dismissal of the petition pursuant to *N.J.A.C.* 1:1-14.4, and granted respondent's cross petition for tuition reimbursement for the 2006-2007 school year in the amount of $14,812.56.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusions set forth by the ALJ. The Initial Decision of the OAL is adopted as the final decision in this matter, and L.D.R. is directed to reimburse the Board for tuition as set forth therein.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 16, 2007

OAL DKT. NO. EDU 1324-07
AGENCY DKT. NO. 440-11/06

L.D.R., ON BEHALF OF MINOR CHILDREN, T.M. AND P.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that petitioner – who did not appear at hearing and proffered no explanation for her absence – has failed to demonstrate the children's entitlement to a free public education in respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to remit to respondent tuition in the amount of $14,812.56 for the period of her children's ineligible attendance in the district.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/16/07

Date of Mailing: 8/17/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01324-07

AGENCY DKT. NO. 440-11/06

L.D.R., ON BEHALF OF MINOR CHILDREN, T.M. AND P.M.,

Petitioners,

v.

BOARD OF EDUCTION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

L.D.R. pro se -not appearing

Rita F. Barone, Esq., for respondent (Purcell, Reis, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: July 20, 2007 Decided: July 23, 2007

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE CASE

On November 29, 2006, the petitioner, (L.D.R.), filed a petition with the Department of Education challenging the Board of Education's residency determination.

PROCEDURAL HISTORY

The matter was forwarded to the Office of Administrative of Law (OAL) on January 10, 2007 pursuant to N.J.S.A. 18A:38-1, for a hearing and determination as a contested case. On June 5, 2007, the respondent filed a Notice of Motion for Summary Decision. A hearing was scheduled for July 18, 2007. The petitioner did not respond to the Notice of Motion, nor did she appear in the court. The respondent moved for dismissal of the petitioner's case and for granting its cross petition for tuition reimbursement. The Motion was granted. A signed copy of the Order for Summary Decision is attached herewith.

FINDINGS OF FACT

1. On February 13, 2007, the OAL mailed a Notice of Hearing to the petitioner at the provided address.

2. The United States Postal Service never returned the above communication as undeliverable.

3. The counsel for the respondent appeared. The OAL received no communication from the petitioner regarding her failure to appear on July 18, 2007.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the petitioner has abandoned this matter and that it should be dismissed for failure to appear.

N.J.A.C. 1:1-14.4(a) provides that, if after appropriate notice, a party does not appear in a proceeding scheduled by the Clerk of OAL, the judge may direct the Clerk

to return the matter to the transmitting agency if the judge does not receive an explanation for the nonappearance within one day.

ORDER

It is hereby **ORDERED** that the petitioner's application for relief is dismissed pursuant to N.J.A.C. 1:1-14.4, and I **DIRECT** the Clerk to return the matter to the Board of Education for appropriate disposition.

It is further **ORDERED** that the respondent's cross-petition for tuition reimbursement for the 2006-2007 school year in the amount of $14,812.56 is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/23/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 7/23/07

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 24 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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PURCELL, RIES, SHANNON, MULCAHY & O'NEILL
One Pluckemin Way
P.O. Box 754
Bedminster, NJ 07921
(908) 658-3800
Attorneys for Respondents, South Orange/Maplewood School District
Our File: (304) 18015-H/RFB

RECEIVED
2007 JUL 20 A 7:55
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

LYDIA ROLLING o/b/o T.M. and P.M., Petitioner(s), v. SOUTH ORANGE - MAPLEWOOD SCHOOL DISTRICT, Respondent(s).	OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDUOS 01324-2007N Agency # 440-11/06 ORDER FOR SUMMARY DECISION

THIS MATTER having been opened to the Court by PURCELL, RIES, SHANNON, MULCAHY & O'NEILL, ESQS., Attorneys for Respondent, South Orange/Maplewood Board of Education, upon notice to Petitioner and this matter having been submitted to the Court for ruling and the Court having reviewed the moving papers, and there being no appearance by the Petitioner at the hearing scheduled for July 18, 2007, and good cause having been shown;

IT IS ON THIS 20th day of July, 2007;

ORDERED that summary judgment is entered in favor of the Respondent, South Orange/Maplewood School District dismissing the plaintiff's Residency Appeal with prejudice;

IT IS FURTHER ORDERED that the Petitioner shall reimburse the Respondent for tuition for the 2006-2007 school year in the amount of $14,812.56.

Carol I. Cohen

Honorable Carol I. Cohen, ALJ

337-07

#337-07

AGENCY DKT. NO. 366-10/06

IN THE MATTER OF THE TEACHING CERTIFICATE OF BARBARA GRANT-RAUSCHKOLB, WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Order to Show Cause and the accompanying affidavit have been reviewed, as has petitioner's October 31, 2006 letter indicating its consent to a vacation of the order.

Upon such review, the Commissioner approves vacation of the order, and removes the matter from the Department of Education's docket.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/23/07

Date of Mailing: 8/24/07

336-07

#336-07

S.S. and E.S. on behalf of minor child, E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners sought the expungement or redaction of E.S.'s Union Township school disciplinary record because the family has permanently moved out of state, and/or because the pertinent document in the child's record – a letter from the school principal – is allegedly inaccurate. Respondent Board contended that, pursuant to *N.J.S.A.* 18A:36-19, it is obligated to retain the letter in E.S.'s school records. The parties submitted cross motions for summary decision and jointly stipulated to the material facts.

The ALJ found that: the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.,* does not apply in the instant case, as E.S. is no longer a student in New Jersey; the record of E.S. related to his making a threatening gesture seven years ago, while in the first grade, is not educationally relevant and should be expunged by the Board pursuant to *N.J.A.C.* 6A:32-7.7(a)1; the issue of whether a suspension seven years ago was merited is not a subject of review here; and that the principal's letter in E.S.'s file meets the broad definitions of "student discipline record" and "student record". The ALJ granted summary decision to petitioners, and ordered that the Board remove the principal's letter from E.S.'s student record and destroy it.

The Commissioner rejected the OAL's Initial Decision, finding, *inter alia,* that: petitioners' argument that the principal's letter should be expunged because its contents are inaccurate is without merit; *N.J.A.C.* 6A:32-7.8(b) allows student records which are no longer educationally relevant to be destroyed only while the student is still enrolled in a district; disposal of the records of a student who has left the district is governed by the Destruction of Public Records Law (DPRL), which mandates that student disciplinary records be maintained until two years after the student's graduation or termination from the school system or age 23, whichever is longer; the relevant statutes and regulations do not prohibit the sharing of student disciplinary records across state lines, nor do they suggest that the retention of information in student disciplinary records is no longer of benefit after a student has moved out of state; *N.J.A.C.* 6A:16-7.10 and other New Jersey regulations flow from federal regulations, making it reasonable to conclude that the retention and sharing of student disciplinary records was intended to be universal. Accordingly, the Commissioner granted the respondent's motion for summary judgment and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 23, 2007

OAL DKT. NO. EDU 5179-07
AGENCY DKT. NO. 112-4/07

S.S. and E.S. on behalf of minor child, E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Commissioner rejects the Initial Decision for the reasons that follow.

As explained by the Administrative Law Judge (ALJ), the parties submitted cross motions for summary decision and jointly stipulated to the material facts. (Initial Decision at 2) Stipulated fact #3 stated that on or about June 7, 2000, E.S., had an argument with another student. (Initial Decision at 2) Stipulated fact #4 stated that "[d]uring the argument E.S. 'allegedly' pointed his first finger at the other child and threatened to shoot him." (*Ibid.*) In a letter to petitioners on the date of the incident, the school principal stated that E.S. "held his hand to the child's head like a pistol" and said twice "I am going to shoot you in the brain and kill you." (Letter dated June 7, 2000 from Dr. Edward A. Kliszus, attached as exhibit to respondent's June 13, 2007 letter brief in support of its motion for summary decision) E.S. was suspended for three days, and the letter from the school principal was placed in his record. (Initial Decision at 2-3)

Subsequent to June 7, 2000, there were no further reports of violence, threats or disruptive behavior by E.S. in the Union school system. (Stipulated fact #8, Initial Decision at 3) In 2005, E.S.' family moved to Pennsylvania, where he was enrolled for the 2005-2006 school year. (Stipulated fact #7, Initial Decision at 3) Petitioners ask the Commissioner to order the removal from E.S.'s school record of the June 7, 2000 letter by the school principal.

At the outset, the Commissioner agrees with the Administrative Law Judge (ALJ) that the argument set forth in Point I of petitioners' summary disposition brief is without merit. In that argument, petitioners invoked *N.J.A.C.* 6A:32-7.7, which allows expungement of inaccurate or irrelevant information in student records. Petitioners appeared to contend that the June 7, 2000 letter by the school principal contains inaccuracies and irrelevancies by virtue of its allusion to the referral of the incident to the Assistant Superintendent of the school district, and recommendation that E.S. receive counseling or a psychiatric evaluation. These items, according to petitioners, made the incident seem more serious than it was, thus generating inaccurate and irrelevant information.

However as the ALJ explained:

> [Petitioners] point to no facts in [Dr. Kliszus'] letter which are inaccurate, but rather complain that Dr. Kliszus mischaracterized the incident as serious. The joint stipulation of facts, upon which both parties agreed to rely as a complete recitation of relevant facts, does not suggest that any of the facts in the letter were inaccurate. The issue of whether a suspension seven years ago was merited is not a subject of review here. (Initial Decision at 6)

The Commissioner further agrees with the ALJ that Dr. Kliszus' letter conforms to the broad definitions of "student discipline record" and "student record" as defined by *N.J.A.C.* 6A:32-2.1. (Initial Decision at 6-7)

In Point II of their brief, petitioners maintain that E.S. is in the East Stroudsburg, PA school district permanently; that this renders his records in the Union School District

irrelevant; and that consequently – pursuant to *N.J.A.C.* 6A:32-7.7 – their request for expungement of Dr. Kliszus' letter should be granted. They make reference to *N.J.A.C.* 6A:32-7.8, but that regulation does not help them.

N.J.A.C. 6A:32-7.8(b) allows student records to be destroyed while the student is still enrolled in a district. After the student has left the district, his records may be disposed of only in accordance with the Destruction of Public Records Law (DPRL), *N.J.S.A.* 47:3-15 *et seq.* Records are classified by the State Records Committee and posted on a Records Retention and Disposition Schedule. As the ALJ explained, student disciplinary records have been assigned the Record Series Number 0012-0001.[1] Records in that classification may not be destroyed until two years after the student's graduation or termination from the school system or age 23, whichever is longer. Since E.S. has not reached the age of 23, his records are not ripe for disposal.

Petitioners also cite to the Initial Decision in *J.C. on behalf of minor child, J.C. v. Board of Education of the Bergen County Vocational School District*, Agency Dkt. No. 284-8/03, OAL Dkt. No. EDU 9575-03, for the proposition that once a student has transferred, his disciplinary records may be destroyed at the request of his guardian(s). The Initial Decision in *J.C.*, however, was rejected by the Commissioner of Education, and cannot serve as support for petitioners' position. (Commissioner's Decision No. 34-04, decided February 5, 2004)

The Commissioner's decision in *J.C.* reflects the statutory scheme described above:

> In the instant matter, J.C. withdrew from the Bergen County Vocational School District to attend school at Bogata High School and, thus, pursuant to *N.J.A.C.* 6:3-6.8(c)2, [6A:32-7.8(c)], the

[1] As mentioned, *supra*, Dr. Kliszus' letter qualifies as a disciplinary record under *N.J.A.C.* 6A:32-2.1.

> destruction of his pupil records are [sic] governed by the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.*, which specifies that the destruction of public records are [sic]to be in accordance with the Records Retention and Disposition Schedules found at http://www.njarchives.org/links/recman.html.
>
> With respect to a student's Confidential Disciplinary File, Record Series No. 0012-0001, the Records Retention and Disposition Schedule for school districts specifies that such file is be [sic] retained for "two years after graduation or termination from school system or age 23, whichever is longer." The Commissioner cannot, therefore, grant petitioner the relief he seeks as the Board is prohibited from removing the documents at issue from J.C.'s disciplinary file and destroying them until such time as two years have passed or until J.C. turns 23, whichever is longer. (*Ibid.* at 2)

The State Board of Education subsequently considered the matter and affirmed the Commissioner's decision. (State Board Decision No. 12-04, decided July 7, 2004) After doing so, the State Board additionally observed that the reason for the discipline – *i.e.,* the threat of student violence – militated against destroying the records about it.[2] [3] The State Board also reasoned that the documents concerning J.C.'s discipline remained educationally relevant until J.C. was no longer a student in the New Jersey school system. (*Ibid.* at 3, emphasis added)

This latter conclusion was interpreted narrowly by the ALJ in the present case. He found that:

> Clearly, the State Board, in interpreting its own regulations, made a very specific distinction in their application to a student transferring from one district to another in the New Jersey public

[2] New Jersey statutes and regulations reflect a widespread concern about violence in schools and other institutions. *See, e.g. N.J.S.A.* 18A:35-27 (Findings and Declarations about the link between violence and vandalism and ethnic intolerance; *N.J.S.A.* 18A:35-4.26 (Elementary school instruction about gang violence); *N.J.S.A.* 18A:17-46 (Requirement that school employees report student violence; *N.J.A.C.* 6A:16-7.1 (code of student conduct); *N.J.A.C.* 6A:16-5.3 (Requirement that school employees report incidents of violence, vandalism and alcohol and other drug abuse).

[3] Petitioners distinguish the Commissioner's and State Board's decisions by arguing that E.S.'s behavior was much less serious compared to the behavior at issue in J.C. However, petitioners did not challenge the suspension when it was imposed. Thus, the suspension and the documents describing it are properly in E.S.'s student record. By way of contrast to the criminal law statute allowing assignment judges to dismiss prosecutions where they determine that a defendant's behavior was *de minimis,* the Commissioner is aware of no provision in the Destruction of Public Records Law that allows exceptions to the disposition schedule based upon the content of disciplinary records. Nor is there any expert testimony in the record evaluating the significance of E.S.'s behavior.

> school system versus an individual who is no longer a student in the New Jersey public school system. . . . E.S. is no longer a student in nor has an attachment to the New Jersey public school system. . . . I conclude accordingly that, consistent with the distinction made by the State Board in *J.C.*, the Destruction of Public Records Law does not apply here. Instead, I further conclude that the record of E.S. related to his making a threatening gesture with his finger seven years ago while in the First Grade, is not educationally relevant for this out of state individual and should be expunged by the Union Township School District pursuant to *N.J.A.C.* 6A:32-7.7(a)1.

The Commissioner cannot agree with the ALJ's interpretation of the State Board's language in *J.C.* and the conclusion that New Jersey's laws and regulations concerning student disciplinary records are nullified by a student's move to a neighboring state. Such an interpretation could create a loophole allowing students to rid themselves of disciplinary records by transferring out of New Jersey, and returning later with a clean file.

The law does not support such a notion. First, there is no provision in the DPRL for destroying New Jersey student disciplinary records earlier than the date set forth in the above described retention and disposition schedule, based solely upon a student's subsequent enrollment in the school district of another state. Second, in *N.J.A.C.* 6A:16-7.10 – which requires the transfer of disciplinary records between public school districts, and between public school districts and private schools – there is no provision limiting the receiving schools to schools located in New Jersey.

Third, the provisions of *N.J.A.C.* 6A:16-7.10 refer to 20 *U.S.C.* 6301, *et seq.* – the law popularly known as No Child Left Behind (NCLB) – and 20 *U.S.C.* 1232g, a section of the Family Educational Rights and Privacy Act of 1974 (FERPA). Section 7165(b) of NCLB requires that, "in accordance with the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g," each state which receives federal funds [under NCLB] "shall provide an

assurance . . . that [it] has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school." (Emphasis added) Section 1232g of FERPA, in turn, contains provisions allowing the disclosure – to teachers and school officials in other schools who have legitimate educational interests in the behavior of the student – of information about disciplinary action taken against students. *See, e.g.*, 20 *U.S.C.* 1232g (h).

In other words, nowhere in the relevant statutes and regulations is there language stating that the sharing of student disciplinary records cannot cross state lines, or that retention of the information in student disciplinary records in New Jersey is no longer of benefit to any institution or agency after a student has moved from New Jersey. By virtue of the fact that *N.J.A.C.* 6A:16-7.10 and other New Jersey regulations flow from federal regulations, it is more reasonable to conclude that the retention and sharing of student disciplinary records was intended to be ubiquitous. Consequently, the Commissioner construes the above quoted language in *J.C.* to create a dichotomy between the relevance of records pertaining to a student who is still in an elementary or secondary school system as opposed to a student who has terminated his or her education by graduation or other means, and will no longer be enrolled in any elementary/secondary school.

Accordingly, summary decision is granted in favor of respondent and the petition is dismissed. The Commissioner notes that, pursuant to *N.J.A.C.* 6A:32-7.7(d), petitioners may place a statement in E.S.'s record commenting on the information therein or setting forth reasons

for their disagreement with the Commissioner's decision. Such a statement must always be disclosed along with the portion of E.S.'s record to which it pertains.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 8/23/07

Date of Mailing: 8/24/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05179-07
AGENCY DKT. NO. 112-4/07

S.S. AND E.S. ON BEHALF OF MINOR CHILD, E.S.,

Petitioners,

v.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Respondent.

Glen J. Vida, Esq., for petitioners

Margaret A. Miller, Esq., for respondent (Weiner Lesniak LLP, attorneys)

Record Closed: June 25, 2007 Decided: July 10, 2007

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioners S.S. and E.S. o/b/o E.S., a minor child, (E.S. or petitioners) seek the expungement or redaction of E.S.'s Union Township school disciplinary record, since the family has permanently moved from the State of New Jersey and/or because the particular document, which is a school principal's letter, is inaccurate. The principal's letter referred to an incident where E.S., then eight, allegedly pointed a finger at another

child and threatened to shoot him. The regulations of the Department of Education require the maintenance of student disciplinary records under certain circumstances. The sole issue is whether the Board has the right or obligation to retain or maintain the Principal's letter.

PROCEDURAL HISTORY

Petitioners filed their petition with the Commissioner of Education on April 20, 2007. After the Union Township Board of Education (Board) filed an Answer on April 26, 2007, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, which, on May 3, 2007, filed it for determination as a contested case.

On June 14 and June 25, 2007, the parties filed cross-motions for summary decision and a joint statement of material facts.

STATEMENT OF FACTS

As all relevant facts are stipulated, I **FIND** the following to be the **FACTS** of this case:

1. On June 7, 2000, E.S. was a First Grade Student at Connecticut Farms School, Union, New Jersey.
2. E.S. was born on June 16, 1992.
3. On or about June 7, 2000, while in the playground of the school, E.S., then age eight years old, allegedly had an argument with another First Grade Student.
4. During the argument E.S. allegedly pointed his first finger at the other child and threatened to shoot him.
5. E.S. was suspended for three days for this occurrence.

6. On June 7, 2000, a letter from Dr. Edward Kliszus, Principal of Connecticut Farms School, was forwarded to various entities and placed into E.S.'s record.
7. Since that time, E.S. has been a well-behaved and obedient student while at the Union School District. He left the Union School District and moved to Pennsylvania in April 2005. E.S. finished the 2005 school year in June in New Jersey. He was enrolled in August 2005 in the Pennsylvania school system for the 2005-2006 school term.
8. There were no subsequent incidents involving E.S. making any threats, being violent or engaging in disruptive behaviors while he remained in the Union School System.
9. E.S's parents believe that E.S. does not present a threat of physical danger notwithstanding the June 7, 2000 letter of Dr. Kliszus.

LEGAL ANALYSIS

The Board contends that it is obligated to retain in its records of E.S. the letter of Dr. Kliszus, relying on the regulations of the State Board of Education. The applicability of these regulations flows from the statute upon which they are predicated. N.J.S.A. 18A:36-19 entitled "Pupil records, creation, maintenance and retention, security and access ...." provides:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.

Under N.J.A.C. 6A:32-7.7(a)1, student records are subject to challenge by parents on grounds of inaccuracy, irrelevancy or inclusion of improper information. The parent may seek to expunge inaccurate, irrelevant or otherwise improper information from the student record. N.J.A.C. 6A:32-7.8(c) indicates that, upon graduation or permanent departure of a student from a school district, information in student records, other than that described in section (e), may be disposed of, but only in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq. Section (e) requires that the New Jersey public school district of last enrollment, graduation or permanent departure of the student from the school district shall keep for 100 years a mandated record of a student's name, date of birth, name of parents, gender, citizenship, address, telephone number, health history and immunization, standardized assessment and test answer sheet (protocol), grades, attendance, classes attended, grade level completed, year completed, and years of attendance. The disciplinary record in issue here is not an item for which 100-year retention is required.

The retention of a disciplinary record is however ordinarily required upon the permanent departure of a student from a school district unless it meets the requirements of the Destruction of Public Records Law. J.C. obo J.C. v. Bd. of Educ. of the Bergen County Vocational School District, Final Decision of State Board of Education (February 5, 2004), http://lawlibrary.rutgers.edu/oal/final/edu9575-03_1.pdf. The Destruction of Public Records Law requires that the destruction of public records are to be in accordance with the Records Retention and Disposition Schedules created by the State Records Committee established in the State Department of Education. Record Series No. 0012-0001 of the Records Retention and Disposition Schedule for school districts specifies that a student's confidential disciplinary file is to be retained for "2 years after graduation or termination from school system or age 23, whichever is longer." http://www.njarchives.org/links/retention.html.

In J.C., supra, a student, who had withdrawn from Bergen County Academies and transferred to Bogota High School, requested that Bergen County Academies expunge from his record certain documents relating to a disciplinary action against him.

The Commissioner, with the affirmance of the State Board of Education, found that, under the terms of the predecessor regulation to N.J.A.C. 6A:32-7.8(c), the destruction of such discipline-related documents was prohibited until the later of two years past graduation or the attainment of age twenty-three as required by the Destruction of Public Records Law. The State Board rejected J.C.'s argument that, since he was no longer enrolled in Bergen County Academies, the documents were not educationally relevant and should be expunged pursuant to the predecessor regulation to N.J.A.C. 6A:32-7.7(a)1. The State Board disagreed because J.C.'s withdrawal from Bergen County Academies involved a threat of student violence and the incident was of such character that the evidence should not be destroyed as a consequence of J.C.'s transfer to another New Jersey school district. However, the State Board placed a very specific caveat on its rejection of the expungement application where it found "...that the documents involved remain educationally relevant until J.C. is no longer a student in the New Jersey public school system [emphasis supplied]". Id.

Clearly, the State Board, in interpreting its own regulations, made a very specific distinction in their application to a student transferring from one district to another in the New Jersey public school system versus an individual who is no longer a student in the New Jersey public school system. Unlike J.C., as stipulated by the parties, E.S. is no longer a student in nor has an attachment to the New Jersey public school system. He has instead been a permanent resident of Pennsylvania and has been enrolled in the Pennsylvania school system for the last two years. I **CONCLUDE** accordingly that, consistent with the distinction made by the State Board in J.C., the Destruction of Public Records Law does not apply here. Instead, I further **CONCLUDE** that the record of E.S. related to his making a threatening gesture with his finger seven years ago while in the First Grade, is not educationally relevant for this out of state individual and should be expunged by the Union Township School District pursuant to N.J.A.C. 6A:32-7.7(a)1.

Although the disciplinary record retention requirement arises out of the general grant of authority to the Department of Education under the Destruction of Public Records Law, this requirement is not a statutory mandate but rather a determination of the Department of Education itself through its issuance of its own schedule. It is a well-established principle that one accords substantial deference to an interpretation of a

regulation by an agency responsible for enforcing it. See, Mutschler v. Envir. Protection, 337 N.J. Super 1, 14 (App. Div. 2001); Middle Dept. Insp. v. Comm.Affairs, 278 N.J.Super 573, 577 (App. Div. 1995); Petition of Adamar of New Jersey, 222 N.J.Super. 464, 469 (App. Div. 1988). The basis for the expungement of E.S.'s disciplinary record is consistent with and in deference to the State Board's interpretation of its regulations, regarding a former public school student no longer attached to the New Jersey public school system, as to the educational relevancy of a record or as to when it will be subject to its Records Retention and Disposition Schedules.

In view of the above conclusion, it is not necessary to address the contention of petitioners in their brief that the contents of Dr. Kliszus' letter were inaccurate.[1] In any event, they point to no facts in the letter which are inaccurate but rather complain that Dr. Kliszus mischaracterized the incident as serious. The joint stipulation of facts, upon which both parties agreed to rely as a complete recitation of relevant facts, does not suggest that any of the facts in the letter were inaccurate. The issue of whether a suspension seven years ago was merited is not a subject of review here.

Equally unavailing is petitioners' argument that Dr. Kliszus' letter is a diatribe rather than an appropriate part of E.S.'s student record. N.J.A.C. 6A:32-2.1 defines the various types of student records as follows in relevant part:

> "Student discipline record" means information maintained in a student's record of all disciplinary actions taken against the student by the school district and any information the school has obtained pursuant to N.J.S.A. 2A:41-60, Disclosure of juvenile information....
>
> "Student record" means information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information that is maintained for the purpose of second party review is considered a student record. Therefore, information recorded by certified personnel solely as a memory aid, not for the use of a second party, is excluded from this definition.

[1] The June 7, 2000 letter of Dr. Kliszus is attached to the Board's brief.

The Kliszus letter meets the broad definitions of "student discipline record" and "student record.

ORDER

It is hereby **ORDERED** that summary decision is granted to petitioners; and it is further **ORDERED** that the Board shall immediately remove the June 7, 2000 Kliszus letter from E.S.'s student record and destroy it.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 10, 2007
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 7/10/07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 11 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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335-07

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OAL DKT. NO. EDU 5356-06
(EDU 7891-03 ON REMAND)
AGENCY DKT. NO. 201-6/03

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE RAMAPO/INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law on July 30, 2007 – along with the recommended Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably: petitioner has not demonstrated that, absent such relief, it will suffer irreparable harm; nor has petitioner shown that a balancing of the interests and equities weighs in its favor.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits as contemplated by the ALJ and the parties.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/23/07

Date of Mailing: 8/24/07

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT AND/OR INTERIM RELIEF

OAL DKT. NO. EDU 05356-06
(Remand of OAL DKT. NO. EDU 07891-03)

AGENCY DKT. NO. 201-6/03

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT,

Petitioner,

v.

BOARD OF EDUCATION OF THE RAMAPO/ INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

William C. Soukas, Esq., for petitioner (Nowell, Amoroso, Klein, Bierman, attorneys)

John E. Croot, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

BEFORE **RICHARD McGILL,** ALJ:

This matter was remanded from the Appellate Division of Superior Court for additional proceedings in regard to a dispute between the Board of Education of the

Bergen County Vocational and Technical School District (petitioner) and the Board of Education of the Ramapo/Indian Hills Regional High School District (respondent). The remand was transmitted to the Office of Administrative Law on April 26, 2006, for determination as a contested case. As a result of changes in the facts and the law, petitioner filed a second amended petition on February 8, 2007.

On June 27, 2007, petitioner filed a motion for emergent and/or interim relief with the Commissioner of Education seeking an order requiring respondent to place into an escrow account and/or with the Commissioner of Education all tuition and transportation monetary sums, both past and future, which petitioner maintains have been unlawfully withheld. The motion was transmitted to the Office of Administrative Law by letter dated June 28, 2007. Oral argument in regard to petitioner's motion was heard on July 30, 2007.

The factors to consider in regard to the motion for emergent and/or interim relief are set forth in N.J.A.C. 6A:3-1.6(b) as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The first consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. Harm is considered to be irreparable if it cannot be remedied by monetary damages. Crowe v. DeGioia, 90 N.J. 126, 132-33 (1982). Petitioner maintains that the lack of funds will affect instructional line items and result in a lower amount of funds being available for pupils' education. This situation will ham petitioner's pupils. But as respondent points out, petitioner will not have access to

funds placed in escrow until the end of the case, and therefore, the requested relief will not benefit petitioner's pupils. Moreover, petitioner's concern that respondent will not be able to pay in the event of an unfavorable determination is without support. It follows that petitioner has not demonstrated that it will suffer irreparable harm if the requested relief is not granted.

The second consideration is whether the legal right underlying petitioner's claim is settled. The obligation of a regional school district to pay tuition for a pupil living in the school district to attend a vocational school is set forth in N.J.S.A. 18A:54-20.1(a). Respondent relies on an exception for a regional school district maintaining its own vocational school or schools, but this contention does not alter the fact that the legal right underlying petitioner's claim is expressly set forth in a statute. It follows that the legal right underlying petitioner's claim is well settled.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the claim. In the proceeding that led to the remand, petitioner's motion for summary decision was granted by the undersigned, and the initial decision was adopted by the Commissioner of Education whose decision was affirmed by the State Board of Education. On appeal, the Appellate Division of Superior Court without expressing an opinion on the matter remanded the case for additional findings of facts and a determination as to whether respondent's program may fairly be characterized as a vocational school under N.J.S.A. 18A:54-20.1. In view of this history, while the decision of the Appellate Division certainly raises doubt as to the outcome, on balance petitioner has demonstrated a livelihood of prevailing on the merits.

In regard to the equities and interests of the parties, placement of the disputed funds in escrow will create a burden for respondent. On the other hand, petitioner will not directly benefit, because it will not have the use of the funds for pupils' education. Under the circumstances, the equities and interests of the parties do not indicate that petitioner will suffer greater harm if the requested relief is not granted.

In view of the above, petitioner has demonstrated that the legal right underlying its claim is well settled and that petitioner has a likelihood of prevailing on the merits.

But petitioner has not demonstrated that it will suffer irreparable harm if the request is not granted or that on balance the equities and interests of the parties indicate that petitioner will suffer greater harm if the requested relief is not granted. Therefore, I **CONCLUDE** that petitioner's motion for emergent and/or interim relief should be denied.

Accordingly, it is **ORDERED** that petitioner's motion for emergent and/or interim relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Aug. 3, 2007
DATE

RICHARD McGILL, ALJ

tbj

331-07

B.W., on behalf of minor children, S.L. and N.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of Ewing Township – contested respondent's determination that her grandchildren, S.L. and N.A., are ineligible to attend school in respondent's district, claiming that the children reside with her in her Ewing apartment because their mother, A.A., was having marital problems which prohibited caring for her children in her Trenton home. Respondent district counterclaimed for tuition reimbursement.

The ALJ found that: A.A. is the mother of S.L. and N.A., and is domiciled in Trenton; based on surveillance of A.A.'s residence, S.L. and N.A. reside with their mother in Trenton, and therefore were not properly domiciled in respondent's school district as required under *N.J.S.A.* 18A:38-1(a). Accordingly, the ALJ dismissed the petition; ordered that petitioner pay respondent tuition for S.L. in the amount of $8,541, and for N.A. in the amount of $6,931.08; and ordered the children disenrolled from Ewing Township Schools.

Upon a full and independent review of this matter, the Commissioner concurred with the findings of the ALJ and adopted the Initial Decision as the final decision in this matter. In so doing, she noted that although the record contains two court orders granting petitioner "residential custody" of S.L. and N.A., petitioner has failed to demonstrate by a preponderance of the credible evidence that the children *actually* lived with her. Accordingly, the Commissioner directed petitioner to remit tuition in the amount of $15,4472.08 to the Board.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 21, 2007

OAL DKT. NO. EDU 2627-07
AGENCY DKT. NO. 92-3/07

B.W., on behalf of minor children, S.L. and N.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate that S.L. and N.A. are domiciled within the Ewing Township School District so as to entitle them to attend school in the District free of charge pursuant to *N.J.S.A.* 18A:38-1 *et seq.*

It is noted that the record contains two court orders from the Superior Court of New Jersey Chancery Division – Family Part, County of Mercer, one dated January 24, 2007 and the other dated February 7, 2007, granting petitioner "residential custody" of N.A. and S.L., respectively. Notwithstanding such court orders, petitioner has failed to demonstrate by a preponderance of the credible evidence that these children were *actually* living with her thus entitling them to free attendance in the District's schools.[1] *See I.B., on behalf of minor child, M.A. III v. Board of Education of the Township of Belleville, Essex County*, decided by the State Board of Education, December 6, 2006; *Also See D.M., on behalf of minor child, B.N. v. Board*

[1] The record, in fact, overwhelmingly precludes such a determination.

of Education of the Township of Ewing, Mercer County, decided by the State Board of Education, November 3, 2003, *appeal dismissed*, Docket #A-002172-03T3 (App. Div. 2004)

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Commissioner hereby directs that petitioner remit to the Board tuition in the amount of $8,541 for S.L.'s ineligible attendance in its schools and $6,931.08 for that of N.A., for a total amount of $15,472.08.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/07

Date of Mailing: 8/21/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2627-07
AGENCY DKT. NO. 92-3/07

B.W., on behalf of minor child,
S.L AND N.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING,
MERCER COUNTY,
Respondent.

B.W., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: July 5, 2007 Decided: July 23, 2007

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

Pursuant to N.J.S.A.18A:38-1, respondent, Ewing Township Board of Education (hereinafter District or respondent), held a hearing and determined that S.L. and N.A.,

the grandchildren of B.W. and children of A.A., were not domiciled within the respondent district, although they continued to attend school within the respondent district. Consequently, the respondent decided that the children should be removed from their respective schools, and that B.W. should pay tuition for the children. According to the papers filed, B.W. alleges that she and her grandchildren are domiciled within the Ewing District and claim that the District was and is required to provide her grandchildren with a free public education. Petitioner appealed the determination of the District, and the District counterclaimed for an order requiring B.W. to pay tuition.

PROCEDURAL HISTORY

On February 15, 2007, a hearing was held by the District, which petitioner and A.A. attended, for the purpose of giving the petitioner the right to appeal the determination of the District that S.L. and N.A. do not reside within the Ewing Township School District. On that date, the respondent determined that neither the parent, A.A., nor the children, S.L. and N.A., resided within the Ewing School District, and directed B.W. to remove the children from the Ewing Township schools. On or about March 29, 2007, B.W. filed a pro se residency appeal with the Commissioner of Education. On or about April 9, 2007, respondent filed an answer to the aforesaid petition. The Department of Education then transmitted the matter to the Office of Administrative Law (OAL) on May 1, 2007, where it was received and filed as a contested case pursuant to N.J.S.A. 52: 14B-2(b). The matter was scheduled for hearing on July 5, 2007, at the OAL offices in Mercerville, New Jersey. After testimony was completed, and all requested documents were placed into evidence, the record was closed on that date.

FINDINGS OF FACT

B.W. is the mother of A.A., and the grandmother of S.L. and N.A. B.W. lives at 701 P. Avenue, Apartment A-1, in Ewing, New Jersey. That address consists of a one-bedroom apartment and the lease is in the name of both B.W. and A.A. Both children were enrolled in the Ewing Township Schools by April 2006. A.A. also owns a residence located at 235 M. Avenue, Trenton, New Jersey. A.A. testified that she lives

with B.W. and the children at 701 P. Avenue, Apartment A-1. She testified that she is having problems with her husband, who resides at the M. Avenue, Trenton address, and, in a reconciliation effort, splits her evenings, sometimes staying in Trenton and sometimes staying in Ewing. A.A. admitted that she owns the residence on M. Avenue in Trenton and her vehicles are registered at that address. She also testified that prior to March 1, 2007, there was a very loose arrangement wherein A.A. and the children resided at different locations at different times. A.A. testified that a routine has now been established wherein she and the children reside with B.W. at the Ewing address on Saturday nights, Wednesday nights, and Thursday nights, and just the children reside at that address on Sunday, Monday, Tuesday, and Friday nights when she stays at 235 M. Avenue with her husband.

Mr. Pete Manetto testified on behalf of the District. Mr. Manetto is a retired Trenton City police officer, a licensed private investigator, and has a private detective agency. He also works part-time as an investigator for the Ewing Township Board of Education, primarily doing surveillance in investigating residency cases. He completed a report (R-1) for the period October 13, 2006 through January 5, 2007. On October 16, 2006, Mr. Manetto began his surveillance at 235 M. Avenue, Trenton at 7:00 a.m. He observed A.A. and S.L. leaving the residence at 7:30 a.m. and followed the vehicle to Ewing High School where S.L. was dropped off for school. On October 20 surveillance at 235 M. Avenue, Trenton was again initiated at 7:00 a.m. and at 7:30 a.m. A.A., S.L., and N.A. left the residence and S.L. was dropped off at Ewing High School. The vehicle then left the area but because of traffic the surveillance ended. On October 23 the surveillance again commenced at 7:00 a.m. at 235 M. Avenue, Trenton. A.A., S.L., and N.A. all left that residence and the vehicle's destination was Ewing High School where S.L. exited the vehicle and entered the school. The vehicle then continued on to Ewing's Parkway School and N.A. exited the vehicle along with A.A. and both entered the school. Surveillance was again initiated on October 24, 2006, at which time surveillance commenced at 7:00 a.m. at 235 M. Avenue, Trenton. A.A., S.L., and N.A. left the residence and entered A.A.'s vehicle at 7:33 a.m. S.L. was dropped off at Ewing High School and, shortly thereafter, N.A. was dropped off at the Parkway School. On October 30, 2006, again surveillance was initiated at 235 M. Avenue. At 7:35 a.m., A.A., S.L., and N.A. left the residence and proceeded to Ewing High School where S.L.

was dropped off and then proceeded to the Parkway School where N.A. was dropped off. On November 1, 2006, surveillance commenced at 6:30 a.m. A.A. and S.L. left the residence at 7:38 a.m., and the vehicle proceeded to Ewing High School where S.L. was dropped off. The vehicle then returned to 235 M. Avenue, Trenton, and the surveillance then ended. On November 3, 2006, surveillance began at 6:30 a.m. at 235 M. Avenue. At 7:29 a.m., A.A. and S.L. left the residence and S.L. was dropped off at Ewing High School. The vehicle returned to 235 M. Avenue. At 8:25 a.m., A.A. and N.A. left the residence and N.A. was dropped off at the Parkway School, and surveillance ended. On November 8, 2006, surveillance again began at 235 M. Avenue, Trenton. At 7:29 a.m., A.A. and S.L. left that residence and S.L. was dropped off at Ewing High School. At 7:40 a.m., the same vehicle was located back at 235 M. Avenue. At 8:14 a.m., A.A. and N.A. left 235 M. Avenue and proceeded to the Parkway School where N.A. was dropped off and surveillance ended. On November 16, 2006, surveillance began at 6:30 a.m. at 235 M. Avenue, Trenton. There being no activity, Mr. Manetto proceeded to 701 P. The surveillance ended at 7:50 a.m. with no observation of the children, however, on that date both S.L. and N.A. were in attendance at their respective schools. On November 21, 2006, Mr. Manetto began his surveillance at 6:30 a.m. and was observing 235 M. Avenue, Trenton. One of A.A.'s vehicles was located in the driveway and it appears that same had not moved since November 16. There being no activity, the surveillance ended at 7:40 a.m., and Mr. Manetto proceeded to 701 P. Avenue and began his surveillance of Apartment A-1. There was no activity at that address either and the surveillance ended at 8:45 a.m. Mr. Manetto testified that a status check indicated both children were in their respective schools on that date. On December 20, 2006, Mr. Manetto began his surveillance at 235 M. Avenue at 6:00 a.m. A.A. and S.L. left the residence at 7:34 a.m. and proceeded to Ewing High School where S.L. exited the vehicle and entered the school. The vehicle then proceeded back to 235 M. Avenue. At 8:20 a.m., A.A. and N.A. exited the residence and N.A. was dropped off at the Parkway School. On January 4, 2007 surveillance began at 6:00 a.m. at 235 M. Avenue. At 7:27 a.m., A.A. and S.L. left the residence and proceeded to Ewing High School where S.L. was dropped off. At 7:37 a.m., the vehicle returned back to 235 M. Avenue. At 8:19 a.m., A.A. and N.A. exited the residence and proceeded to the Parkway School where N.A. exited the vehicle and enters the school. On January 5, 2007, the surveillance again was initiated at 6:00 a.m. at 235 M. Avenue. Again, A.A.

and S.L. left the residence and proceeded to Ewing High School where S.L. was dropped off and enters the school. The vehicle then returned back to 235 M. Avenue. At 8:18 a.m., A.A. and N.A. left the residence and proceeded to the Parkway School where N.A. was dropped off and entered the school building. Mr. Manetto continued his testimony by summing up his surveillance and stating that out of the seventeen days that he was on surveillance detail in this matter, eleven mornings the children left 235 M. Avenue, Trenton and went to schools in Ewing Township. On the other six mornings of surveillance, there was no indication that the children resided at either M. Avenue, Trenton or 701 P. Avenue, Ewing. Mr. Manetto also testified he did a motor vehicle search and discovered the two vehicles parked at 235 M. Avenue are registered to A.A. at that address.

Mr. David Mikalauskas is the residency and attendance officer for the Ewing Township Board of Education. He has held that position for eighteen years. He testified that the child, S.L., attends Ewing High School and the per diem rate for that tuition is $54.75. He also testified that N.A. attends the Parkway Avenue elementary school and the per diem rate of that tuition is $44.43. His testimony continued that the tuition owed from October 16, 2006 to June 22, 2007, the last day of school, was for a period of 156 days. The high school tuition for that period is $8,541 and the elementary school tuition for the same period is $6,931.08.

As a result of hearing the testimony in this matter, I **FIND** that A.A. is the mother of S.L. and N.A. and she is domiciled at 235 M. Avenue, Trenton. I also **FIND**, based on the surveillance of that residence, S.L. and N.A. reside with their mother.

LEGAL ANALYSIS

N.J.S.A.18A:38-1(b)(2) states that when a superintendent of a school district determines that a person is attending a district school but is not domiciled within the district, the parent may present proof at a hearing, to show by a preponderance of the evidence, that a child is eligible for a free education based on domicile within the district.

If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition, prorated on a per diem basis.

N.J.S.A. 22-3.1 provides that a student is domiciled in a school district when that student lives with a parent whose permanent home is located within the school district. A home is permanent when the parent intends to return to it when absent and no present intent of moving from it. In this case, A.A., the parent of S.L. and N.A., testified that she lives in Trenton on Sundays, Mondays, Tuesdays, and Fridays with her husband. Consequently, it must be determined that A.A., the mother of S.L. and N.A., resides within the City of Trenton at least four days per week. There has been no evidence presented that A.A. does not plan on returning to her Trenton residence nor does she have any intent on moving from it.

CONCLUSION

I have found that A.A., the parent of S.L. and N.A., is domiciled at 235 M. Avenue, Trenton, New Jersey. I must conclude that the children, S.L. and N.A., are also domiciled in the City of Trenton, since I have found they reside with A.A. This conclusion is supported by the surveillance of 235 M. Avenue disclosing numerous occasions where the children left that address early in the morning and proceeded directly to school by way of transportation provided by A.A. It is noteworthy that at no time were the children seen exiting 701 P. Avenue in the morning hours prior to school. This is not to say that on certain occasions the children do not stay at 701 P. Avenue but that address is clearly not the domicile of their mother with whom they reside.

ORDER

As a result of the findings and applicable law, I **ORDER** the petition in this matter be **DISMISSED**. I further **ORDER** the District's claim for tuition be **GRANTED** and I **ORDER** B.W. to pay to respondent tuition for S.L. in the amount of $8,541 and for N.A. in the amount of $6,931.08. I further **ORDER** that S.L. and N.A. be disenrolled from the education programs offered by the Ewing Township Board of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 23, 2007
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

JUL 31 2007

7/27/07
Mailed to Parties:
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mp/jh

WITNESSES

For petitioner:

A.A.

For respondent:

Pete Manetto
David Mikalauskas

EXHIBITS

For petitioner:

None

For respondent:

R-1 Surveillance report

341-07

OAL DKT. NO. EDU 5929-07
AGENCY DKT. NO. 144-6/07

DENCO CONSTRUCTION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, AND RIEFOLO CONSTRUCTION COMPANY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the matter is appropriately dismissed in light of the jointly executed stipulation submitted by the parties.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille Edley
COMMISSIONER OF EDUCATION

Date of Decision: August 28, 2007
Date of Mailing: August 28, 2007

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05929-07
AGENCY DKT. NO. 144-6/07

DENCO CONSTRUCTION, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY AND RIEFOLO CONSTRUCTION.
Respondents.

James J. Tarnofsky, Esq., for petitioner, (Hedinger & Lawless, LLC, attorneys)

Guy Little, Esq., for respondent (Carroll McNulty Kull, LLC, attorneys)

Jane Galina-Mecca, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: August 7, 2007 Decided: August 7, 2007

BEFORE: **JOSEPH A. PAONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on June 11, 2007, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. Petitioner's Order to Show Cause with Temporary Restraints was denied on June 15, 2007. A telephone conference was scheduled for August 7, 2007,

and prior to that date the parties agreed the matter should be dismissed with prejudice and without costs. A signed copy of the Stipulation of Dismissal is attached hereto and made a part hereof.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** or consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8-10-07
DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency: 8-15-07

Mailed to Parties:

AUG 15 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

HEDINGER & LAWLESS L.L.C.
Attorneys at Law
147 Columbia Turnpike Suite 200
Florham Park, New Jersey 07932-2145
(973) 301-9100
Attorneys for Petitioner,
Denco Construction, Inc.

DENCO CONSTRUCTION, INC., Petitioner, v. **WAYNE TOWNSHIP BOARD OF EDUCATION and RIEFOLO CONSTRUCTION COMPANY,** Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET No.: EDU-5929-07 AGENCY No.: 144 - 6/07 **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same is hereby dismissed with prejudice and without costs against any party.

HEDINGER & LAWLESS L.L.C.
Attorneys for Petitioner,
Denco Construction, Inc.

By: _____
James J. Tarnofsky

Dated: July 31, 2007

FOGARTY & HARA
Attorneys for Respondent,
Wayne Township Board of Education

By: _____
Thomas Scapoli

Dated: July 24, 2007

CARROLL MCNULTY KULL LLC
Attorneys for Respondent,
Riefolo Construction Company

By: _____
Guy T. Lytle

Dated: July 30, 2007

LAW OFFICE OF
HEDINGER
&
LAWLESS
L.L.C.

4064/9721t

343-07

OAL DKT. NO EDU 2210-07
AGENCY DKT. NO. 63-3/07

IN THE MATTER OF THE TENURE HEARING OF GEORGE MERTZ, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record, proposed "Stipulation of Settlement and Settlement Agreement" (proposed agreement) and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and, for the reasons that follow, the matter is remanded to the OAL for further proceedings.

Petitioners filed four tenure charges against respondent. The two issues underlying the charges were excessive absenteeism, and excessive physical force applied to two preschool students.

The record contains extensive documentary evidence supporting the charges pertaining to respondent's excessive absenteeism and his failure to provide timely medical explanations from his physician(s) to avoid discipline for the absences. By way of contrast, the record contains nothing to contradict the foregoing evidence, except two unsworn statements from respondent, dated March 12 and March 27, 2007, respectively, which generally attribute his absences to illnesses and injuries, allege that he submitted doctors' notes and discharge papers for his absences and maintain that he called the school message center for each absence.

The record also includes copies of several contemporaneous documents referring to an October 4, 2005 incident in which respondent was observed to have handled two young

students in a rough manner. The documents include handwritten notes from two school employees who observed respondent – at two different times during a physical education class – dragging students across the floor. In a contemporaneous note, respondent acknowledged dragging one of the children, but contended that it was for the child's safety. He further acknowledged lifting the other child up under the arms to switch his location, but alleged that the child was neither hurt nor upset. In the unsworn statement referenced above – dated March 27, 2007 – respondent denied that he used inappropriate force, claimed that only one student was involved in the incident and maintained that the incident occurred in 2004.

The parties apparently decided to settle the matter and executed the proposed agreement on July 9, 2007. Under the terms of the settlement, petitioner would withdraw the tenure charges. Respondent would accept the increment withholdings for the 2005-2006 and 2006-2007 school years and the suspension without pay of 120 days – penalties that had already been imposed and completed. Respondent would be reinstated to employment in petitioner's school district upon final execution of the proposed agreement but, "as a result of personal circumstances unrelated to the tenure charges, [would] not return to employment with the Board after June 30, 2007". It was agreed that only respondent's dates of employment and teaching assignments would be provided to prospective employers who inquired about respondent.

Paragraph 7 of the proposed agreement states that respondent's choice to seek other employment is not part of the consideration for the settlement, and is not a consequence of the tenure charges. Paragraph 8 states that the parties agree that the facts of this case do not warrant suspension or revocation of respondent's teaching certificate, or transmittal of the matter to the State Board of Examiners. Curiously, the parties also appear to "agree" that this matter "will not be referred to the State Board of Examiners by the Commissioner of Education, and the

Commissioner accepts this agreement, and will not refer the matter to the State Board of Examiners."[1]

The parties concede that tenure settlements must meet the standards set forth in *In re Cardonick,* 1990 *S.L.D.* 842, 850-51, decided by the Commissioner of Education on April 7, 1982, affirmed by the State Board of Education on April 6, 1983:[2]

> The proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights, and that the agreement is consistent with the public interest. (Emphasis added.)

In paragraph 3 of the proposed agreement the parties recite "rationales" for the settlement terms. According to the parties,

> "information was exchanged . . . which demonstrates to the Board's satisfaction that (a) Mertz's absenteeism which is the subject of charges One, Two and Four was caused by a series of disabilities which may be the subject of reasonable accommodations and which should not preclude his continuing employment with the Board or his future employment with other boards, that Mertz is addressing the underlying causes of his past absenteeism, that he is able to return to work and fulfill the essential job function of regular attendance . . . and (b) that as to the single disputed alleged incident of corporal punishment which allegedly occurred on October 4, 2005 which is the subject of Charges Three and Four, the Board can rely only on two classified pre-school students in order to present the allegations and that bona fide disputes exists [sic] as to whether Mertz used force and whether he used such force as was reasonable and necessary to quell a disturbance threatening physical injury and for the protection of person or property. The Board further understands that Mertz denies that he engaged in the conduct referred to in these charges, and realizes that Mertz will present statements

[1] Clearly, the parties may not agree among themselves to bind a third party, or to limit the discretion of the Commissioner of Education.

[2] *See also, N.J.A.C.* 6A:3-5.6.

and/or testimony from himself and other students he taught during the 2005-2006 school year to dispute the claims made about his behavior.

As stated above, the record contains a prodigious amount of evidence supporting the tenure charge of excessive absenteeism, and documentation creating a strong inference that respondent handled a student inappropriately on October 4, 2005. By way of contrast, the Initial Decision contains no findings of fact about the "information" that persuaded the Board to reverse its position, and the record contains nothing relating thereto.

As to the charge of excessive absenteeism, months of absences over several school years remain unexplained by the hip injury and phlebitis mentioned by respondent in his unsworn replies to the charges. Nor are there any facts in the record that would support the contention that a resolution to the problem or problems causing the excessive absences had been achieved. General recitations that contradict the evidence in the record cannot suffice to satisfy the *Cardonick* requirement that supporting documentation be presented for alleged circumstances justifying the settlement.

The references in the settlement to *State-Operated School Dist. Of Jersey City v. Howard,* 95 *N.J.A.R.* 2d (EDU) 301 (App. Div. 1995) and *Svarnas v. AT&T Communications,* 326 *N.J. Super.* 59 (App. Div. 1999) do not help the parties. In *SOSD Jersey City,* a teacher charged with chronic excessive absenteeism was returned to work by the Commissioner after she proved that she had undergone a rigorous program of rehabilitation, and after she provided evidence that she was successfully addressing the cause of her past absenteeism. But the court expressly stated that "[t]here can be . . . little question that a tenured teacher whose alcoholic problems continue to result in chronic excessive absenteeism and prevent her from regular fulfillment of her teaching duties suffers from an incapacity that may justify her removal." In

Svarnas, the respondent's termination for excessive absenteeism was upheld because – accommodations notwithstanding – her asthma often prevented her from showing up to do her job.

In sum, any reversal by petitioner of the charges and penalties requested in tenure charges must be supported by specific facts showing that the circumstances are no longer as alleged in the petition. The parties here have offered no such facts.

As regards the charge relating to corporal punishment, the parties have similarly failed to provide evidence that the facts are other than those contained in the record. As noted above, there are copies of two notes – written by adult employees in petitioner's district – reporting the rough treatment by respondent of two pre-school students. The Commissioner is consequently puzzled by, and rejects, the parties' contention that only the young students' allegations could support petitioner's charge of corporal punishment.

All of the foregoing is of particular concern in view of the assertion, in paragraph 8 of the proposed agreement, that:

> Neither the tenure charges nor the settlement thereof shall be deemed to have resulted in Mertz's loss of his tenured position, that the facts do not warrant suspension or revocation of Mertz's certificate, and that in these circumstances, that the tenure matter is not appropriate for transmittal or referral to the State Board of Examiners pursuant to *N.J.A.C.* 6:9-17.4 or under any other statute or regulation and will not be referred to the State Board of Examiners by the Commissioner of Education . . . .

Finally, the Commissioner notes that the terms of paragraph 5 of the proposed agreement direct that respondent be paid a salary and medical benefits "from the date of the full and final execution of this Stipulation of Settlement [which was July 9, 2007] through June 30, 2007." Clearly, that provision constitutes an impossibility. Even if the proposed

agreement were acceptable under the *Cardonick* standards, paragraph 5 would have to be amended.

The settlement is rejected. The *Cardonick* requirement that support must be offered for the alleged circumstances justifying the settlement has not been satisfied. Consequently, no determination can be made as to whether the settlement is consistent with the public interest, a determination that is also required under *Cardonick*. The matter is therefore remanded to the OAL for such further proceedings as may be necessary to bring the settlement agreement into compliance with *N.J.A.C.* 6A:3-5.6 If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[3]

Lucille Edley

COMMISSIONER OF EDUCATION

Date of Decision: 8/31/07

Date of Mailing: 8/31/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2210-07

AGENCY DKT NO. 63-3/07

IN THE MATTER OF THE TENURE HEARING OF GEORGE MERTZ, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Keith Waldman, Esq., for School District of the City of Trenton, Mercer County, petitioner (Selikoff & Cohen, attorneys)

Thomas W. Sumner, Jr., Esq., for George Mertz, respondent (Sumner & George, attorneys)

Record Closed: July 10, 2007 Decided: July 16, 2007

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter involves the tenure charges of George Mertz filed by the School District of the City of Trenton, Mercer County. The case was transmitted to the Office of Administrative Law (OAL) on March 21, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and was assigned to the undersigned Administrative Law Judge (ALJ) for hearing.

Prior to the plenary hearing scheduled to commence on July 17, 2007, the parties faxed a copy of the executed Stipulation of Settlement and Settlement Agreement, along with the Board Resolution.

The Stipulation of Settlement and Settlement Agreement indicating the terms thereof is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 17, 2007

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

Fax 7/17/07

Mailed to Parties:

[redacted]

JUL 13 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SELIKOFF & COHEN, P.A.
307 Fellowship Rd., Suite 314
Mt. Laurel, NJ 08054-1233
(856) 778-6055
Counsel for Respondent,
George Mertz

IN THE MATTER OF THE TENURE HEARING OF GEORGE MERTZ, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

BEFORE THE OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY

OAL DOCKET NO. EDUTH 02210-2007S
AGENCY REF NO. 63-3/07

STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT

The parties to this matter, the Trenton Board of Education ("Board") and George Mertz ("Mertz"), having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1 The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the tenure charges shall be prejudiced and the matter shall be returned to the Office of Administrative Law for hearings in relation to the tenure charges, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new, revised or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

EXHIBIT A

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the Board shall withdraw the tenure charges.

3 Rationale for Settlement (*Cardonnick* Standards)

A. On or about March 1, 2007, the Board filed the tenure charges with the Commissioner of Education against Mertz.

B. The tenure charges allege excessive absenteeism as unbecoming conduct (Charge One) and as abandonment of his position (Charge Two), corporal punishment of students in a single incident on October 4, 2005 (Charge Three) and unbecoming conduct based upon the totality of the allegations of the preceding charges (Charge Four).

C In the course of their investigation and discovery in the case, information was exchanged between the parties which demonstrates to the Board's satisfaction that: (a) Mertz's absenteeism which is the subject of Charges One, Two and Four was caused by a series of disabilities which may be the subject of reasonable accommodations and which should not preclude his continuing employment with the Board or his future employment with other boards, that Mertz is addressing the underlying causes of his past absenteeism, that he is able to return to work and fulfill the essential job function of regular attendance (*See, e.g., State-Operated School Dist. of Jersey City v. Howard*, 95 *N.J.A.R.2d* (EDU) 301 (App. Div. 1995); *Svarnas v. AT&T Communications*, 326 *N.J. Super.* 59 (App. Div.1999)) and (b) that as to the single disputed alleged incident of corporal punishment which allegedly occurred on October 4, 2005 which is the subject of Charges Three and Four, the Board can rely only on two classified pre-school students in order to present the allegations and that bona fide disputes exists as to whether Mertz

used force and whether he used such force as was reasonable and necessary to quell a disturbance threatening physical injury and for the protection of person or property. The Board further understands that Mertz denies that he engaged in the conduct referred to in these Charges, and realizes that Mertz will present statements and/or testimony from himself and other students he taught during the 2005-2006 school year to dispute the claims made about his behavior.

D. Both parties acknowledge that this settlement agreement is based upon their analysis and understanding of the evidence which would be proffered at the hearing, that these conclusions appear to be probable, but cannot be stated with certainty, and that in the event that this settlement agreement is not approved and the matter proceeds to a hearing, neither this agreement nor anything in this agreement shall be admissible in evidence, and that neither party will be deemed to have admitted or conceded any of the contents of or the statements in paragraph 3 of this agreement, or in any other paragraph in this agreement.

E. The Board is aware of the public interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the public schools in New Jersey. However, upon review of all the circumstances, which includes evaluation of the time and expense of pursuing tenure charges, the uncertainty of the result which might be obtained, both in terms of sustaining the charges and the penalty which might be imposed, Mertz's tenured service in the district, and in all other respects favorable record, the Board believes and Mertz concurs that it is in the best interests of all parties and the public to resolve this matter by this settlement agreement.

4 The parties agree that the acts or omissions alleged to be engaged in by Mertz as referred to in paragraph 3 above may be deemed to constitute conduct unbecoming and

were sufficient to warrant the filing of the tenure charges, but not his removal, and that the appropriate penalty for Mertz in these circumstances is the withholding of Mertz's employment and adjustment increments for the 2006-2007 school year, and the suspension without pay for one hundred and twenty (120) days, penalties which have already been imposed on and served by Mertz as a result of the tenure charges.

5 The parties further agree that the Board will reinstate Mertz to an employment position effective upon the full and final execution of this Stipulation of Settlement and pay his salary from the date of the full and final execution of this Stipulation of Settlement through June 30, 2007, and with all benefits and emoluments, including, but not limited to, health insurance benefits, from the date of the full and final execution of this Stipulation of Settlement through June 30, 2007. In addition, if any perspective employers contact the Board, or any of the Board's officers, agents, employees, representatives, or members about Mertz, the only information provided about Mertz shall be the date(s) of Mertz's employment with the Board and his teaching position(s) with the Board; provided that nothing herein shall limit any legal right which may exist to access to this settlement agreement.

6. By settling this matter, Mertz acknowledges that he is waiving his right to hearings before the Office of Administrative Law and Commissioner of Education, in which he could seek an adjudication on the merits of the tenure charges, and on the penalty, if any, if the tenure charges are sustained. Mertz further acknowledges that he understands and agrees to the terms of this agreement and is satisfied with the legal representation that he received in this matter.

7 The parties understand that as a result of personal circumstances unrelated

to the tenure charges, Mertz will not return to employment with the Board after June 30, 2007, instead choosing to seek other employment opportunities out-of-State, and has so advised the Board. The parties further agree that the appropriate penalty for Mertz's acts or omissions is as set forth in paragraphs four (4) and five (5) above, and that Mertz's determination not to return to employment after June 30, 2007 does not constitute part of the consideration for this agreement, and is not as the result of the tenure charges.

8 As per paragraph seven (7) above, the parties expresaly agree that neither the tenure charges nor the settlement thereof shall be deemed to have resulted in Mertz's loss of his tenured position, that the facts do not warrant suspension or revocation of Mertz's certificate, and that in these circumstances, that the tenure matter is not appropriate for transmittal or referral to the State Board of Examiners pursuant to *N.J.A.C.* 6:9-17.4 or under any other statute or regulation, and will not be referred to the State Board of Examiners by the Commissioner of Education, and the Commissioner accepts this agreement, and will not refer the matter to the State Board of Examiners.

9 The parties agree that in the event that the Commissioner of Education does not accept paragraph eight (8) or any paragraph of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for hearing without prejudice to either parties' position.

10. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

11. The Board has approved the terms of this settlement agreement as acknowledged by the attached resolution.

George Mertz

STATE OF ~~NEW JERSEY~~ MARYLAND :
COUNTY OF ~~MERCER~~ WORCESTER : SS

I certify that on June 21, 2007, George Mertz, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Patricia L. Baisley
MY COMMISSION EXP.
4/28/08

PATRICIA L BAISLEY NOTARY PUBLIC WORCESTER CO., MARYLAND

RECEIVED
2007 JUL 16 P 12: 08
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Joyce M. Kersey [redacted], President of the Trenton Board of Education

Joyce M. Kersey

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on July 9, 2007, ~~Robert Revelle~~ Joyce M. Kersey, President of the Trenton Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Thomas W. Sumners, Jr

Rodney Lofton, Superintendent of Schools
Trenton Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on July 9, 2007, Rodney Lofton, Superintendent of the Trenton Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Thomas W. Sumners, Jr
Attorney at Law
State of New Jersey

TRENTON BOARD OF EDUCATION

RESOLUTION

2007 JUL 16 P 12:08
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

WHEREAS, the Trenton Board of Education certified Tenure Charges against George Mertz on February 26, 2007, Agency Docket No. 63-3/07, OAL Docket No. EDUTH 02210-2007S; and

WHEREAS, the parties agree it is in their best interests to amicably resolve the Tenure Charges as set forth in the settlement agreement, attached hereto as Exhibit A;

THEREFORE, BE IT RESOLVED on this 9th day of July, 2007, that the Trenton Board of Education agrees to settle the above-mentioned Tenure Charges as set forth in Exhibit A.

Nancy R. Swirsky
Bus. Admin./Board Secretary
Trenton Board of Education

Joyce M. Kersey
President
Trenton Board of Education

254-07

OAL DKT. NO. EDU 5775-07
AGENCY DKT. NO. 140-5/07

M.O.-B. on behalf of minor child, C.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record in this matter – including the audiotape of the June 7, 2007, hearing at the Office of Administrative Law (OAL) – and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1]

The Commissioner agrees with the ALJ that petitioner has failed to:

1. Demonstrate that respondent's graduation requirements are arbitrary, capricious, unreasonable or unlawful;
2. Prove that respondent applied its policies regarding graduation and participation in graduation exercises to the facts of this case in an arbitrary, capricious or unreasonable manner; or
3. Establish equitable grounds for emergent relief.

Accordingly, for the reasons articulated by the ALJ, the recommended Order of the OAL denying petitioner's application is adopted by the Commissioner as the Final Order on this motion. Because the present decision fully disposes of all issues in dispute between the

[1] As *N.J.A.C.* 1:1-12.6 makes no provisions for the filing of exceptions by the parties, petitioner's exceptions were not considered.

parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/20/07

Date of Mailing: 6/20/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 05775-07
AGENCY DKT. NO. 140-5/07

M.O-B. ON BEHALF OF MINOR CHILD, C.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

Respondent.

M.O-B. petitioner, pro se, on behalf of C.O. minor

Kenneth James Lindenfelser, Esq., for respondent

Record Closed: June 8, 2007 Decided: June 11, 2007

BEFORE **JAMES J. GERAGHTY,** ALJ:

Pursuant to N.J.A.C. 1:1-12.6, petitioner, mother of C.O., a seventeen year old senior at Kearny High School, applies for emergency relief from a decision of the Town of Kearny Board of Education to bar him from participating in graduation exercises and Project Graduation, a related activity, on grounds that he failed to earn sufficient credits due to excessive tardiness and unexcused absences. The matter was commenced through a petition filed by C.O.'s mother, M.O-B., with the Commissioner of the New Jersey Department of Education on May 23, 2007. Id. at section 12.6(b). The Commissioner forwarded the matter to the Office of Administrative Law ("OAL") on June 1, 2007. Id. at section 12.6(c). A hearing was held June 7, 2006 at the OAL. Petitioner M.O-B. testified. Counsel for respondent presented two witnesses, Kearny High School

Principal Alfred Somma and Vice-Principal Patrick Ragnoni. The Commissioner transmitted documents to the OAL including memoranda and copies of e-mails from M.O-B. At the hearing respondent submitted a copy of the Kearny High School Student Handbook and submitted a memo of statutory authority the next day. Petitioner likewise made a post-hearing submission on Friday June 8, 2007 whereupon the record closed.

The issue is whether petitioner has demonstrated the factors necessary to establish grounds for the requested emergency relief.

FACTUAL BACKGROUND

Based on the testimony and documents of record, I **FIND:**

C.O., a senior at Kearny High School, was scheduled to graduate in June 2007. 120 credits are needed to graduate. He lost credit for three classes for which he was registered during the fall 2006 semester due to excessive unexcused absences allegedly the result of various family and other personal problems. In an effort to afford C.O. the opportunity to graduate with his classmates, the school administration customized a curriculum for C.O. through which he would be able to make up the credits by taking two evening courses at Harrison High School during the spring semester and one course at Kearny High School during the summer 2007 session. Although C.O. would not be able to graduate until he successfully completed summer school, he would be allowed to attend graduation exercises and participate in Project Graduation.

C.O. registered for a Spring 2007 chorus course at Kearny High School. In early February 2007 he purportedly was embarrassed in class by the teacher and, rather than drop the course, decided to no longer attend. The teacher, assuming that C.O. had dropped the course, neglected to notify other school officials and C.O.'s parents in accordance with school protocols. It was not until April 2007 that C.O.'s mother learned about the absences which, by that time, already were excessive. However, since M.O-B. was not given the opportunity to correct her son's behavior, the school administration decided to permit C.O. to make up for the course credits by doing a report. C.O. copied a report from the internet and submitted it as his own. School officials discovered the plagiarism.

In his monthly attendance report to parents, the Vice-Principal advises parents that if their child cuts a class two or more times in a semester, all credit will be lost. Arriving late twice is deemed one cut. A tardy student, that is, one who has arrived late missing more than one-half the class is deemed to have cut the class.

C.O. registered for auto mechanics for the Spring 2007 semester. Due to tardys and cuts, C.O. had accumulated three and one-half cuts. M.O-B. contested two of the late arrivals and the school administration acquiesced thus reducing one full cut. Nevertheless, C.O. had accumulated net two and one-half cuts thus disqualifying him for credit for that course. M.O-B. contested other tardys claiming that since auto body is a two-period course, a student would have to arrive after forty minutes, not twenty minutes late as maintained by the school administration, to be debited a cut. Each period is forty minutes. The Vice-Principal's attendance reports do state that "missing more than half the class," not being late twenty minutes, is a cut. However, the Kearny High School Student Handbook, a copy of which is distributed to each student, states:

> Students arriving to class after the first twenty minutes of a period with an unacceptable excuse or an unexcused lateness will be regarded as having cut the class. (emphasis added.)

Handbook at 7.

The Student Handbook describes an "amnesty program" through which the principal may reinstate credits lost by a student who failed to adhere to the attendance policy if the student meets certain criteria including the avoidance of tardys or cuts, among other things. Ibid. C.O.'s second semester customized curriculum was created pursuant to this program.

Because C.O. failed to comply with the terms of the amnesty program, submitted a plagiarized report, and accumulated sufficient cuts and tardys to lose credit for chorus and auto mechanics, he would have earned only 111 credits, not the 120 credits needed for graduation. Although the school administration would have allowed him to attend graduation exercises and Project Graduation despite his need to make up an additional course during 2007 summer school, the loss of credit for additional courses

plus the fraudulent report resulted in the school administration's decision to bar him from graduation exercises and project graduation.

LEGAL AUTHORITY AND ANALYSIS

In accordance with guidelines established by the Commissioner of Education, "... each board of education shall establish standards for graduation from its secondary schools." N.J.S.A. 18A:7C-2. The Kearny Board of Education requires a student to "complete successfully" at least 120 credits. (Policy Statement Exhibit R-2). The minimum credit requirement prescribed by the Department of Education is 110. N.J.A.C. 6A:8-5.1(a)1.i. Successful completion includes attendance at the required number of course sessions. In order for a student to qualify for participation in the high school graduation ceremony, "he/she must pass the high school proficiency test (HSPT) and must not lack more than one subject to graduate." Policy Statement supra at 3.

Actions of administrative agencies must be sustained unless found to be arbitrary, capricious, or unreasonable. Burris v. Police Dept. Township of West Orange, 338 N.J. Super. 493 (App. Div. 2001); Henry v. Rahway State Prison, 81 N.J. 571 (1980). The burden of proof is on the party challenging the administrative action. Barone v. Dept. of Human Services, Div. of Med. Asst., 210 N.J. Super. 276 (App. Div. 1986), aff'd, 107 N.J. 355 (1987). It is well settled that a reviewing court or tribunal does not substitute its judgment for that of the agency, but determines solely whether the agency action was arbitrary, capricious, or unreasonable, or otherwise not in accordance with law. R. & R. Marketing, L.L.C. v. Brown-Forman Corporation, 158 N.J. 170 (1999).

The criteria for granting emergency relief are those prescribed in Crowe v. DeGioia, 90 N.J. 126 (1982). Based on equitable principles, an applicant will prevail if able to demonstrate that it will suffer irreparable harm if the relief is not granted, petitioner's underlying legal right is settled, petitioner is likely to succeed on the merits and, assuming the equities and parties' interests are balanced, petitioner will suffer greater harm than respondent if relief is not granted.

That the Kearny School Board has discretionary authority to establish policies governing graduation is unassailable. Petitioner has adduced neither evidence nor

cogent arguments to demonstrate that the Board's graduation requirements are unreasonable or otherwise legally infirm. Before the spring 2007 semester, C.O. would have been shy one and one-half credits of the 120 needed for graduation. Therefore, even if he had successfully completed the amnesty program, he still would not have been able to graduate in June 2007. The pivotal issue here is whether he had satisfied the requirements to participate in the graduation exercises including Project Graduation. Since C.O. lacks more than one subject to graduate due to his excessive unexcused absences from chorus, he is disqualified from participating in the graduation ceremony. Thus, the disagreement between M.O-B. and the school administration concerning the applicable tardiness standard in connection with the auto body course is largely moot. Accordingly, petitioner is unlikely to succeed on the merits and C.O.'s underlying right on his claim is far from settled.

If relief is not granted, C.O. will not be able to participate in the 2007 graduation exercises with his class. However, should he successfully meet the graduation requirements at the end of the summer session or the fall 2007 semester, there is no reason why he could not attend graduation ceremonies thereafter. Therefore, assuming that C.O.'s disappointment rises to the dignity of "harm," it is only irreparable to the extent that he would not again be able to graduate with the class of 2007. In this respect, the harm to petitioner is not grave. On the other hand, should he be allowed to participate in graduation ceremonies, the interests of the school district would be seriously prejudiced. The Board of Education and the school administration have a strong interest in establishing standards to which all students must adhere in order to enjoy the status, prestige, and privileges of Kearny High School graduates. School policies must be applied even handedly. It would be patently unfair if C.O. were allowed to enjoy the same privileges as other students who met the prescribed credit and attendance requirements. Actually, there are no equities which favor petitioner. Therefore, on balance, petitioner will not suffer greater harm than the school Board if the relief is not granted.

CONCLUSIONS

Based on the foregoing factual findings and legal authority, I **CONCLUDE** that petitioner has failed to demonstrate that the attendance and graduation standards promulgated by the Kearny Board of Education are arbitrary, capricious, unreasonable,

or otherwise not in accordance with law. I further **CONCLUDE** that petitioner has failed to establish equitable grounds for emergency relief, specifically, that he is likely to succeed on the merits. Accordingly, I **CONCLUDE** that the decision of the Kearny High School administration to bar him from participation in the June 2007 graduation exercises, including Project Graduation, is well grounded and in accordance with law.

DISPOSITION AND ORDER

Based on the foregoing findings and conclusions, the application for emergency relief is **DENIED** and the application is **ORDERED DISMISSED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

This file is being returned to the agency pursuant to N.J.A.C. 1:1-3.3.

6/11/2007
DATE

JAMES A. GERAGHTY, ALJ

pb

344-07

OAL DKT. NO. EDU 397-07
AGENCY DKT. NO. 6-1/07

S.D. on behalf of minor children J.D. and T.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SWEDESBORO-WOOLWICH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/31/07

Date of Mailing: 8/31/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 397-07

AGENCY DKT. NO. 6-1/07

S.D. O/B/O J.D. AND T.D.,

Petitioners,

v.

BOARD OF EDUCATION OF SWEDESBORO-WOOLWICH SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

John B. Comegno, Esq., for petitioners, (Comegno Law Group, P.C.)

Wayne C. Streitz, Esq., for respondent (Ware, Streitz & Thompson, attorneys)

Record Closed: July 2, 2007 Decided: July 17, 2007

BEFORE **ANA C. VISCOMI**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 29, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was then scheduled for a hearing before Hon. Joseph Lavery, ALJ on February 13, 2007. As Judge Lavery recused himself due to a conflict, the matter was thereafter reassigned to me.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release (J-1). The Board adopted a Resolution dated June 25, 2004, (R-1) approving the settlement.

I have reviewed the record and the terms of the settlement and Board Resolution and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures. The Board has passed a resolution approving the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 17, 2007
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

JUL 20 2007

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/lam

SWEDESBORO-WOOLWICH BOARD OF EDUCATION

RESOLUTION

OFFICE OF ADMIN LAW

BE IT RESOLVED by the Board of Education of the Swedesboro-Woolwich Consolidated School District in the County of Gloucester and State of New Jersey that the Tuition/Residency Settlement Agreement between the Board and S.D. family be approved as recommended by the Board Solicitor.

The motion was adopted by unanimous vote of all eight (8) members present.

The foregoing is a true copy of a resolution adopted by the Board of Education of the Swedesboro-Woolwich Consolidated School District in the County of Gloucester on May 9, 2007. A copy of the approved settlement is attached but remains confidential until fully implemented.

WITNESS

Date

Swedesboro-Woolwich
Board of Education

4/25/07

By:

Michael B. Griggel
Business Administrator/Board
Secretary

R-1

SETTLEMENT AGREEMENT
AND
GENERAL RELEASE

2007 JUN 18 A 11:30
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

This Settlement Agreement and General Release ("Agreement"), dated this 5th day of June 2007, is made and entered into by and between the Swedesboro-Woolwich Board of Education ("Board") on the one hand, and Seth and Susan Daniels ("Daniels") on the other hand, for good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged and agreed by the Parties, the Parties do hereby covenant and agree as follows:

DEFINITIONS

The following terms as used in this Agreement shall be defined as set forth in subparagraphs (A) through (J) of this section.

A. All references to the "effective date" shall refer to the date in which the following conditions have been fulfilled:

i. The parties and their attorneys have signed the Agreement.

B. All references to "Board" shall refer to the Swedesboro-Woolwich Board of Education, its members, administrators, teachers, staff, employees, attorneys, agents and assigns in their official capacity.

C. All references to "District" shall refer to the Swedesboro-Woolwich School District.

D. All references to "Daniels" shall refer to Seth and Susan Daniels.

E. All references to "Daniels Children" shall refer to the children of the Daniels enrolled in the District, specifically, M.D., T.D. and J.D.

F. All references to "Tuition" shall refer to any and all claims made by the Board or which can legally be made by the Board against the Daniels or Daniels children for any form of payment, other service or obligation on account of any goods or services the Board has supplied the Daniels and/or Daniels children.

G. All references to "Current Home" shall refer to the Daniels' current residence at 44 Messina Drive, Woolwich, New Jersey, 08085.

H. All references to "Grace Period" shall refer to the time after the date in which payment is due. Payment during the Grace Period is equivalent to payment prior to any due date listed in this Agreement.

I. All references to the "Parties" shall refer to the Board and the Daniels as those terms are defined herein.

J. Any term not defined in this section shall be interpreted based solely upon its common usage in the English language unless it is a legal term then the term shall be interpreted by its definition in the Black's Legal Dictionary.

WITNESSETH

WHEREAS, in approximately January 2005, the Daniels executed a contract of sale and construction for their Current Home. The builder of the Current Home, Piersol Homes at the Meadows, L.L.C., informed the Daniels that the anticipated date of completion was October 1, 2005;

WHEREAS, on or about August 24, 2005, the Daniels registered the Daniels Children in the District. At the Board's request, and in accordance with Board Policy No. 5111, the Daniels paid $564 in Tuition to the Board for each of the Daniels children for a total of $1,692. It was the understanding of the Daniels, based in part upon correspondence from the Board, that the

Board would reimburse the aforementioned tuition payments upon the receipt of documentation establishing that the Daniels Children were domiciled within the District;

WHEREAS, on or about September 6, 2005, the Daniels provided paperwork to the Board that they allege established the domicile of the Daniels Children within the District. The Board alleges that such documentation was insufficient to prove domicile;

WHEREAS, between September 6, 2005, and March 9, 2007, the Daniels submitted additional documentation that they allege further established the domicile of the Daniels Children within the District. The Board alleges that this additional information submitted by the Daniels was still insufficient to prove domicile;

WHEREAS, two of the Daniels Children, J.D. and T.D., have been attending school in the District since the beginning of the 2005-2006 school year and continue to attend school within the District until the present time;

WHEREAS, one of the Daniels Children, M.D., only attended school within the District for the 2005-2006 school year. For the 2006-2007 school year M.D. was enrolled in the Kingsway Regional School District;

WHEREAS, on or about December 21, 2006, the Board decided that the Daniels and the Daniels Children did not met the domicile or residency requirements for the Board, and that the Daniels owed the Board tuition payments for the time in which the Daniels Children had attended school within the District. The Daniels filed an appeal of the Board's decision with the Commissioner of Education, who subsequently transferred the matter to the Office of Administrative Law;

WHEREAS, on February 13, 2007, a hearing was held before the Honorable Joseph Lavery, A.L.J., concerning the Daniels' appeal of the Board's decision. Without issuing any

Order, Judge Lavery recused himself and the case was reassigned to the Honorable Ana C. Viscomi, A.L.J.;

WHEREAS, on March 9, 2007, the Daniels and the Daniels Children permanently moved into the Current Home, ending any dispute regarding the Daniels Children's domicile within the District and their right to attend the Board's schools without payment of tuition;

WHEREAS, as of March 9, 2007, the Board claimed $17,543 in Tuition was due and owing from the Daniels; and

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants and agreements contained herein, and intending to be legally bound, the Parties hereby agree as follows:

AGREEMENT

1. No Admission and Reservation of Rights. This Agreement is in compromise of disputed claims between the Board and Daniels, and is not, and shall not be construed as an admission by Daniels or Daniels Children to any violation of any state, federal, or local statute, regulation, judicial doctrine, or other law, or a violation of any right of any person or entity. Specifically, Daniels and Daniels Children disclaim violating any law or committing any unlawful action against any person or entity and disclaim any liability to any other person or entity.

With respect to the rights and obligations regarding or relating to all matters outside the scope of this Agreement, and regarding or relating to any person or entity not a party to this Agreement, the Board, Daniels and Daniels Children reserve all positions and all rights, defenses and privileges.

2. Acknowledgment and Representation. The Parties acknowledge that they have been given a reasonable period of time to consider this Agreement. The Parties have been represented by attorneys throughout this matter and have obtained advice of counsel as needed to understand each of the terms and conditions of this Agreement; they are satisfied with the advice they received from their attorneys and they enter into this Agreement willingly, freely, voluntarily, knowingly, and with the understanding that their rights and interests under and as they are affected by this Agreement are with full authority and consent, and without coercion or duress. The Parties further affirm and acknowledge that in executing this Agreement they do not rely and have not relied on any promise, inducement, representation or statement by the other Party about the subject matter, meaning, or effect of this Agreement that is not stated in this document, and that the only consideration for executing this Agreement are the promises including mutual releases expressly contained or described herein.

3. Settlement Amount. In full and complete satisfaction of any present and/or past obligation of the Daniels for Tuition, the Daniels shall pay to the Board the sum of NINE THOUSAND AND 00/100 DOLLARS $9,000.00 ("Settlement Amount") in accordance with the Payment Schedule set forth in section (4) of this Agreement specifically in exchange for the Board's release of any present and/or past obligation from the Daniels for Tuition, as well as the other commitments and recitals contained in this Agreement.

4. Payment of Settlement Amount. The Daniels shall pay the full Settlement Amount to the Board in twelve (12) equal monthly installments of SEVEN HUNDRED AND FIFTY AND 00/100 DOLLARS $750.00 ("Monthly Installment"), with the first Monthly Installment due within two (2) weeks of the date of the Order approving and incorporating this Agreement, and with the remaining eleven (11) Monthly Installment payments to be made on the

same day of the month thereafter until the full Settlement Amount is paid in full subject to the following terms and conditions:

a. The Board agrees to provide the Daniels with a forty-five (45) day Grace Period to pay each Monthly Installment;

b. The Daniels are entitled to pay any or all of the Settlement Amount prior to the expiration of the twelve (12) month payment schedule set out within this Agreement. Any such pre-payments made by the Daniels shall be credited against any subsequently owed Monthly Installments ("Pre-Payment Credits");

c. In the event that the Daniels fail to pay a Monthly Installment and the Daniels do not have a sufficient amount of Pre-Payment Credits to cover the amount of the missed Monthly Installment, the Board, following the expiration of the forty-five (45) Grace Period, may at its discretion enter a default against the Daniels for the sum of $17,500 less any payments previous made in accordance with this Agreement ("Default Amount");

d. If the Board decides to enter a default, the Daniels shall pay the Board any Default Amount within thirty (30) days from the date of the Daniels' receipt of written notice of the default from the Board. In the event the Daniels fail to pay the Default Amount within that thirty (30) day period, the Board may unilaterally apply to the New Jersey Superior Court, Gloucester County Vicinage for a judgment against the Daniels for the Default Amount;

The Daniels shall make each Monthly Installment by way of a personal or certified check made payable to the "Swedesboro-Woolwich Board of Education" and delivered by regular mail, federal express or hand delivery to the Board's Administrative offices located at 15 Fredrick Blvd, Woolwich Twp, New Jersey 08085.

5. Daniels Children. The Board recognizes that the Daniels Children have no responsibility for the facts and/or allegations contained within this Agreement. The Board recognizes and agrees that the Daniels Children owe no Tuition or any other obligation to the Board. The right to recover payment as set out in sections three (3) and four (4) of this Agreement is solely against the Daniels. The Board recognizes and agrees that the Daniels' Current Home is the Daniels Children's current domicile.

6. Dismissal and Final Order. In exchange for the mutual covenant set forth herein, the Parties shall immediately take whatever action is required to dismiss with prejudice the matter entitled *S.D. o/b/o minor children, J.D. and T.D. v. Board of Education Swedesboro, Gloucester County*, OAL Dkt. No. EDU397-07, as well as any and all other legal or administrative proceedings currently filed by one party against the other, including, but not limited to, its agents, contractors and assigns. The Parties specifically consent to the entry of a final Order and final decision incorporating this Agreement.

7. Board Approval. The Board has reviewed, voted on and approved the Agreement contained within this document and the document itself.

8. Covenant Not To Sue. In exchange for the aforementioned Agreement, the Board hereby forever waives and releases all legal or equitable claims other than the remedies mentioned within this document, they have or may have against the Daniels or their agents, representatives, or any other person who may be held accountable for the actions of the Daniels or Daniels children from all past, present, and future actions, claims, rights, accounts, suits, causes of action, obligations, debts, demands or liability of any kind or nature, known or unknown, foreseen or unforeseen, matured or unmatured, under state and/or federal law which in any way arise from or relate in anyway to any and all rights of the Board to seek tuition from the

Daniels or Daniels children for any period prior to the effective date of this Agreement, including, but not limited to, claims for tuition in accordance with N.J.A.C.6A:22-1.1 *et seq.* and N.J.S.A. 18A:38-1 *et seq.*

9. No Assignment. The Board hereby represents and warrants that it has not assigned or otherwise transferred or subrogated any claims or rights which it may have against the Daniels or Daniels Children regarding or relating to any right to seek Tuition for any period prior to the effective date.

10. Complete Agreement. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior and subsequent written or oral and all contemporaneous oral agreement, understanding, and negotiation.

11. Binding Effect. This Agreement shall be binding upon all parties and upon their next of kin, heirs, attorneys, representatives, administrators, executors, successors, and assignees.

12. Governing Law. This Agreement shall be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

13. Severability. If any portion of this Agreement is declared or determined by any court or other government body to be illegal or invalid that portion shall be excluded from the Agreement, but the validity of the remaining parts, terms, or provisions shall not be affected.

14. Amendments. This Agreement may only be amended in writing by way of a notarized document signed by all parties and the individual counsel for all parties.

15. Execution In Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which shall constitute one in the same instrument.

16. Headings. Headings contained herein are for purpose and organization only and shall not constitute a part of this Agreement or in any way alter the terms of the Agreement.

THE REMAINDER OF THIS PAGE HAS INTENTIONALLY LEFT BLANK

THE UNDERSIGNED HAVE CAREFULLY READ THIS SETTLEMENT AGREEMENT AND UNCONDITIONAL GENERAL RELEASE, ALL TEN (10) PAGES; THEY HAVE READ, KNOW AND UNDERSTAND ITS CONTENTS, THEY FREELY AND VOLUNTARILY AGREE TO ABIDE BY ITS TERMS, AND ARE FULLY AUTHORIZED TO SO, AGREE AND BE BOUND; AND THEY HAVE NOT BEEN COERCED INTO SIGNING THIS AGREEMENT.

For Seth and Susan Daniels

SETH DANIELS — Dated: MAY 21, 2007

SUSAN DANIELS — Dated: May 21, 2007

JOHN B. COMEGNO II, ESQUIRE — Dated: MAY 29, 2007
Counsel for Seth and Susan Daniels

For the Swedesboro-Woolwich Board of Education

Richard Fisher — Dated: 6, 5, 2007

WAYNE C. STREITZ, ESQUIRE — Dated: JUNE 5, 2007
Counsel for the Board

OAL DKT. NOS. EDU 9039-05 AND EDU 12277-05
AGENCY DKT. NOS. 142-6/05 AND 248-9/05
(CONSOLIDATED)

RICHARD J. SMUTEK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Confidential Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner is compelled to reject the proposed settlement. It is noted that this agreement calls for payments – in excess of $238,300 – to the instant petitioner, including payment of his *salary* of $156,000 plus longevity for the 2007-08 school year, *subsequent to his July 31, 2007 retirement.* Absent detailed explication of how payment of salary to a retired individual is possible and, most importantly, how expenditure of more than $238,300 is in the public interest – particularly in an Abbott District where it is essential that scarce resources be dedicated to the education of the District's school children – the Commissioner cannot consider granting approval to this proposed settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the parties' agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/16/07
Date of Mailing: 8/16/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED

INITIAL DECISION

SETTLEMENT - CONSOLIDATED

OAL DKT. NOS. EDU 9039-05 &
EDU 12277-05
AGENCY DKT. NOS. 142-6/05 & 248-9/05

RICHARD J. SMUTEK,
Petitioner,
v.
CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY,
Respondent.

Andrew Babiak, Esq., for petitioner

Karen A. Murray, Esq. for respondent (The Murray Law Firm, LLC, attorneys)

Record Closed: July 17, 2007 Decided: July 20, 2007

BEFORE **BARRY N. FRANK**, ALJ:

The matter bearing OAL Dkt. No. EDU 9039-05 was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on July 26, 2005, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A.

hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, and assigned to the undersigned on August 30, 2005. The matter bearing OAL Dkt. No. EDU 12277-05 was transmitted to the OAL on November 14, 2005. Subsequently, a consent order consolidating these cases was executed on February 7, 2006.

After numerous settlement discussions, the parties agreed to settle this matter. On July 10, 2007, they submitted the attached Confidential Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. On July 17, 2007, the Board Resolution approving the settlement was submitted, which is also attached and incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 20, 2007
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

Date Received at Agency: 7-26-07

Mailed to Parties:

JUL 26 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

THE MURRAY LAW FIRM, LLC
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Respondent

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RICHARD J. SMUTEK, **Petitioner,** **v.** **BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,** **Respondent.**	**Agency Docket No. 248-9/05** **OAL Docket No. 090339-2005N** **Agency Docket No. 142-6/05** **OAL Docket No. 12277-2005N** **CONFIDENTIAL** **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement (hereinafter "Agreement") is made this 28th day of June, 2007, by and between Petitioner, Richard J. Smutek (hereinafter "RJS"), who resides at 1 Enfield Circle, West Windsor, New Jersey 08550, and the Respondent, Elizabeth Board of Education (hereinafter the "Board"), with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207.

WITNESSETH:

WHEREAS, RJS is currently employed as a tenured teaching staff member for the Elizabeth Public School District; and,

WHEREAS, RJS has filed two (2) Petitions of Appeal with the Commissioner of Education which have been consolidated(Agency Docket No. 142-6/05; OAL Docket No.

EDUOA 09039-2005N; and Agency Docket No. 248-9/05; OAL Docket No. EDUOA 12277-2005N (hereinafter the "Litigation"); and,

WHEREAS, the Litigation involves RJS's assertion to tenure in the position of Assistant Superintendent; and

WHEREAS, the Board has denied the material allegations of RJS's Petitions; and

WHEREAS, to avoid the time and expense of further litigation, the parties mutually desire to settle and resolve the Litigation and all disputes and differences between them, on the terms and conditions set forth herein; and

WHEREAS, both the Board and RJS desire to enter into this Agreement stipulating the terms of the settlement of the Litigation including his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of mutual releases of any and all claims which the parties may have against the other arising from RJS's employment or otherwise;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. RJS agrees to sign an irrevocable letter of resignation from all employment with the Board, effective July 31, 2007. The resignation letter is attached as Exhibit A and shall

be expressly conditioned upon the Commissioner of Education's approval of this Agreement. The signed letter of resignation shall be held in escrow by the Board's counsel until such time as the Commissioner acts on this Agreement. The letter of resignation shall be null and void if this Agreement is not approved by the Commissioner and shall be returned to RJS in such event. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of RJS's resignation.

2. The Board shall acknowledge , for all employment purposes, that its initial transfer of RJS to the position of Director was not performance related, but due to central office staff reorganization.

3. RJS shall remain employed by the Board in the title of Director until such time as he resigns.

4. Upon the Commissioner's approval of the settlement, the Board shall provide RJS with the following retroactive salary adjustments:

(1) for the 2005-2006 school year, from $117,830 to $150,250, plus $1,500 (longevity);

(2) for the 2006-2007 school year, from $122,830 to $156,000, plus $2,000 (longevity).

The Board shall continue to pay RJS a salary of $156,000 (plus longevity) for the 2007-2008 school year. Within ten (10) business days from receipt of the Commissioner's approval of the settlement, the Board shall pay RJS the foregoing salary figures (less applicable

standard and ordinary withholdings) and shall also adjust RJS's payroll and personnel records in accordance with all applicable state and federal laws and regulations.

5. In consideration for services RJS rendered in supervising the Adult Evening Program for 2005-2006, beyond the normal working day, since the date of the Board transfer, the Board shall pay RJS a stipend of $9,162 (less applicable taxes and deductions) based upon RJS working 229.05 extra hours at a rate of $40 per hour. Said stipend shall be paid within ten (10) business days from the receipt of the Commissioner's approval of the settlement. In consideration for the services RJS rendered in supervising the Adult Evening Program for 2006-2007, beyond normal working day hours, the Board will pay RJS at a rate of $40 per hour, for a total of $896.65. Neither this agreement to pay for the time worked in '05-'06 or '06-'07 or the hourly rate shall be precedential for any other employees working with the Adult Evening Program.

6. Upon RJS's retirement, the Board agrees that it shall pay him for his unused sick leave days at the rate of $75 per unused sick leave day. Payment at this per diem rate shall not be precedential for any other Administrator in the District. The Board also agrees that upon RJS's separation from employment, it shall pay him for his unused, accumulated vacation days at his per diem rate, calculated as his final annual salary divided by 240 working days.

7. During the remainder of RJS's employment, the Board agrees to provide him with all the (non-salary) benefits, perquisites, and emoluments of the position of Director including membership dues; (family) medical; (family) dental; (family) vision; (family)

prescription; etc. Within ten (10) business days from receipt of the Commissioner's approval of the settlement, the Board shall reimburse RJS $1,270 for his payment of NJASA membership dues for 2005-2006, and $1,350 for his payment of NJASA membership dues for 2006-2007, and shall pay him $600 for additional travel allowances between July 2005 and June 2007.

8. The parties' entry into this Agreement shall not constitute an admission of guilt, wrongdoing or labeling on the part of the Petitioner or Respondent.

9. RJS waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that RJS shall not, as of the effective date of his resignation, receive from the Board any other compensation or benefits or emoluments of employment except as otherwise provided in this Agreement.

10. Except as otherwise provided herein, in consideration of the above, RJS agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past and present; and agents of the Board ("Releasees"), past and present, of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims seeking employment or re-employment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had. Except as otherwise provided herein, this release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1966, The Civil Rights Act of 1991, The Age Discrimination in

Employment Act of 1967, The Americans With Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board. Specifically excepted from this release are: (1) any claims arising from a breach of this Agreement or any provision hereof; (2) any claim relating to RJS's right upon cessation of employment with the Board to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA) (as amended); (3) any rights he may have arising under the Teacher's Pension and Annuity Fund (TPAF) and related statutes and regulations; and (4) any claim for indemnification under N.J.S.A. 18A: 16-6 or N.J.S.A. 18A: 16-6.1.

11. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge RJS from any and all claims which it may have against RJS. It specifically releases RJS from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency, or any other federal or state statutory provision, administrative

regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

12. The parties expressly agree that they shall act in good faith to ensure implementation of the terms of this Agreement.

13. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Agreement and that each signs this Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations, and are satisfied with the advice received.

14. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, successors, and assigns.

15. This Agreement incorporates and settles all claims and disputes which may exist between RJS and the Board arising from his employment or otherwise. Except as otherwise provided herein, it is understood and agreed that any and all previous discussions and

agreements, whether oral or written, are hereby merged into this Agreement, and that this Agreement is intended to be final and complete resolution of the Litigation.

16. The parties agree that the term of this agreement shall be kept in a separate confidential litigation file and shall not be released to anyone other than the parties or their legal representatives, except pursuant to Court order or valid subpoena.

17. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signatures of all the parties hereto are required for this Agreement to be binding on any party. An original signature transmitted by facsimile shall be deemed an original for purposes of this Agreement. This Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of New Jersey. Pursuant to N.J.A.C. 1: 1-19.1, this Agreement will be submitted to the Honorable Barry N. Frank, A.L.J. for his consideration and approval.

18. This agreement is subject to approval of the Board of Education.

For the Board:

Karen A. Murray, Esq.

Counsel for Respondent,

Elizabeth Board of Education

Dated: June 29, 2007

President, Elizabeth Board of Education

Dated:

For the Petitioner:

Andrew Babiak, Esq.

Counsel for Petitioner,

Richard J. Smutek

Dated: June 28, 2007

Richard J. Smutek

Dated:

EXHIBIT "A"

1 Enfield Circle
West Windsor, NJ 08550

June 28, 2007

Mr. Pablo Munoz, Superintendent of Schools
Elizabeth Board of Education
500 N. Broad Street
Elizabeth, NJ 07207

Dear Mr. Munoz:

Subject to the terms of the Stipulation of Settlement, I hereby tender my resignation, for retirement purposes, from all my positions with the Elizabeth Board of Education effective July 31, 2007.

Sincerely,

Richard J. Smutek

ELIZABETH BOARD OF EDUCATION

RESOLUTION

WHEREAS, Richard Smutek has pending litigation (OAL DKT: No. 090339-2005N; OAL DKT: No. A227-2005N), and

WHEREAS, in the interests of economy and efficiency, and

WHEREAS, Mr. Smutek and the Elizabeth Board of Education have agreed to resolve the above cases without a hearing and further litigation;

NOW, THEREFORE, BE IT RESOLVED, that the Elizabeth Board of Education hereby accepts the confidential agreement on file with the Board Secretary.

Elizabeth, New Jersey
Dated: June 28, 2007

345-07

#345-07

OAL DKT. NO. EDU 8746-06
AGENCY DKT. NO. 422-10/06

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
DENISE TUCKER, CAMDEN SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT, CAMDEN COUNTY.	:	DECISION
	:	

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

A copy of this decision is being transmitted to the State Board of Examiners for their records.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/06/07

Date of Mailing: 9/07/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08746-06
AGENCY DKT. NO. 422-10/06

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DENISE TUCKER, CAMDEN SCHOOL DISTRICT, CAMDEN COUNTY

Gregory G. Johnson, Esq., for petitioner, School District of Camden County (Sumners George, P.C., attorneys)

Jason E. Sololowski, Esq., for respondent (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: May 22, 2007 Decided: August 3, 2007

BEFORE **LAURA SANDERS,** CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 3, 2007
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

Receipt Acknowledged:

DATE
DEPARTMENT OF EDUCATION

Mailed to Parties: Laura Sanders
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 8 2007
DATE
OFFICE OF ADMINISTRATIVE LAW

/ns

Sumners George, P.C.
849 W. State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Camden City Board of Education

	: BEFORE THE COMMISSIONER OF
	: EDUCATION OF NEW JERSEY
IN THE MATTER OF THE TEACHING	:
CERTIFICATE OF DENISE TUCKER,	: AGENCY REF. No: 422-10/06
SCHOOL DISTRICT OF CAMDEN,	: OAL DOCKET No: EDUOR 08746-2006S
CAMDEN COUNTY	:
	: SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

The parties to this matter, petitioner City of Camden Board of Education ("District"), and respondent Denise Tucker, having reached an agreement to amicably resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

WHEREAS, Denise Tucker is a former teacher employed by the District;

WHEREAS, on or about October 12, 2006, the District filed an Order to Show Cause to suspend the respondent's teaching certificate pursuant to N.J.S.A. 18A:28-8 for respondent's failure to provide sixty (60) days written notice to the District of her intention to resign her teaching position;

WHEREAS, on or about November 8, 2006, Ms. Tucker through her attorneys filed a response to the Order to Show Cause essentially denying all charges;

WHEREAS, the respondent resigned her teaching position by written notice to the District on August 31, 2006, and the District accepted respondent's resignation on November 13, 2006;

WHEREAS, in light of the nature of the allegations and the possibility of protracted litigation, it is in the best interest of the parties to resolve the allegations before the Commissioner of Education;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner will withdraw its Order to Show Cause, thereby dismissing the action in its entirety.

2. Respondent, Denise Tucker agrees to a ten (10) month suspension of her teaching certificate beginning September 1, 2006 to June 30, 2007 for failure to provide sixty (60) days written notice to the District of her intention to resign her teaching position pursuant to N.J.S.A. 18A:28-8.

3. This Agreement constitutes the full Agreement between the parties.

4. By settling this matter, respondent acknowledges that she is waving her right to a hearing before the Office of Administrative Law and Commissioner of Education, in which she could seek an adjudication on the merits of the allegations in the Order to Show Cause, and on the penalty, if any, if the allegations are sustained. Respondent further acknowledges that she understands and agrees to the terms of this agreement and is satisfied with the legal representation that she received in this matter.

5. The parties agree that this agreement constitutes the full agreement between the parties, and that their agreement to this agreement and its validity is contingent upon

the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the allegations in the Order to Show Cause shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the allegations in the Order to Show Cause, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new, revised or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

6. By entering this agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against each other, except for any claims respondent may have arising under the Teachers' Pension & Annuity Fund statutes, N.J.S.A. 18A:66-1 et. seq., and any claims arising from a breach of this settlement agreement or any provision thereof. This includes all claims, including those of which both parties are not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. The releases specifically include, without limitation, all claims which respondent may have respecting tenure, discrimination on any basis, rights under the collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, except stated herein. The releases specifically

include, without limitation, all claims which petitioner, its individual members, successors, assigns, and agents, may have with respect to tuition reimbursement, reimbursement and/or repayment of monies from respondent pursuant to a service commitment contract dated May 14, 2003 between the District and respondent, or any other matter pertaining to her employment, except stated herein. However, the releases will be null and void if this Agreement is declared null and void by a court of competent jurisdiction or agency with jurisdiction over this matter.

7. The petitioner Camden Board has approved the terms of this settlement agreement as acknowledged by the attached resolution.

For the Employee

Denise Tucker

Dated: June 2007

Jason E. Sokolowski, Esq.
Attorney for Ms. Tucker

Dated: 6/25/07

For the Camden Board of Education

Dr. JoAnn Manning
Interim Superintendent of Schools
Camden Board of Education

Dated: 6/11/07

Gregory G. Johnson, Esq.
Attorney for Camden Board of Education

Dated: 7/12/07

RESOLUTION #189-SY'06

RESOLUTION OF THE BOARD OF EDUCATION OF THE CITY OF CAMDEN TO CONFIRM THE SETTLEMENT AGREEMENT WITH MS DENISE TUCKER

WHEREAS, The Camden Board of Education upon recommendation of the Interim Superintendent, and in consultation with Special Counsel for Labor, approves entering into a settlement in the matter entitled "In the Matter of the Teaching Certificate of Denise Tucker, Agency Ref. No: 422-10/06 School District of Camden, OAL Docket no: EDUOR 08746-2006S.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby authorizes the Interim Superintendent to sign the Settlement Agreement as a signatory, as well as Special Counsel for Labor, on behalf of the Board.

ROLL CALLL VOTE:

Yes: 9

Nay: 0

Abstentions: 0

Adopted: June 25, 2007

346-07

OAL DKT. NO. EDU OS 9009-2007N
AGENCY DKT. NO. 219-8/07

S. L. on behalf of minor child, D.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audiotape of the proceedings – and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.[1]

FACTS AND PROCEDURAL HISTORY

The controversy stems from an incident that occurred on Friday evening, July 6, 2007. During the incident a young man was severely beaten in the parking lot of respondent's high school. The following facts concerning D.L.'s relation to the incident are undisputed:

1. D.L. was asked by a fellow student, V.C., for a ride.
2. D.L. picked V.C. and N.S. up at the location designated by V.C.
3. At V.C.'s request, D.L. drove to the high school parking lot.
4. Another student, M.F., was already there and came to the car.

[1] There are no provisions for exceptions to proposed orders on emergent applications in *N.J.A.C.* 1:1-12.6 and *N.J.A.C.* 1:1-18.4. Further, petitioner's motion for expedited review was not entertained, since review of the order on petitioner's emergent application is already being undertaken on an expedited track.

5. V.C. and N.S. exited the car, spoke with M.F., and walked with M.F. to a group of young people about 50 feet from D.L.'s car.

6. D.L. remained in the school parking lot.

Exhibit H to the affidavit of Vincent J. Nuzzi, Esq. supporting petitioner's motion for interim relief (Petitioner's Affidavit) is an undated statement by D.L. concerning the evening of July 6, 2007. In the statement, which was prepared in consultation with his attorney and read to the respondent Board of Education (respondent Board) at a hearing on August 2, 2007, D.L. related that after V.C., N.S. and M.F. exited his vehicle and walked toward the group of young people, he "could hear arguing, and could see that someone was fighting." He further related that he exited his car "after a couple of minutes," and that he and an individual named "Dominick Dellavalle" went to where the fight occurred.

The statement also recounts:

> By the time I got to the scene of the fight everyone seemed to be attempting to break up the fight. Dominick Dellavalle was pulling V.C. away from the fight and trying to calm him down. Dominick put V.C. in my car. Dominick told me to get V.C. out of the lot. M.F. and N.S. got in the car and they asked me to drive them home to M.F.'s house.

It is undisputed that D.L. did drive the other students to M.F.'s house.

It appears from the record that within a few days of the incident, respondent had requested a meeting with D.L. and his parents to discuss same. (Exhibit A to Petitioner's Affidavit is a copy of a letter dated July 12 from petitioner's counsel to the principal of Verona High School asking for the deferral of any meeting until the disposition of the juvenile charges that had been brought against D.L.)

On July 19, 2007, respondent gave notice to petitioner, through counsel, that D.L. would not be allowed on school grounds until completion of the investigation into the

July 6, 2007 incident. (Exhibit B to Petitioner's Affidavit) A letter with the same date, and the subject heading "D.L. – Expulsion Hearing", was sent by respondent's counsel to petitioner advising that a formal hearing would take place on August 2, 2007, and that it could result in the imposition of disciplinary sanctions. (Exhibit D to Petitioner's Affidavit) At the time of the letter, the charges against D.L. were:

1. Aggravated assault on school property; and
2. Trespassing on school property.

A list of witnesses expected to testify at the hearing was provided in the letter, as well as an indication of the documents upon which respondents planned to rely and instructions outlining petitioner's rights relative to the hearing. The letter also advised that respondent had determined not to refer D.L. to the Child Study Team, but that petitioner could request an evaluation if he believed D.L.'s alleged misconduct might have been attributable to an educational disability. Petitioner was invited to contact respondent's counsel with any questions he might have about the upcoming proceeding. (Exhibit D to Petitioner's Affidavit)

By way of a letter dated July 25, 2007, respondent's counsel provided petitioner's counsel with the three-page police report, dated July 7, 2007, concerning the incident. (Exhibit F to Petitioner's Affidavit) The report indicates that the victim was able to identify his attackers, and that the attackers had arrived in a car matching the description of petitioner's car. The victim and witnesses apparently told police that four males exited the car and asked the victim where another individual was. One of the four males began punching the victim. After the victim was repeatedly punched and kicked, the four males were said to have returned to the car that they arrived in and left the scene.

Respondent's counsel advised petitioner's counsel that the police report was the only document provided by the police to respondent, and that respondent did not receive copies of individual statements provided to the police by witnesses. Petitioner's counsel asserted – in Paragraph 15 of Petitioner's Affidavit – that respondent did have copies of the individual statements collected by the police, as well as statements taken by the assistant principal of Verona High School.

On or about July 29, 2007, respondent's counsel told petitioner's counsel that he was then in possession of sworn statements of the victim and eyewitnesses to the incident. Based upon those statements, he had concluded that D.L. had not incited the attack or struck the victim. He informed petitioner's counsel that the respondent Board wished to use the upcoming August 2, 2007 hearing to ask D.L. questions. Among the questions would be the extent of D.L.'s foreknowledge, if any, of an anticipated altercation. (Petitioner's Affidavit, #17)

On August 2, 2007, D.L., his parents, and their counsel appeared before the respondent Board. The Board advised that they would not take any testimony from eyewitnesses, but might hear from the investigating police officer, whom petitioner's counsel would be allowed to cross examine on a limited basis. (Petitioner's Affidavit, #18-19)

Petitioner's counsel alleged in his affidavit that at the time of the August 2, 2007 hearing, the information that had been provided to the respondent Board consisted of summaries of witness statements – prepared by the assistant principal – which were not provided to petitioner's counsel, and copies of the "initial" police report. He further alleged that respondent's counsel represented that the information in the assistant principal's summaries did not differ significantly from the police reports that were issued subsequent to the initial report

provided to petitioner's counsel on July 25, 2007. (Petitioner's Affidavit, #21) The respondent Board also reviewed photographs of the victim's injuries. (Petitioner's Affidavit, #27)

Petitioner's counsel made an opening argument to the respondent Board, D.L. made the above referenced statement that is attached to Petitioner's Affidavit as Exhibit H, and petitioner submitted D.L.'s cell phone record for the date of the incident. Counsel for the three students whom D.L. drove to and from the high school refused the request of petitioner's counsel to testify for D.L. at the hearing. (Petitioner's Affidavit, #21-22)

According to petitioner's counsel, the respondent Board asked D.L. questions to ascertain what D.L. knew before the incident. They also asked him about a report by an eye witness that D.L. had stated "He's had enough, come on let's go." They inquired about a report that he had sped into the parking lot, and asked when the first time was that he spoke to anyone about the incident. (Petitioner's Affidavit, #24) According to petitioner's counsel, D.L. denied foreknowledge of the fight, denied making the statement that the victim had "had enough," and denied speeding into the school parking lot. Petitioner's counsel represented that D.L. first told his parents about the incident the next day when the police called. (Petitioner's Affidavit, #26)

After questioning D.L., the respondent Board met in private with the district superintendent, after which it deliberated in executive session. (Petitioner's Affidavit, #28) In paragraph 29 of Petitioner's Affidavit, petitioner's counsel alleged that, after deliberations, respondent's counsel advised that the respondent Board had found D.L. culpable for complicity in the altercation, that the Board had found that he was not credible, and that the Board had concluded that D.L. had had foreknowledge of the attack. There is no transcript of the Board hearing in the record, and no evidence from respondent to rebut the allegations.

The respondent Board heard argument from petitioner's counsel concerning an appropriate penalty, deliberated with counsel and the district superintendent, and advised that the hearing would be continued to August 7, 2007. (Petitioner's Affidavit, #31-33)

Petitioner's counsel made arrangements for Dominick Dellavalle to give a statement to the assistant principal. According to petitioner's counsel, Dellavalle related in the statement that it was he who had said "[H]e's had enough, let him go." Dellavalle also recounted that he had put V.C. in D.L.'s car and told D.L. to remove him from the scene. (Petitioner's Affidavit, #37)

At the August 7, 2007 hearing continuation, the respondent Board did not have copies of the Delavalle statement, but the district superintendent acknowledged the above reported substance of same. (Petitioner's Affidavit, #39) According to petitioner's counsel, respondent's counsel represented that the Board was satisfied that D.L. did not have foreknowledge of the attack, but the Board remained interested in why D.L. did not try to break up the fight and why he drove V.C., N.S. and M.F. to M.F.'s house. (Petitioner's Affidavit, #41)

After deliberations, the respondent Board concluded the following, as reflected in a resolution dated August 7, 2007:

> A. It is uncontroverted that D.L. did not physically touch anyone once arriving at the high school parking lot that evening. It is also uncontroverted that D.L. did not take any actions to incite of [sic] otherwise encourage the participation or continuation of the assault that evening. D.L.'s [sic] also did nothing to try and stop the fight.
>
> B. It is uncontroverted that D.L. drove V.C. and N.S. to the high school parking lot after being asked to do so by V.C. It is also uncontroverted that, after the assault took place, D.L. drove N.S., M.F. and V.C. from the high school parking lot to M.F.'s home.
>
> (Exhibit K of Petitioner's Affidavit)

In consequence of the foregoing facts, respondent determined that:

D.L. did not commit an aggravated assault against another student. However, it is clear that D.L. was complicit in the actions of others that evening and took limited steps to stop or otherwise deter the students from participating in the assault at the high school parking lot that evening. With regard to the second charge of trespass on school property, the Board finds these charges to be sustained; however, since the victim and other witnesses to this incident were not similarly charged with trespassing, no disciplinary action will be taken concerning this charge.

(*Ibid.*)

On the basis of those determinations, respondent imposed the following penalties:

1) D.L. shall be placed on a long-term probationary period for the remainder of his high school term in order to continue his education in the district schools. A violation of these conditions of probation shall result in an expulsion of D.L. after the appropriate procedures and hearings. The conditions of probation are as follows:

    a. D.L. shall not display any acts of violence/ disobedience/defiance/insubordination/offensive language or other flagrant act toward any employee or student of the District.

    b. D.L. shall neither retaliate nor have others act on his behalf against any witnesses or potential witnesses to the July 7, 2007 incidents.

    c. D.L. and parents shall make every effort to attend any counseling programs/services provided by the District.

2) The Board affirms the District Administration's recommendations as to the appropriate penalties for participation in various privileges for the 2007-2008 school year including extracurricular and co-curricular activities. These recommendations are as follows:

    a. D.L. shall be provided a three-day in-school suspension, beginning the second day of school, September 11, 2007.

    b. Loss of captaincy on teams for the 2007-2008 school year.

    c. Loss of open lunch for the 2007-2008 school year with the opportunity to appeal for reinstatement at the end of the first semester.

d. Loss of parking privileges for the 2007-2008 school year with the opportunity to appeal for reinstatement at the end of the first semester.

e. A five (5) week exclusion from participation in any co-curricular and extra-curricular activities, beginning the first day of school (September 10, 2007) and ending on October 14, 2007. A two-week reduction to the exclusion shall be granted, pending display of good behavior during the time period which would permit participation on October 1, 2007.

f. Prior to the beginning of the school year, D.L. shall continue to be excluded from participation in any co-curricular or extra-curricular activities.

(Ibid.)

On August 14, 2007, petitioner filed an appeal with the Commissioner of Education and a motion for emergent relief. The matter was transmitted to the Office of Administrative Law (OAL) and heard by an administrative law judge (ALJ) on August 20, 2007. At the conclusion of argument by counsel for both parties, the ALJ entered a proposed order on the record.

The proposed order – which was memorialized on August 21, 2007 – recommended a stay to the portion of respondent's resolution that prohibited D.L. from participating in football practice, pending the hearing on the merits of petitioner's appeal. The ALJ recommended upholding the "balance" of respondent's resolution. A review of the hearing audiotape reveals that the rationale for the ALJ's proposed order was his view that barring D.L. from football practice would render moot any favorable outcome that D.L. might ultimately be granted after a hearing on the merits of the case.

CONCLUSIONS OF LAW

As the parties acknowledge, the instant application for emergent relief must be evaluated pursuant to the standards set forth in *N.J.A.C.* 6A:3-1.6 (b) and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Petitioner has the burden of showing, by a preponderance of the evidence, that: (1) the relief is necessary to prevent irreparable harm; (2) the legal right underlying petitioner's claim is settled; (3) petitioner has a reasonable probability of ultimate success on the merits.; and (4) a balancing of the equities reveals that petitioner would suffer greater hardship than respondent if the requested relief were denied.

A. Irreparable Harm

In considering the argument made before the ALJ on August 20, 2007, the Commissioner concludes that the gravamen of petitioner's prayer for relief from the penalties imposed by respondent appears to pertain to the penalties related to football. He asks that the restrictions against him practicing and playing football be lifted. The Commissioner agrees that the facts support a finding of irreparable harm, insofar as there is no way to replace missed participation in football games and practices.[2] However, there are three further standards to be met by petitioner, all of which must be satisfied in order to establish entitlement to emergent relief.

---

2 The Commissioner is cognizant of the well-established principle that a prohibition from attending extracurricular events does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests, and not its irreparable nature – that applications of this type actually fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003.

B. Settled Legal Right

The settled legal right which petitioner invokes in the present matter is the right of due process. The nature of the process which is due students who have been given notice that they may be disciplined by school authorities is addressed in Department of Education regulations *N.J.A.C.* 6A:16-7.1 through 7.6. A distinction is made between the process due for the imposition of suspensions that are longer than ten days, and suspensions that are ten days or less. The latter are designated "short-term suspensions," and the process due students faced with possible short-term suspensions is outlined in *N.J.A.C.* 6A:16-7.2. Petitioner argues that since the caption in respondent's July 19, 2007 notice to petitioner of charges stated that an expulsion hearing was anticipated, the Commissioner should determine that D.L. was entitled to the more comprehensive "process" provided in *N.J.A.C.* 6A:16-7.3 and 7.5. The Commissioner disagrees.

The record shows that respondent disseminated the first communications to petitioner at a time when it was relying upon an initial police report, and the police investigation was ongoing. The initial police report indicated that all four students who arrived at the school parking lot in D.L.'s car participated in the beating of the victim. By the time the hearing actually commenced, respondent had communicated to petitioner's counsel its determination that D.L. had neither incited the attack nor assaulted the victim. While respondent articulated its inclination to believe that D.L. had foreknowledge of the fight, it continued the hearing to another day for further presentations and deliberations.

By the commencement of the second day of the hearing, after petitioner was able to present more evidence, respondent imparted its determination that D.L. did not have foreknowledge of the attack on the school grounds. Questions were directed to D.L. about his reasons for not trying to break up the fight and for driving his friends away from the scene.

Respondent ultimately found D.L. complicit in the attack by virtue of his failure to try to stop it and by his transport of V.C., N.S. and M.H. from the school parking lot. The penalty was far less than a ten day suspension.

The Commissioner declines, at this point in the proceedings, to impose the due process requirements for long-term suspensions and expulsions, where the penalty imposed was a short-term suspension. At the time of its first notices, respondent was required to warn of possible expulsion, because the information it had at the time suggested that D.L.'s behavior warranted same. The less formal procedures employed by respondent at the hearing flowed from the revised information which it received subsequent to its first letters to petitioner. The settled right applicable to D.L. in this case is the due process outlined in *N.J.A.C.* 6A:16-7.2.

C. Liklihood of Prevailing on the Merits [3]

In applying *N.J.A.C.* 6A:16-7.2 to the measures which respondent took in response to the July 6, 2007 attack on its property, the Commissioner finds that respondents actions, overall, appear to have complied with that regulation's terms:

1. Oral contact was made with D.L.'s family on July 7, 2007 – the day after the incident. On July 12, 2007, petitioner's counsel wrote to the high school principal stating that D.L. would not speak to the school authorities. Five days later respondent sent a letter to petitioner articulating charges based upon the information it had at that time. That information was based upon sources other than D.L., since D.L. was not permitted to speak with respondent's representatives. *N.J.A.C.* 6A:16-7.2(a)(1) accordingly appears to have been satisfied.

[3] At the outset, the Commissioner rejects any contention by petitioner that respondent does not have jurisdiction over altercations which occur on its property.

2. A hearing took place prior to the suspension wherein D.L. was allowed to give his version of the incident. While the hearing could have been conducted by a school administrator, it was conducted in the presence of both administrators and the Board. *N.J.A.C.* 6A:16-7.2(a)(2) accordingly appears to have been satisfied.
3. *N.J.A.C.* 6A:16-7.2(a)(3) and (4) pertain to the treatment of students who are being disciplined while school is in session. To the extent that they may apply in this matter, respondent appears to have substantially complied with them.
4. There appears to be no dispute about respondent's compliance with *N.J.A.C.* 6A:16-7.2(a)(5). D.L. will be given educational instruction during his three-day in-school suspension.
5. Respondent appears to have complied with the reporting requirements of *N.J.A.C.* 6A:16-7.2(b).
6. Finally, *N.J.A.C.* 6A:16-7.2(c) does not appear to be applicable to this matter.

Accordingly, the Commissioner cannot conclude that petitioner is likely to prevail on the merits of his challenge to respondent's disciplinary action.

D. Balance of Equities

Petitioner presents numerous assertions about the irreparable harm that D.L. (and the football team) may experience as a result of a delay in his participation in football. The Commissioner agrees that the absence may generate some questions if D.L. seeks to join teams in the future, but on balance, the Commissioner finds that most of the contentions are speculative and without merit.

If D.L. chooses to stay in physical condition to play football, there are other venues which he can employ. There is no bar to D.L. associating with his team members and the coach, and D.L. may presumably obtain information about plays and strategies thereby. It seems likely that at least some of the plays employed this year will have been employed in prior years during which D.L. played football.

Since there are co-captains, the football team will not be leaderless in D.L.'s absence. Any effect of D.L.'s absence on the team's success is speculative and, as the policy petitioner mentions in his papers clearly articulates, "winning" is not a criteria for evaluating the educational value of the school's athletic teams. Moreover, the football team is not a party to this matter.

The Commissioner cannot conclude that a three-week absence from football will bar D.L. from admission to college. Nor can she conclude, in light of D.L.'s overall athletic abilities, that D.L. will be barred from college sports as a result of such an absence from games and practices. Similarly, any assumptions about scholarships must be deemed speculative.

Finally, as argued by respondent, extracurricular activities such as high school sports are privileges, not educational rights. *See, e.g., J.M.G. on behalf of minor child J.G. v. New Jersey State Interscholastic Athletic Association,* decided by the Commissioner, April 24, 1998. In sum, the Commissioner cannot regard the irreparable harm caused to D.L by a limited absence from football as severe.[4]

By way of contrast, the harm to respondent – were the Commissioner to stay the imposition of its penalty upon D.L. – would be significant. The occurrence of such a violent incident on school property can and does create a chilling effect on the students, their families and the community. As part of its efforts to ameliorate the community's understandable

[4] See note 2, *supra.*

concerns, respondent must be able to discipline the students who were involved, irrespective of whether the discipline comes at a convenient time.

Relying on the undisputed facts and on D.L.'s own statement to the respondent Board – which statement was filed by petitioner's counsel – the Commissioner has no difficulty accepting, for purposes of this emergent application, that D.L. was complicit in the July 6, 2007 incident. While he may not have known – when he was driving the other students to the school premises – what was about to occur, he plainly stated that he heard arguing and saw that someone was fighting. Yet, there is no indication in the record that he attempted to call the authorities.

He and Dominick Dellavalle "went over to where the fight occurred."[5] Others "seemed to be attempting to break up the fight," and "Dellavalle was pulling V.C. away from the fight and trying to calm him down." D.L. did not offer any indication that he tried to assist.

Based on the foregoing statements, it appears that – at the very least – D.L. knew that V.C. was involved in the altercation. That knowledge notwithstanding, D.L. removed V.C. and the others from the scene.

It is possible that at the time of this incident, D.L. did not understand what his responsibilities were as a person who witnessed a fight on school property and saw that his friend or acquaintance was a participant. That lack of understanding does not excuse him from the consequences that flow from the abandonment of those responsibilities, and it is hoped that he will not react similarly in the future.

The Commissioner does not imply that D.L. should have put himself at risk by stepping into the middle of a fight. However, there is no indication that he called for help or did anything to ameliorate the situation. At the very least, D.L. assisted students – who had

[5] In light of that statement it is not unreasonable to conclude that D.L. was aware that someone had been hurt.

seriously violated school policies and brutally harmed another student – by transporting them away from the scene of the infractions and allowing them to evade the authorities.

Petitioner's motion papers have not demonstrated that the imposition of a three-day suspension and the curtailment of extracurricular activities for a discrete period of time – with the opportunity to shorten the time for good behavior – is an arbitrary or capricious action by respondent. Indeed, divesting respondent of its discretion to impose that penalty, under the circumstances of this case, would impose a more serious harm than the penalty will impose upon D.L. Thus, a balancing of the equities does not favor petitioner.

Petitioner has not met the standards set forth in *N.J.A.C.* 6A:3-1.6 (b) and articulated in *Crowe v. DeGioia, supra.* Accordingly, the proposed order of the ALJ granting a stay of respondent's action with respect to D.L.'s participation in football practices is rejected and petitioner's application requesting emergent relief is denied.

IT IS SO ORDERED.[6]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/07/07

Date of Mailing: 9/07/07

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

NUZZI & MASON, LLC
50 Nelson Street
Dover, New Jersey 07801
(973) 366-9300
Attorneys for Petitioner, D.L.

S.L. & L.L. on behalf of D.L. Petitioner(s), vs. Verona Board of Education, Respondent(s).	**OFFICE OF ADMINISTRATIVE LAW** OAL DOCKET NO.: EDU OS 9009-2007N ORDER GRANTING EMERGENT RELIEF

This matter having been opened to the Commissioner of Education on the motion and affidavit of Nuzzi & Mason, LLC, attorney for Petitioners in the above captioned matter, for an Order Granting Emergent Relief on notice to Defendant; and having considered the papers submitted; arguments of counsel, if any; and for good cause shown; it is hereby

ORDERED that any portion of Respondent's August 9, 2007 Resolution prohibiting D.L. from participating in football practice is hereby stayed pending the hearing of Petitioners' appeal in this matter, and D.L. shall therefore be permitted to participate in all practices with the Verona High School Football Team; and it is further

ORDERED that the balance of Respondent's August 9, 2007 resolution shall be enforced in all respects pending the hearing of Petitioners' appeal in this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision on this matter. The final decisions shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF**

THE DEPARTMENT OF EDUCATION does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

DATE: August 21, 2007

BARRY N. FRANK, ALJ

#338-07

OAL DKT. NO. EDU 4655-07
AGENCY DKT. NO. 176-6/07

DIASHA WOODS ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-14.4 – along with copies of notifications sent to the parties by the OAL on August 9, 2007, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.[1]

IT IS SO ORDERED.

Jmin EDay

COMMISSIONER OF EDUCATION

Date of Decision: 8/23/07

Date of Mailing: 8/24/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

348-07

OAL DKT. NO. EDU 4400-06
AGENCY DKT. NO. 406-11/04

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.A. AND B.Z.,	:	ORDER
RESPONDENT.	:	

On May 31, 2007, a final agency decision was rendered in this matter, wherein the Commissioner adopted the Initial Decision of the Office of Administrative Law assessing respondents, Christine Applegate (C.A.) and Barbara Zimmerman (B.Z.), $22,499.40 in tuition to compensate the Hamilton Township Board of Education for the ineligible attendance of C.A.'s three children in the public schools of the district pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that – as of July 3, 2007 – no payments had been made toward the judgment amount, and it requested that the Commissioner seek, as to both respondents, entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10.

When offered the opportunity to contest the Board's representations, B.Z. contended she was not responsible for decisions made by the children's parents and reiterated her argument (previously made at hearing) that she had simply offered her home to the children so they could live in a stable environment – which she would no longer be able to provide if a judgment is recorded against her, since her means are limited; at no point, however, did she deny the Board's claim as to nonpayment of the ordered assessment. C.A. did not respond to the Department's notice of opportunity, and all attempts to reach her

for this purpose – including an attempt made through B.Z., who was presumed to know her whereabouts, were unsuccessful. The Commissioner, therefore, has no alternative but to conclude that the assessment against respondents – duly ordered after full and fair hearing pursuant to the Administrative Procedure Act – has not been satisfied in whole or part, so that the Board is entitled to the docketing it requests.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Christine Applegate and Barbara Zimmerman are now subject to entry of a judgment by the court in the amount of $22,499.40, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/07

Date of Mailing: 9/10/07

349-07

#349-07

A.M.S., ON BEHALF OF MINOR CHILD, A.D.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a single parent on active duty in the United States Army, who resided in Jackson Township prior to his enlistment – contested the Margate Board's determinations that his adopted son, A.D.S., is ineligible to receive a free public education at district expense because he does not meet the residency requirements provided by law. Petitioner, who claimed to be domiciled in Margate, had arranged for his parents, who are residents of Pennsylvania, to temporarily care for A.D.S. after the sudden death of his wife. About a year later, the grandparents became unable to continue providing physical care to A.D.S. – a classified special needs child – and they and his father placed him a private residential setting. Margate disclaimed responsibility for educating A.D.S., whom it contends is domiciled in Pennsylvania with his grandparents.

The ALJ found, *inter alia,* that: *N.J.S.A.* 18A:38-3b – which governs residency issues for students who are the children of members of the New Jersey National Guard or a reserve component of the U.S. military – does not apply in this case, as the petitioner is enlisted in the regular U.S. Army; petitioner is domiciled in the City of Margate as he took the steps necessary to manifest his intention to establish permanent residency there; petitioner is no longer domiciled in Jackson Township; and, based on the holding in *Board of Education of the Township of East Brunswick v. J.R. and the Board of Education of the Township of Edison* – wherein the judge held that the grandparents of a dependent child of an active duty military parent met the conditions for supporting the child gratis as set forth in *N.J.S.A.* 18A:38-1b(1) – A.D.S. is no longer domiciled with his father, but rather with his grandparents in Pennsylvania. Accordingly, the ALJ recommended that the petition be dismissed.

The Commissioner adopted the Initial Decision in part, and rejected it in part. The Commissioner concurred with the ALJ that: *N.J.S.A.* 18A:38-3b has no bearing on this matter as petitioner is an enlisted member of the regular U.S. Army; petitioner has severed his ties to Jackson Township by affirmatively establishing domicile elsewhere; and petitioner has established domicile in the City of Margate. The Commissioner did not agree, however, that A.D.S. had no entitlement to education in Margate, finding instead that the temporary arrangement with his grandparents did *not* shift his legal domicile from that of his father – a New Jersey domiciliary – to that of his grandparents. The Commissioner found, therefore, that the Margate Board of Education was responsible for providing a free public education to A.D.S. and directed that it take the steps necessary to do so.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 7, 2007

OAL DKT. NO. EDU 218-07
AGENCY DKT. NO. 433-11/06

A.M.S., ON BEHALF OF MINOR CHILD, A.D.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the Margate Board of Education's ("Margate" or "the Board") replies thereto, both filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.[1] The Jackson Township Board of Education filed neither exceptions nor replies.

On exception, petitioner contends that the Administrative Law Judge (ALJ) erred in his conclusions regarding A.D.S.'s domicile and the in applicability of *N.J.S.A.* 18A:38-3(b) to this matter, and in failing to address petitioner's allegations of procedural deficiency in the Board's determination of A.D.S.'s ineligibility to attend school in the district.

[1] Pursuant to *N.J.A.C.* 1:1-18.4(d), Margate included cross-exceptions with its replies; these, however, were not considered by the Commissioner in rendering her decision herein. See Note 5 below.

With respect to A.D.S.'s domicile, petitioner argues that the ALJ misconstrued the Commissioner's decision in *East Brunswick, supra*,[2] wrongly reading it to compel the conclusion that A.D.S.'s domicile must be found to have shifted from that of his father to that of his grandparents. According to petitioner, the ALJ failed to recognize that *N.J.S.A.* 18A:38-1(b) – the sole basis upon which *East Brunswick* was decided – neither creates nor alters a student's domicile, but rather provides an alternative means of establishing an entitlement to free education in a school district for a student living with someone other than a parent/guardian under circumstances meeting the criteria of statute. Petitioner urges that there is nothing in *East Brunswick*, or in the facts of this matter, that would warrant – let alone require – deviation from the longstanding general rule that the domicile of a child follows that of his or her parent; to the contrary, petitioner stresses, A.D.S.'s residency with his grandparents was never intended to be permanent – as is necessary to establish domicile – but was in both fact and intent a temporary measure to provide care for the child until a more suitable arrangement could be made. Moreover, petitioner notes, both the statute itself and regulations promulgated by the State Board at *N.J.A.C.* 6A:22 clearly distinguish between domicile and "affidavit" status, so that if satisfying the criteria for the latter resulted in a finding of domicile, such distinction would be unnecessary.[3] (Petitioner's Exceptions at 2-9)

Petitioner further argues that *N.J.S.A.* 18A:38-1(b) does not even apply to this matter. According to petitioner, that statute of necessity must be understood to refer solely to New Jersey school districts, and A.D.S.'s grandparents are domiciled in

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[2] The Initial Decision (at 19) gives an incomplete citation for this decision, which is found at 96 *N.J.A.R.*2d(EDU) 285..

[3]Petitioner references *N.J.A.C.* 6A:22 for general interpretive purposes, notwithstanding his belief that the regulations may be inapplicable to the present matter by their very terms, which exclude "children of military parents" at *N.J.A.C.* 6A:22-1.1(a). (Petitioner's Exceptions at 4, Note 3)

Pennsylvania; moreover, petitioner urges, no claim of entitlement as an "affidavit" student has been made herein, and there is no authority in law or case precedent to impose the "affidavit" provision of *N.J.S.A.* 18A:38-1 on a family that has not sought – and does not wish – to invoke its protection. Such imposition, petitioner avers, employs the statute as a tool to *prevent* a student from obtaining free education in a district, contrary to its clear purpose of *expanding* opportunities for students unable to reside with their parents. (Petitioner's Exceptions at 9-12)

Petitioner additionally disagrees with the ALJ that *N.J.S.A.* 18A:38-3(b) does not control in this matter, reiterating his argument that the spirit and intent of the law – to acknowledge the sacrifice of all service people forced to leave their children's school districts while they are on active duty – must prevail over its letter, which recognizes the service of only the New Jersey National Guard and U.S. reserve forces. This is particularly true, according to petitioner, in a case such as his – where placing form over substance will result in "the potential loss of all educational opportunities for his disabled son," whose ability to attend school in Pennsylvania could cease at any time because his grandparents' district allowed him to matriculate notwithstanding that he does not meet applicable requirements of Pennsylvania law. (Petitioner's Exceptions at 12-14, quotation at 14)

Finally, petitioner reiterates his contention that the Board's written notice of ineligibility failed to comport with *N.J.A.C.* 6A:22-4.2(b), in that it provided only conclusory statements with respect to the Board's substantive findings and none of the requisite information regarding appeal, interim attendance, and so forth. According to petitioner, such deficiency – although not addressed by the ALJ – is yet "another basis for

the Commissioner to find that Margate should bear responsibility for [A.D.S.'s] public education." (Petitioner's Exceptions at 14-16, quotation at 16)

Petitioner concludes by endorsing the ALJ's expression of regret at being compelled to find a soldier's child ineligible for free public education in the district where his parent is domiciled because the parent has been forced to leave his home while he serves in the field, thus penalizing the child for the parent's sacrifice for his country. While conceding that the facts of this matter "do not exactly match what the Legislature or the Department had provisioned for," petitioner contends:

> Nonetheless, the Commissioner is vested with broad powers to safeguard the educational interests of all children in New Jersey. Despite his short-term stint in Pennsylvania, there can be no doubt that [A.D.S.] is one of New Jersey's school-aged citizens. Petitioners call upon the Commissioner to reverse [the ALJ's] decision and ensure that [A.D.S.], like all other young New Jerseyans, receives the free public education to which he is entitled. (Petitioner's Exceptions at 17)

In reply to petitioner's exceptions, the Margate Board of Education urges the Commissioner to adopt the ALJ's finding that A.D.S.'s domicile must now follow that of his grandparents, in light of the clear evidence showing that he was sent to live with them and that they are legally vested with custody, guardianship and authority over his health, education and welfare. The Board points to stipulated facts (Exhibit J-1); testimony elicited at hearing;[4] the executed documents conferring power of attorney (Exhibit P-2); tax returns (Exhibits R-11A,B,C and R-12); and affidavits signed by A.D.S.'s grandparents upon enrolling him in Pennsylvania for 2005-06 and 2006-07 (Exhibits R-6, R-7), regarding their support of A.D.S., their assumption of responsibility for him in all matters related to school, and their intent to keep him continuously – all showing that the arrangement is *not* temporary and that A.D.S.'s grandparents are acting

[4] The record provided to the Commissioner did not include hearing transcripts.

in the place of a parent who intends to remain in the military until retirement, thus conferring their domicile upon A.D.S.

According to the Board, petitioner has failed to understand that the ALJ (properly) relied upon *East Brunswick, supra*, for "practical guidance" in allocating educational responsibility under facts similar to those herein. Pursuant to *East Brunswick*, the Board contends, where parents and grandparents establish an arrangement in which the grandparents are caring for and supporting the child, entitlement arises solely under *N.J.S.A.* 18A:38-1(b), since entitlement under *N.J.S.A.* 18A:38-1(a) is "no longer possible because the requirements of *N.J.A.C.* 6A:22-3.1(a) [are] not satisfied." According to the Board, the only difference here is that A.D.S.'s grandparents are domiciled in Pennsylvania, a fact from which no deprivation results since the record nowhere indicates that the school district in which the grandparents reside – and in which A.D.S. was previously enrolled – has refused, is refusing, or will refuse to educate A.D.S.; indeed, the Board contends, A.D.S. is entitled to "affidavit" status under provisions of Pennsylvania law that substantively parallel those of New Jersey at *N.J.S.A.* 18A:38-1(b). (Board's Reply at 2-9, quotation at 6)

The Board further argues that the Department of Education has adopted – in regulations first codified at *N.J.A.C.* 6A:28-2.1 *et seq.*, then later recodified at *N.J.A.C.* 6A:22-1.1 *et seq.* – a specific standard for determining educational responsibility based upon a claim of domicile under *N.J.S.A.* 18A:38-1(a). The Board contends that these regulations – which apply to all students except as noted, with the provision excluding "children of military parents" clearly pertaining solely to children covered by *N.J.S.A* 18A:38-7.8 – expressly require that, in order to be found domiciled

in a district, an unemancipated student must be *living* with a parent or legal guardian. (Board's Reply at 9-11)

As to the applicability of *N.J.S.A.* 18A:38-3(b) to the instant matter, the Board reiterates that where a statute is clear on its face, it is to be construed as written, in accord with its plain and ordinary meaning; the Board further notes that petitioner has proffered neither legislative history nor case law in support of the expansive interpretation he proposes as an alternative. (Board's Reply at 11-13)

Finally, with respect to the alleged deficiencies in its procedures, the Board contends that it provided petitioner with a sufficient statement of its decisions and the reasons for it, and that circumstances rendered several other provisions of *N.J.A.C.* 6A:22-4.2(b) inapplicable or premature. Additionally, according to the Board, to whatever extent its written notice did not specify appeal procedures or A.D.S.'s right to enrollment during the pendency of an appeal, these omissions caused no prejudice to A.D.S.; the Board observes that an appeal was timely filed on his behalf and that he was thereupon enrolled in the Margate school district (and has remained so since), and that he was given a full and fair opportunity to present the merits of his claim to the Commissioner. (Board's Reply at 13-15) [5]

Having carefully considered this matter based upon the record and the arguments of the parties, the Commissioner adopts in part, and rejects in part, the Initial Decision of the OAL.

[5] As indicated above (Note 1), the Board additionally filed "cross-exceptions" with its replies to petitioner's exceptions. These, however, are not addressed herein because they are in substance primary exceptions to the ALJ's finding that A.M.S. is domiciled in Margate and as such were required pursuant to *N.J.A.C.* 1:1-18.4(a) to have been filed within 13 days of the mailing date of the Initial Decision. Counsel for petitioner was advised, upon inquiry as to the time frame for replying to the Board's cross-exceptions, that applicable rule made no provision for such reply.

Initially, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:38-3(b) has no bearing on this matter, since petitioner is an enlisted member of the regular United States Army, and the statute is clear on its face in limiting its applicability to members of the New Jersey National Guard and the reserve component of U.S. armed forces. The Commissioner further concurs that petitioner has, by taking affirmative action to establish a domicile elsewhere, severed his connection to Jackson Township, where he was living – in a home owned by his wife's parents – at the time of his enlistment and would thus have been presumptively domiciled in accordance with *Wolf, supra.* Finally, the Commissioner concurs that petitioner has established domicile in the City of Margate, since the record is clear that the address on which his claim is based has at least occasionally served in the past – and is now intended to permanently serve – as petitioner's one consistent "home base;" moreover, in light of petitioner's ongoing military service and his parents' provision to him of an apartment owned and maintained by them, it is of no import that petitioner is seldom physically present in Margate, that the accoutrements of daily living are attached to the location of his current army assignment rather than to Margate, or that he himself pays no associated rent, taxes, fees, utilities, or insurance premiums on the apartment.

However, notwithstanding her agreement with the ALJ that petitioner is domiciled in Margate, the Commissioner cannot concomitantly agree that *East Brunswick, supra*, compels the conclusion that petitioner's son, A.D.S., is domiciled with his grandparents in Pennsylvania.

The ALJ is correct in stating that the domicile of a child ordinarily follows that of his or her parent unless circumstances warrant otherwise. The Commissioner

finds, however, that circumstances here do not so warrant because – although the daily care and supervision of A.D.S. was entrusted to his grandparents after his mother's death due to the physical absence of his sole surviving parent – that arrangement was from its outset clearly delineated as temporary in nature, a stopgap measure to provide for the child until appropriate long-term arrangements could be made (Exhibits P-25/R-6, P-26/R-7; Initial Decision at 11-13);[6] indeed, after less than one year, A.D.S.'s grandparents found that they could no longer care for him (Initial Decision at 13; Exhibit R-2). Moreover, petitioner has at all times retained guardianship and legal custody of A.D.S. and has never ceased to be actively involved in his welfare or to contribute to his support as means and circumstances allowed.[7] Thus, there is no basis on which to conclude that A.D.S.'s legal domicile has shifted from that of his father to that of his grandparents.

Nor is this outcome altered, as the ALJ felt regretfully compelled to find, by the Commissioner's decision in *East Brunswick, supra*, notwithstanding that the facts of that matter are in many ways similar to those herein.[8]

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[6] While it is true that A.D.S.'s grandparents executed affidavits of custody and support to effectuate the child's attendance in their Pennsylvania district as noted by the Board in its reply exceptions (see page 4 above) and in the Initial Decision at 19, the form's standard attestations of ongoing care and support are clarified by handwritten elaborations that plainly state the nature and purpose of the family's arrangement, including the fact that their son was still providing support for A.D.S. and that the situation was to be temporary in nature.

[7] The record overall shows the support to A.D.S. provided by his grandparents to be part of a larger pattern of ongoing assistance to petitioner – their adult son – rather than assumption by them of the financial responsibility for rearing petitioner's child. This pattern continued even through A.D.S.'s placement in Bancroft, the contract for which was ultimately executed by petitioner as the "person to be served," with his father (A.D.S.'s grandfather) co-signing as the "responsible party" (Exhibit R-13, page 12).

[8] In *East Brunswick*, the student in question was also the disabled child of a military parent left with his grandparents due to the parent's inability to provide consistent on-site care, and the parent – who was domiciled in a different school district – had delegated to them all responsibility for the child's education and welfare notwithstanding that she contributed to the child's upkeep. Under these circumstances, the Commissioner concluded that the child was entitled to be educated in the grandparents' district of domicile because he met the criteria of *N.J.S.A.* 18A:38-1(b). (Contrary to the Board's assertion in Reply Exceptions

In applying *N.J.S.A.* 18A:38-1 to determine a student's entitlement to education in a particular district, the Commissioner cannot lose sight of the statute's larger purpose, which is to effectuate the provision of free public education to the school-age children of the state. (Cf., *N.J.A.C.* 6A22-2.1(b)) Because the Legislature has chosen to attach such entitlement to a particular school district based on domicile or residency in the district – as noted by the State Board in proposing implementing rules at 36 *N.J. Reg.* 2279(a) – the statutory and regulatory framework necessarily recognizes that: 1) New Jersey's children find themselves in a variety of living arrangements, and 2) a child's educational entitlement must be assigned in the way that makes the most sense under the circumstances. Thus, the law provides for school attendance in a district by children living with a parent; children living with someone other than a parent due to family/economic hardship or the parent's absence due to active duty in the National Guard or U.S. reserve forces; children residing temporarily with a parent in a district other than that of their legal domicile; children placed in a district by the Division of Youth and Family Services; children of homeless families; children placed in the district by court order (*N.J.A.C.* 6A:22-3.2(e), referencing *N.J.S.A.* 18A:38-2); children who previously lived in the district but were compelled to relocate due to the parent's absence for active duty in the National Guard or U.S. reserve forces (*N.J.A.C.* 6A:22-3.2(f), referencing *N.J.S.A.* 18A:38-3b); and children residing on federal property (*N.J.A.C.* 6A:22-3.2(g), referencing *N.J.S.A.* 18A:38-7.7 *et seq.*).

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at 6, the Commissioner's determination in this matter did not rest – nor could it have rested – on failure to satisfy the requirements of *N.J.A.C.* 6A:22-3.1(a), since rules to implement *N.J.S.A.* 18A:38-1, including the predecessor to the cited rule, were not promulgated by the State Board of Education until 2001, six years after *East Brunswick* was decided.)

While this framework is comprehensive in intent, its method of allocation is, in fact, based on the presumption that in most cases a child will best attend school in the district where he or she is actually living;[9] the law plainly contemplates that students claiming domicile or temporary residence will most likely be living with a parent in the district, while those living with a caretaker due to legitimate family or economic hardship will likely seek to attend school in the caretaker's district rather than in the district of domicile, as was the case in *East Brunswick*.[10] This presumption, though, will not hold true in all cases, and certainly cannot be employed to preclude the child of a New Jersey domiciliary from entitlement to education in *any* New Jersey district because his or her circumstances do not exactly fit one of the situations enumerated in statute or rule. To the contrary, the ability of a child to attend school in a district other than that of his or her legal domicile is granted by the Legislature in the best interest of the *student* – not as a means by which a local district board of education can refuse to educate a domiciled child who, due to unique circumstances, neither resides in the district nor qualifies for education elsewhere in the state pursuant to *N.J.S.A.* 18A:38-1 and its attendant rules or related statutes.

Such is the situation presented by this matter. Here, petitioner is a New Jersey domiciliary, the single parent of a school-age child – also a New Jersey domiciliary – whose daily care and supervision must be provided by someone other than his parent because the parent is in the military and cannot keep the child with him on a regular basis; as a consequence, the child's grandparents agreed to provide such care and

[9] Provided, of course, that the living arrangement is not a subterfuge to attend school in a district other than that of the child's legal entitlement.

[10] Petitioner is correct in asserting that a finding of entitlement under *N.J.S.A.* 18A-38-1(b) does not equate to a finding of domicile in the district.

supervision on a temporary basis until alternative arrangements could be made. Clearly, these are circumstances that might ordinarily have shifted A.D.S.'s entitlement to attend school (at least for a time) to the grandparents' district pursuant to *N.J.S.A.* 18A:38-1(b), as it did in *East Brunswick.* In this case, however, because the grandparents reside in Pennsylvania, reading the statute to conclude that A.D.S. must be educated as an "affidavit" student effectively places him outside the purview of New Jersey law; so that, instead of acting to A.D.S.'s benefit, the law would then work to deprive him (and petitioner) of their rights as New Jersey citizens for no reason other than that petitioner's parents – who offered to assist their suddenly widowed son with the care of his adopted child – happen to live across the state border. Surely the statute and its implementing rules do not contemplate such an unjust result, or one so contrary to the purpose of the law, and the Commissioner declines to so interpret them. *Sydney J. Gunderson v. Board of Education of the City of Brigantine, Atlantic County*, 95 *N.J.A.R.*2d (EDU) 39, affirmed State Board 95 *N.J.A.R.*2d (EDU) 132 (In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter; to hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children.)

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter in so far as it finds petitioner to be domiciled in Margate, and as otherwise set forth herein;[11] but

[11] Like ALJ, the Commissioner makes no findings on A.D.S.'s status under Pennsylvania law.

rejected in so far as it finds that A.D.S. is not entitled to a free public education in the Margate school district pursuant to *N.J.S.A.* 18A:38-1. The Petition of Appeal is granted, and the Margate Board of Education is directed to continue A.D.S.'s enrollment and to take such steps as are necessary to provide him with the free public education to which he is entitled by law. [12] [13]

IT IS SO ORDERED.[14]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/07/07

Date of Mailing: 9/10/07

[12] In so holding, the Commissioner is not unmindful that A.D.S. – who is both disabled and in need of supervision because neither his parent nor his grandparents can provide for his physical care – is unlikely actually to live in Margate notwithstanding his entitlement to be educated there; indeed, all indications point to his being a candidate for residential placement by a State agency such as the Division of Developmental Disabilities or the Division of Youth and Family Services, the former of which has already been involved with A.D.S. (Exhibits P-18, P-19 and R-2). In this regard, the Commissioner stresses that her finding herein is not intended – and should not be construed – as a requirement for, or endorsement of, a residential educational placement at Margate's sole expense; rather both the appropriate educational program for A.D.S and the extent of Margate's responsibility for costs associated with his education if he is placed by a State agency must be determined in accordance with mechanisms provided by the Legislature and State Board for that purpose. *Cf.*, *N.J.S.A.* 18A:46-1 *et seq.*, *N.J.A.C.* 6A:14-1.1 et seq.; *N.J.S.A.* 18A:7B-1 *et seq.*, *N.J.A.C.* 6A:23-5.2/3; *N.J.S.A.* 30:4C-26.

[13] Having thus ruled, the Commissioner does not reach petitioner's claims of procedural deficiency in Margate's notice of ineligibility, which would not in any event constitute a basis for entitlement to a free public education. However, the Board *is* reminded of its obligation to provide information regarding appeals and other matters required by *N.J.A.C.* 6A:22-4.2(b) to the extent possible under the circumstances.

[14] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 218-07

AGENCY DKT. NO. 433-11/06

A.M.S. ON BEHALF OF MINOR CHILD, A.D.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF MARGATE AND JACKSON TOWNSHIP BOARD OF EDUCATION,

Respondents.

Ira M. Fingles, Esq., for petitioner (Hinkle, Fingles & Prior, attorneys)

Robert A. Muccilli, Esq., for respondent, Board of Education of the City of Margate (Capehart & Scatchard, attorneys)

Mark H. Zitomer, Esq., for respondent, Jackson Township Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Record Closed: May 31, 2007 Decided: June 28, 2007

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed respondent Margate Board of Education's (Margate) action denying his son entry to its school on grounds that he does not meet the residency requirements provided by law. The petitioner requested a fair hearing and the matter was transmitted to the OAL on January 12, 2007, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on February 9 and May 1, 2007, in Atlantic City, New Jersey. The record remained open until May 31, 2007, for the parties to submit briefs and replies.

STIPULATIONS
(As to all parties)

1. A.M.S. is the adoptive father of A.S.

2. L. and P. S. are the parents of A.M.S. They are A.'s adoptive grandparents. L. and P. S. reside at 1802 Y. R., Yardley, PA, which is their permanent residence.

3. The residence which forms the basis for A.M.S.'s claim of domicile in Margate City is the condominium unit located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

4. L. and P. S. own the condominium unite located at 9100 A. A., (referred to by Margate City as 9100 B.A.), Apt. 608, Margate, New Jersey.

5. The address where A.M.S. resided prior to his enrollment in the United States Army was 2530 L. C., Jackson, New Jersey, where he lived with his late wife, A.B., and A.

6. During the period from January 1, 2003, through the present, A.M.S. has not resided at 9100 A.A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate,

New Jersey, except from July 29, 2005, through September 9, 2005, and for several days during a two week period while A. was on leave in the summer of 2004.

7. From September 10, 2005, through December 2006, A.M.S. resided at 158 M. D., Eatontown, New Jersey.

8. From December 2006 through the present, A.M.S. resided at 2925 F. L. L., Fort Meade, Maryland.

9. On August 12, 2005, A.M.S. signed a Power of Attorney in which he appointed L. and P. S. as lawful attorney in fact to take and maintain custody of A.S. and to do all things desirable for maintaining A.'s health, education and welfare, inclusive of providing living quarters, food, clothing, medical and dental care and entertainment to him. It expires on August 12, 2008. On November 14, 2006, A.M.S. signed a new Power of Attorney in which he appointed L. and P. S. as lawful attorney in fact to assume and maintain guardianship of A. and to do all acts desirable for maintaining A.'s health, education and welfare, inclusive of providing living quarters, food, clothing, medical and dental care and entertainment to him. This Power of Attorney expires on December 1, 2009. It has not been terminated.

10. A.S. lived with his grandparents, L. and P. S., from September 2005 through October 5, 2006. On October 5, 2006, A. began residing at a Bancroft facility located at 4 Scattergood Road, Cherry Hill, New Jersey. A. was placed at Bancroft by L. and P. S. acting under power of attorney granted to them by A.M.S.

11. A.S. was enrolled in the Pennsbury School District in Pennsylvania during the 2005-06 school year. The Pennsbury School District serves the geographical area in which L. and P. S. live. P.S. signed an Affidavit pertaining to the 2005-06 school year which is dated August 15, 2005. L.S. signed an Affidavit pertaining to the 2006-07 school year which is dated July 24, 2006.

12. A.S. is classified eligible for special education and related services. L. and P. S. attended IEP meetings for A. during the period from September 2005 through the present. A.M.S. has not attended A.'s IEP meetings occurring during this time period. Letters written by the New Jersey Division of Developmental Disabilities during 2005 and 2006 pertaining to A. were addressed to L. and P. S. at 1802 Y. R., Yardley, Pennsylvania.

13. A.M.S.'s current driver's license, vehicle registration and vehicle title reference the 9100 A. A., Apt. 608, Margate, New Jersey address. A General Election Sample Ballot is addressed to A.M.S. at the 9100 A. A., Apt. 608, Margate, New Jersey address.

14. Department of Defense form 2058 was completed by AM.S. and dated September 26, 2005. It lists 9100 A. A., Apt. 608, Margate, New Jersey as A.M.S.'s legal residence/domicile.

15. A.M.S. has never owned the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

16. A.M.S. has never leased the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

17. A.M.S. has never placed in his name any utility service related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

18. A.M.S. has never paid any utility bill(s) (i.e. telephone, electric, gas, water, sewer, garbage removal, etc.) related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey. L. and P. S. have paid the utilities related to the Margate residence and the utilities are registered in their names.

19. A.M.S. has never paid any property taxes related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

20. A.M.S. has never paid any condominium or homeowner fee related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

21. A.M.S. has never paid any property or liability insurance premium related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

22. Prior to this litigation, A.M.S. had not applied for any New Jersey homestead rebate payment related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

23. A.M.S. has never received any newspaper or magazine subscription at the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey.

24. A.M.S. has not made any rental payment related to the residence located at 9100 A. A. (referred to by Margate City as 9100 B. A.), Apt. 608, Margate, New Jersey within the last ten years.

25. The State of New Jersey Insurance Identification Card for A.M.S.'s automobile insurance for the policy period September 2, 2006 through September 2, 2007 is addressed to A.M.S., SPC USA, 150 M. D., Eatontown, New Jersey. The name and address of the insured on the New Jersey Standard Auto Policy Renewal Declarations for the policy period September 2, 2006 through September 2, 2007, is A.M.S., SPC USA, 158 M. D., Eatontown, New Jersey.

26. While residing at 158 M. D., Eatontown, New Jersey, A.M.S. placed cable television and telephone utilities serving the Eatontown residence in his name.

27. While residing at 158 M. D., Eatontown, New Jersey, A.M.S. paid utilities bills related to cable television and telephone service to the Eatontown residence.

28. While residing at 158 M. D., Eatontown, New Jersey, A.M.S. had delivered to his residence in Eatontown a washing machine and dryer.

29. On September 21, 2006, L.S. sought to enroll A. in the Margate City School District. The Margate City School District determined that A. was not eligible for enrollment based upon the information presented at that time. The School District's solicitor, Augustine A. Repetto, Jr., sent a letter dated November 1, 2006 to Ira M. Fingles, Esq., counsel for the petitioner, stating the reasoning for the determination.

30. A.S. is not listed as a dependent on A.M.S.'s state and federal income tax returns for the 2006 tax year.

31. A.M.S. was not the birth parent or adoptive parent or legal guardian of A.D.S. during the time period during which they lived in Jackson.

32. A.M.S .registered to vote in Margate on August 9, 2005.

33. A.M.S. lived in Jackson from September 2000 through March 2001.

(As to Petitioner and Jackson, only)

1. While A. lived in Jackson, he was educated by the Jackson Township Board of Education.

FACTUAL DISCUSSION

A.M.S. testified on his own behalf. A.M.S. is currently a sergeant in the United States Army and is presently stationed at Fort Meade, Maryland. He is the father of A.D.S., whom he adopted in 2002 following his marriage to A.D.S.'s mother.

A.M.S. stated that he graduated from college in 1994. At that time, he considered his domicile to be 9100 A.A., Margate, New Jersey. That premises was a condominium owned by his parents. His parents resided in Yardley, Pennsylvania, and utilized the Margate property as a seashore home. A.M.S. offered no basis for his contention that the Margate property was his domicile at that time.

In 1995, he moved away from the Margate address, but he did not remember where he moved. However, in 2000 he took up residence in Jackson Township, New Jersey, where he began living with a woman named A.B. A.B. was the mother of A.D.S. They resided in a home owned by A.B.'s parents. A.M.S. and A.B. were married in 2001, and A.M.S then adopted A.D.S. by Order of the Superior Court on May 6, 2002 (P-28).

After the marriage, A.M.S. and his family lived in Jackson until March 22, 2001. On that date, A.M.S. enlisted in the U.S. Army. With his enlistment, he began an odyssey that took him around the world and back.

He was initially sent to Fort Jackson, South Carolina for basic training. From May 2001 through May 2002, he was stationed at Fort Huachuca, Arizona. A.B. and A.D.S. ultimately joined him in Arizona. A.B.'s brother took up residence in the Jackson Township home.

From May 2002 through November 2003, A.M.S. was stationed at Fort Lewis, Washington. A.B. and A.D.S. resided with him there. From November, 2003 through October, 2004, A.M.S. served in Iraq. A.B. and A.D.S. remained in the State of

Washington. A.M.S. had fifteen days leave in July 2004. He spent that time with his family at his parent's condo at 9100 A.A., Margate.

After his service in Iraq was completed, A.M.S. returned to Fort Lewis. In May 2005, A.M.S. was transferred to Wurzburg, Germany. A.B. and A.D.S. went to Germany with him. On July 8, 2005, A.B. suddenly died, leaving A.M.S. the sole guardian of A.D.S.

A.M.S. was afforded six weeks bereavement leave commencing July 29, 2005 and concluding September 10, 2005. A.M.S. spent this time at 9100 A. A., Apt 608, in Margate, New Jersey. AM.S. testified he went to that address because, "that's my home." It was at this time that he began in earnest to attempt to establish domicile in Margate.

On September 10, 2005, A.M.S. was assigned to Fort Monmouth in Eatontown, New Jersey. He resided in an Army barracks, and could not take A.D.S. with him. Accordingly, he sent A.D.S. to live with his parents in Yardley, Pennsylvania. He did not relinquish guardianship rights, but instead executed a Power of Attorney affording his parents the power to make decisions for A.D.S. (P-2). On November 14, 2006, he executed a second, similar power of attorney that remains in effect today (P-3).

His parents enrolled A.D.S. in the Pennsbury School in Yardley, Pennsylvania for the 2005-2006 school year. A.D.S. is a classified student who exhibited difficulties at Pennsbury. Consequently, on October 5, 2006, A.M.S. placed A.D.S. at the Bancroft School in Cherry Hill, New Jersey. The placement was residential, and A.M.S.'s parents have been paying the costs of Bancroft since that time.

In January 2007, A.M.S. was transferred to Fort Meade, Maryland. He is presently stationed there, but has no intention of making Maryland his home. He resides in Army housing. A.M.S. stated he has lived in Army housing since his enlistment, with the exception of his time in Washington state, where he rented a house for his family.

A.M.S. stated he intends to remain in the Army until retirement, but he considers Margate to be his home, and he intends to return to Margate after he retires. A.M.S. has previously held a casino license in Atlantic City.

A.M.S. introduced a series of documents in support of his assertion that he is domiciled in Margate. P-4 is his New Jersey Drivers License. It was issued July 30, 2005, and utilizes the Margate condo as his address.

P-5 is his automobile title. It was issued August 24, 2005, and lists the Margate condo as his address. P-6 is his automobile registration, valid through 8/2007. It lists the Margate condo as his address.

P-7 is an Absentee Ballot. It shows A.M.S. is registered to vote at the Margate condo. P-7A is a Voter Profile dated April 23, 2007. It shows A.M.S. address to be 9100 A. A, #608, Margate.

P-9 is an automobile insurance policy for A.M.S.'s vehicle dated September 6, 2005. It says that the vehicle insured was principally garaged at the Margate condo. P-8 is an automobile insurance card dated September 2, 2005, and expiring in September 2006. It reflects the Margate condo as A.M.S.'s address. A.M.S. stated his current insurance card shows his address at Fort Meade. He stated he must use that address because the car is located there. His insurance comes through United Services Auto Association, a carrier only available to Army personnel. He stated that United Services requires that the address listed be the location where he is stationed.

P-10 is a U.S. Army document entitled State of Legal Residence Certificate. Its purpose is to serve as a declaration of domicile. It is dated September 26, 2005, and shows the Margate condo as A.M.S.'s domicile. P-11 is another Army document dated October 3, 2005. It states that as far as the Army is concerned, A.M.S. altered his official residence from Washington to the Margate condo. P-12 is a third Army

document reflecting that the Army considers A.M.S.'s domicile to be 9100 A. A. in Margate.

P-14 is a bank statement dated August 15, 2005. It shows the address used by the bank for A.M.S. to be the Margate condo. P-15 is a second bank statement dated February 28, 2006. A.M.S. stated this account was created to receive his wife's insurance money. It shows A.M.S.'s address to be 9100 A. A., Margate. P-16 is a copy of a check from A.M.S.'s present checking account. It bears A.M.S.'s name and the address 9100 A. A., Apt 608, Margate, New Jersey.

P-17 is a request to the Social Security Administration for selection as payee. It is dated August 11, 2005, and shows the Margate condo to be A.M.S.'s address.

P-18 is a document from the New Jersey Division of Developmental Disabilities reflecting that A.M.S.'s address is the Margate condo. Similarly, P-19 is a letter to A.M.S. from the New Jersey Department of Human Services. It was sent to 9100 A. A., Margate, New Jersey.

P-20 is A.M.S.'s application for membership at BJ's, a discount food store. It shows his address to be the Margate condo. P-21 is a Margate City Library Card. A.M.S. stated he has held this card for many years. P-22 is a Summons for Jury Duty instructing A.M.S. to report for jury duty on May 16, 2007, at the Atlantic County Courthouse, 1201 Bacharach Boulevard, Atlantic City, New Jersey. P-22 was addressed to A.M.S. at the Margate condo.

P-23 is a 2006 Federal Income Tax Return. In it, he utilized 9100 A. A., Margate as his residence.

A.M.S. attempted to enroll A.D.S. in the Margate school. Respondent Margate Board of Education declined admission. The Board solicitor sent A.M.S. a letter dated November 1, 2006, which states that he does not meet the residency requirements to enroll A.D.S. in the Margate school (P-24).

On cross examination, A.M.S. admitted that his current bank statements are all mailed to him at his Fort Meade address. However, A.M.S. stated that none of his checks bears the Fort Meade address. He also admitted that when he was stationed at Fort Monmouth, his bank statements were sent to Eatontown.

A.M.S. acknowledged that he read the two powers of attorney (P-2, P-3) before he signed them. He understood he was executing the documents so that his parents could care for A.D.S. He agreed that for a year, A.D.S. lived with his parents. He acknowledged that P-3 speaks in terms of designating "a guardian to care for your child(ren) in you absence." However, he stated he never intended to relinquish his parental rights. P-3 is a form he obtained from the Army. A.M.S. stated A.D.S. lived with his parents during the week, but with himself on weekends, either in Eatontown or in Margate.

A.M.S. acknowledged that, prior to the onset of this action, he never filed for a homestead rebate for the Margate property. He conceded that 2006 was the first year he listed the Margate condo as the address on his federal income tax return (P-23). In 2003 and in 2004, he listed Fort Lewis, Washington. In 2005 he listed Eatontown, New Jersey. A.M.S. could not recall if he filed a New Jersey state income tax return during those years. He admitted that his 2006 tax return (P-23) did not list A.D.S. as a dependent, but stated that decision was made by his accountant and not himself.

A.M.S. admitted he has not renewed his BJ's card.

A.M.S. admitted that, prior to 2005, the State of Legal Residence Certificate he filed with the Army listed Fort Lewis, Washington as his residence. However, he stated that on October 1, 2005, he changed that document to reflect 9100 A. A. in Margate (P-10).

A.M.S. agreed that most of his personal possessions were presently situate in Maryland. Prior to his transfer, those possessions were in Eatontown.

A.M.S. acknowledged that his parents paid for the cost of placing A.D.S. at Bancroft. However, he stated he was present on the day A.D.S. was enrolled. Although the enrollment forms designate his father, L.S., as "Responsible Party", A.M.S. noted that he signed the document as "father" (R-13).

A.M.S. concluded by stating that he never intended to make any of the military bases to which he was assigned his permanent residence. Nor did he have any intent to return to Jackson Township.

L.S. testified for petitioner. L.S. is the father of A.M.S. and the adoptive grandfather of A.D.S.

L.S. is a dentist who resides in Yardley, Pennsylvania. He owns a second home at 9100 A. A. in Margate, New Jersey. He has owned a unit in that complex since 1980. In 1997 he and his wife purchased their present unit, number 608.

L.S. testified that he and his wife P.S. accepted A.D.S. into their home on a temporary basis. They agreed to keep him until a more permanent residential placement could be found.

L.S. and P.S. enrolled A.D.S. in the Pennsbury School in 2005. Pennsbury School's Policy allowed the enrollment of non-residents (P-25:1). As part of the enrollment process, L.S. signed an affidavit stating that he was supporting A.D.S. "gratis" (P-25:2). However, L.S. handwrote the following on the signature page of the affidavit (P-25-3):

> [A.s] father, [A.M.S.], is in the military, and will be stationed at Ft. Monmouth, NJ. We are [A.s] grandparents and taking care of him on a temporary basis. [A.S.] is his father and guardian. He is supporting [A.] and is responsible for his care. We are providing a temporary home and have Power of Attorney to make all decisions necessary for his well being.

L.S. agreed that A.D.S. lived with him and his wife during that year. He stated A.D.S. was very difficult to handle. He had to be watched "24-7". He has trouble going down stairs because he is five feet tall and weighs two hundred pounds. Both L.S. and P.S. have health problems. L.S. stated A.D.S. cannot return to their home. They cannot continue to care for him.

L.S. testified that during the summer of 2006, A.D.S. resided at the Margate condo. A.M.S. took him to Fort Monmouth on weekends.

On cross examination, L.S. stated that he signed the enrollment document at Bancroft not as guardian, but under the terms of the power of attorney. The same was true of the affidavits he submitted to the Pennsbury School District (R-6, R-7).

L.S. acknowledged that he claimed A.D.S. as a dependent on his 2006 tax return. His accountant advised him that because he and his wife were paying the costs of A.D.S.'s placement at Bancroft, he was entitled to the deduction.

L.S. said that he and his wife agreed to help with A.D.S. because his son, A.M.S. is in the Army and is frequently not available because "the Army sends him places."

Respondents rested without calling any witnesses.

LEGAL ANALYSIS

1. THE EFFECT OF N.J.S.A. 18A:38-3b

At the outset, I would dispose of the argument raised by petitioner and vigorously contested by respondents that N.J.S.A. 18A:38-3b is dispositive in this case. That statute states in pertinent part:

> Any person not resident in a school district, if eligible except for residence, and if that person previously was a resident of the district, shall be admitted to the schools of the

> district without payment of tuition if that person's parent or guardian is a member of *the New Jersey National Guard or a member of the reserve component of the armed forces of the United States* and has been ordered into active military service in any of the armed forces of the United States in time of war or national emergency, resulting in the relocation of the student out of the district....
>
> (Emphasis added)

I **FIND** as fact that petitioner was not and is not a member of the New Jersey National Guard, nor is he a member of the reserve component of the armed forces of the United States. Petitioner enlisted in the United States Army. All of the evidence before me indicates that petitioner is a member of the Regular Army. He is not part of the National Guard, nor is he a member of the Army Reserve, the two organizations covered by N.J.S.A. 18A:38-3b. At the very least, petitioner has failed to establish by a preponderance of the credible evidence that he is a member of the National Guard or the Army Reserve.

Accordingly, N.J.S.A. 18A:38-3 does not apply to this case.

2. A.M.S.'s RESIDENCY

I turn next to the issue of domicile. For the reasons set forth below, I **FIND** and **CONCLUDE** that petitioner A.M.S. is domiciled in the City of Margate.

The domicile of a serviceman is established in the same manner as the domicile of others – through the manifestation of an intention to remain in a locale indefinitely along with a physical presence in that locale. The issue of a serviceman's domicile was specifically addressed in Township of Roxbury v. Heydt, 6 N.J. Tax 73 (1983), wherein the Court stated, 77:

> A person's domicile is that place which he regards as his true and permanent home. Matter of Jaffee, 74 N.J. 86, 90-91, 376 A.2d 1181 (1977). A domicile may be acquired by choice; its two essentials are (1) physical presence in the state and (2) a concomitant, unqualified intention to remain

> there indefinitely. Gosschalk v. Gosschalk, 48 N.J.Super. 566, 573, 138 A.2d 774 (App.Div.), aff'd 28 N.J. 73, 145 A.2d 327 (1958).
>
> A serviceman's intent to adopt a new domicile must be manifested by objective facts indicating that the desire to remain will not expire when the serviceman is transferred. Stifel v. Hopkins, supra at 1122. Major Heydt was domiciled in New Jersey upon his return from Germany and before being ordered to Fort Leavenworth, Kansas. He obtained a New Jersey driver's license, a fact considered indicative of an intent to adopt a new domicile. *Ibid.* He purchased his automobile in New Jersey and notified the Army personnel office that his permanent address was Nutley, New Jersey.

See also Lynn v. Glaser, 60 N.J. 259 (1972); Wolff v. Baldwin, 9 N.J. Tax 11 (1986).

In this case, A.M.S. has taken numerous steps that manifest a desire to make Margate his domicile. Following the death of his wife, A.M.S. returned to the Margate condo and took decisive action to establish domicile at that location. Between July 29 and September 10, 2005, he changed his address to 9100 A.A., Unit 608, Margate, New Jersey on the following documents:

- Driver's license
- Automobile Title
- Automobile registration
- Voter registration
- Automobile insurance
- Community Bank account
- Prudential Financial account
- Bank of America account
- BJ's card.

This list of documents far exceeds the indicia of domicile noted in Heydt, supra. I note that I afford far greater weight to the motor vehicle documents and the voter registration than I do to the BJ's card.

But A.M.S. took additional steps to establish domicile. He filed Form 2058 with the Army, formally declaring the 9100 A.A., Margate as his legal residence (P-10). The purpose of Form 2058 is to designate domicile for purposes of determining the state for which income taxes are to be withheld. The Army confirmed this change twice, in documents dated October 3, 2005 (P-11) and February 13, 2007 (P-12).

The New Jersey Superior Court apparently recognized 9100 A.A., Margate as A.M.S.'s legal domicile. Its Jury Management Office called him to appear for jury duty on May 16, 2007 (P-22).

It is difficult to think of what more A.M.S. could have done to manifest an intent to establish 9100 A.A., Unit 608, Margate, New Jersey as his domicile. The evidence that such was his intention is overwhelming.

Margate argues that A.M.S. could not establish domicile because he lacked a physical presence at the condo. Margate notes that A.M.S.'s physical occupation of the premises was essentially limited to the period July 29 through September 10, 2005. Margate points out that A.M.S. has spent far longer time periods physically occupying premises in Washington State, Eatontown, New Jersey, and Fort Meade, Maryland.

This issue was dealt with in Heydt, supra. The Court held, 77:

> The duration of Major Heydt's presence in New Jersey is not a significant factor in determining his domicile, since a member of the Armed Forces has little control over the length of time he may spend in any jurisdiction before being transferred elsewhere. Major Heydt exhibited the requisite intent to adopt a New Jersey domicile, and that intent coincided with his physical presence in New Jersey.

The same test applies here. During the limited time A.M.S. had to establish domicile, he took the steps necessary to manifest his intention to do so in Margate.

For all the reasons set forth above, I **FIND** and **CONCLUDE** that A.M.S. is domiciled in the City of Margate at 9100 A.A., Unit 608.

3. THE JACKSON TOWNSHIP DOMICILE

Given my determination that A.M.S. is domiciled in Margate, it follows that he is no longer domiciled in Jackson Township. But for clarity of the record, it is worth noting that had A.M.S. not established domicile in another location, his "residuary" domicile would have been in Jackson Township. The Court in Wolf, supra, held, 18:

> It is well settled that military service personnel are presumed to retain their domicile as of the date of enlistment, unless an intent to abandon an original domicile and adopt a new one can be established by the proofs. Bowman, supra, 267 F.Supp. at 313,; Deese v. Hundley, 232 F. Supp. 848, 850 (W.D.C. 1964; Ferrara, supra, 285 F. Supp. at 1019; Deese v. Hundley, 232 F.Supp. 848, 850 (W.D.S.C.1964); Ellis, supra, 260 F.2d at 281.

Fortunately for Jackson Township, A.M.S.'s affirmative efforts to establish domicile in Margate have rendered this issue moot. Accordingly, the petition against Jackson Township must be **DISMISSED.**

4. A.D.S.'s DOMICILE

The final question before me is whether A.D.S.'s residence with his grandparents in Yardley, Pennsylvania alters his domicile and negates Margate's responsibility to educate him. As a general rule, "a child's domicile is normally that of his or her parents." Somerville Board of Education v. Manville Board of Education, 332 N.J. Super. 6, 12 (App. Div., 2000), aff'd 167 N.J. 55 (2001). See also J.M. v. Bd. of Educ. of Twp. of West Orange, EDU 1061-00, Initial Decision, (April 6, 2001), adopted and remanded for additional fact finding, (May 24, 2001),

<http://lawlibrary.rutgers.edu/oal/search.html>. While this rule is not absolute, it should be abrogated only when the factual situation is inconsistent with the underlying rationale that "an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location." V.R. v. Bd. of Educ. of Boro. of Hamburg, 2 N.J.A.R. 283, 286 (1980).

The mere fact that a child does not live with his or her parents does not warrant a departure from this rule; in the absence of a legal termination of parental responsibility, "[t]he fact that a third person provides the day-to-day care and control of [a child] at the request of [the child's] parents seems insufficient to overturn normal domicile principles." V.R., supra, 2 N.J.A.R. at 287. However, where the parents have relinquished legal control over the child, the traditional rule may no longer apply as the child no longer receives custody, support and maintenance from his parents. See C.J. v. Bd. of Educ. of Twp. of Union, EDU 03308-05, Initial Decision, (March 28, 2006), adopted, (June 16, 2006).

In C.J., supra, the dividing line was clear. The grandparents had obtained a custody order through the intervention of DYFS. Unquestionably, when custody has been formally transferred by court order, the district of the custodial parent bears the burden of educating the child.

Such is not the case in the matter before me. A.M.S. has maintained custody of A.D.S. He contributes to his support, and actively participates in the larger decisions concerning his future.

At the same time, because he is serving on active duty in the Army, A.M.S. granted control over A.D.S. to his parents, L.S. and P.S. That limited grant of authority was memorialized in the Powers of Attorney (P-2, P-3). A.D.S. resided with L.S. and P.S. L.S. and P.S. provided for his daily care. They enrolled him in the local school in their home town of Yardley, Pennsylvania. Ultimately, when A.D.S. was enrolled at Bancroft, L.S. signed the documents assuming financial responsibility for A.D.S. tuition

and expenses at that school (R-13). L.S. and P.S. paid those expenses during A.D.S.'s first year at Bancroft.

The question thus becomes, despite the lack of a formal transfer of custody, is the authority granted to L.S. and P.S. sufficient to transfer the domicile of A.D.S. from that of his father in Margate to that of his grandparents in Yardley, Pennsylvania?

The matter of Board of Education of the Township of East Brunswick v. J.R. and the Board of Education of the Township of Edison, 96 N.J.A.R. 285 (1995), would appear to apply. In that case, the parents were divorced and the mother held custody. The mother was a member of the U.S. Army Reserve and was on active duty. She also had a medical condition, a factor not existent in the present case. The mother resided in Edison, but her child was cared for by his grandparents, who lived in East Brunswick, because she was unable to care for him. The parents made certain financial contributions toward the child's care, but the grandparents had daily responsibility for him.

The judge in East Brunswick held that the grandparents met the conditions set forth in N.J.S.A. 18A:38-1b(1) that they were supporting the child gratis. On that basis the judge concluded that East Brunswick was responsible for the child's education. The Commissioner affirmed.

Virtually the same set of facts exists here. L.S. executed the Pennsylvania equivalent of the affidavit contemplated in N.J.S.A. 18A:38-1b(1) (P-25, P-26). Although A.M.S. participated in the decision making process regarding his son, L.S. and P.S. had daily control of A.D.S. Like the mother in East Brunswick, A.M.S. is on active duty with the United States Armed Forces.

The holding in East Brunswick references the mother's military service, but does not expressly discuss the impact of that service on her child's domicile. But the result has the effect of limiting the educational opportunities of the soldier's child. It seems unreasonable to hold that the child of a person who is serving his country in the armed

forces is not entitled to be educated in his father's domicile because his father has been compelled to leave him with his grandparents while he serves in the field. In essence, the soldier's child is penalized because of the sacrifice his father is making for his country.

Nevertheless, the holding in East Brunswick compels that result. Absent clarification from the Commissioner, East Brunswick stands for the proposition that when a soldier turns over the care of his child to the child's grandparents while he serves on active duty, and the grandparents provide the support for the child set forth in N.J.S.A. 18A:38-1b(1), it is the grandparents' school district, and not the district of the soldier's domicile, that bears the responsibility to educate the child. Perhaps this case may cause the Commissioner to provide further clarification of this issue.

Based upon the holding in East Brunswick, supra, I conclude that A.D.S. is now domiciled in Yardley, Pennsylvania. Because Yardley is in another state, I make no judgment as to the obligation of that school system to educate A.D.S. However, I do **CONCLUDE** that A.D.S. is no longer domiciled with his father, and therefore, Margate has no obligation to educate him.

A.M.S. argues that for the last year, A.D.S has physically resided at the Bancroft School in Cherry Hill, and therefore the connection to Yardley has been severed. By that logic, Cherry Hill would have the obligation to educate A.D.S.. Such can not be the case. A.D.S.'s education is tied to his domicile. Based upon the Commissioner's holding in East Brunswick, that domicile is in Yardley, Pennsylvania.

Accordingly, the petition demanding that respondent Margate Board of Education provide for the free education of A.D.S. must be **DISMISSED.**

ORDER

I **ORDER** that the petition be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 28, 2007
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 6/28/07

Mailed to Parties:

JUL 3 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

A.M.S.

L.S., petitioner's father

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Request and Authority for Leave (DA Form 31)
P-2 Special Power of Attorney, 8/12/05
P-3 Power of Attorney, 11/14/07
P-4 Driver's License
P-5 Certificate of Title
P-6 Vehicle Registration
P-7 General Election Sample Ballot
P-7A Voter Profile
P-8 Auto Insurance ID Card (effective date 9/2/05)
P-9 N.J. Standard Auto Policy Declarations
P-10 State of Legal Residence Certificate (DD 2058)
P-11 Army Memo (Lahr, 10/3/05)
P-12 Army Memo for Record (Gibson, 2/13/07)
P-13 Not admitted
P-14 Community Bank Statement, 8/16/05

P-15 Prudential Financial Statement, 2/28/06

P-16 Voided Bank of America Check

P-17 Request to be Selected as Payee (SSA), 8/11/05

P-18 DDD Community Services Cover Sheet

P-19 DDD Letter – Cicalese to A.M.S., 1/5/07

P-20 BJ's Renewal Form

P-21 Margate City Public Library Card

P-22 Jury Summons

P-23 2006 Tax Return with Homestead Rebate document attached

P-24 Letter, Repetto to Fingles, 11/1/06

P-25 2005/2006 Application to Pennsbury Schools with attached Affidavit

P-26 2006/2007 Pennsbury Schools Renewal Affidavit

P-27 Application for Admission to Margate District with attached Affidavit, 9/21/06

P-28 Order of Adoption, 5/6/02

For Respondent:

R-1 Owner Information for 9100 B.A., #608, Margate, NJ

R-2 Letters from New Jersey Division of Developmental Disabilities to L. and P. S., 12/14/05, 5/2/06, 5/15/06, 5/17/06 and 6/1/06

R-3 State of New Jersey Insurance Identification Card for policy period 9/2/06 through 9/2/07

R-4 New Jersey Standard Auto Policy Renewal Declarations for policy period 9/2/06 through 9/2/07

R-5 Letter, Repetto to Fingles, 11/1/06

R-6 Pennsbury School District Affidavit for 2005-06 School Year, 8/16/06

R-7 Pennsbury School District Affidavit for 2006-07 School Year, 7/24/06

R-8 Tax Collector Payment Stubs for 3rd and 4th Quarters 2006 and 1st and 2nd Quarters 2007

R-9 Power of Attorney, 11/14/06

R-10A Invitations to Participate in IEP Team Meeting or Other Meetings, 10/17/05

R-10B Invitation to Participate in IEP Team Meeting or Other Meetings, 11/28/05

R-11A 2003 Form 1040 U.S. Individual Income Tax Return

R-11B 2004 Form 1040 U.S. Individual Income Tax Return

R-11C 2005 Form 1040 U.S. Individual Income Tax Return

R-12 2006 Form 1040 U.S. Individual Income Tax Return and NJ Tax Return

R-13 Bancroft Admissions Agreement Packet, 10/5/06

R-14 Margate Board of Education Letter, 1/22/07

350-07

#350-07SEC

IN THE MATTER OF DAVID KANABY	:	
BOARD OF EDUCATION, OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF HILLSBOROUGH,	:	DECISION
SOMERSET COUNTY.	:	

SYNOPSIS

The School Ethics Commission found probable cause to credit allegations that respondent – a member of the Hillsborough Board of Education – violated the School Ethics Act, *N.J.S.A.* 18A:12-24(b) and (c), and the Code of Ethics for School Board Members, *N.J.S.A.* 18A:12-24.1(c) and (i), by sending an email to the Superintendent of the Hillsborough School District in which he was critical of her handling of a matter involving respondent's wife, a teacher in the district. The matter was transmitted to the Office of Administrative Law for hearing as a contested case.

The ALJ found, *inter alia*, that respondent violated *N.J.S.A.* 18A:12-24(b) and (c), and *N.J.S.A.* 18A:12-24.1(c) and (i), when he emailed the district superintendent in an attempt to secure an unwarranted privilege for his wife with respect to the disposition of two days of leave time. Accordingly, the ALJ determined that there is sufficient credible evidence to support the allegations against respondent, and issued an Initial Decision ordering that the findings of probable cause against respondent be affirmed. Subsequently, the School Ethics Commission's Final Decision adopted the ALJ's conclusions, and recommended a sanction consisting of a three-month suspension from the Board.

The Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – found that the Commission's recommended penalty in this case was inconsistent with penalties issued in prior cases. Accordingly, the Commissioner found that the appropriate sanction for respondent in this matter is a one-month suspension from the Board, to be effective as of the filing date of this decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 10, 2007

AGENCY DKT. NO. 202-7/07

IN THE MATTER OF DAVID KANABY	:	
BOARD OF EDUCATION, OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF HILLSBOROUGH,	:	DECISION
SOMERSET COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed, as have the respondent's exceptions and the Commission's reply pursuant to *N.J.A.C.* 1:6C-18.3. In its decision, the Commission adopted the conclusion of the Administrative Law Judge (ALJ) – after a hearing at the Office of Administrative Law (OAL) – that respondent, Hillsborough Board of Education member David Kanaby, violated *N.J.S.A.* 18A:12-24(b) and (c) and *N.J.S.A.* 18A:12-24.1(c) and (i) of the School Ethics Act (Act) by sending an email to the district superintendent berating her for her treatment of respondent's wife with respect to the disposition of two days of leave time, by demanding the receipt of the superintendent's own leave-time records, by publishing the email to other board members and personnel, and by directing the email recipients to avoid "Sunshine Law" issues by refraining from responding to the email. The Commission recommended a sanction consisting of a three-month suspension from the Board.

The Commission's fact-finding and determination as to respondent's violation of the School Ethics Act are not reviewable herein, since, by law, only the Commission may determine whether a violation of the Act has occurred, and appellate review of this determination is expressly in the State Board of Education rather than the Commissioner,

whose jurisdiction is expressly limited to reviewing the Commission's recommended sanction once a violation has been found. *N.J.S.A.* 18A:12-29(c), *N.J.A.C.* 6A:3-9.1, and *N.J.A.C.* 1:6C-2.1. Given the limits of her authority in school ethics matters, the Commissioner cannot reach alleged deficiencies in the Commission's decision, but must rather accept it as valid and review the Commission's recommended penalty in that light.

Respondent excepts to the sanction recommended by the Commission, contending that the three-month suspension is disproportionate to the penalties imposed by the Commissioner in prior cases with similar fact patterns.[1] For example, respondent cites *In the Matter of Edward Gore, Hamilton Township Board of Education,* SB 9-97 (State Board 6/4/97), where a school board member received a censure for securing the home addresses of district employees and sending them an intimidating letter suggesting that their jobs could be in jeopardy if they did not vote for the board candidates he endorsed. The Commissioner notes that *In the Matter of Charles Fischer, Eatontown Board of Education, Monmouth County*, decided by the Commission February 24, 2004 and by the Commissioner April 12, 2004, is a more recent case in which a board member was found to have attempted to direct the activities of a district employee. More specifically, a board member received a reprimand for contacting a board employee at home and making demands of her in an angry and insistent manner.

Petitioner argues that the greater sanction is warranted by the fact that multiple statutory provisions were found to have been violated. The Commissioner is not, however, persuaded that a greater penalty is automatically warranted based solely upon the number of

[1] The Commissioner finds that most of the cases cited by respondent in support of his position pertain to voting and to participation in discussions and debate about matters as to which the respondent board members might not be impartial. As such, the cases are not sufficiently apposite to provide guidance in the present matter.

statutory provisions implicated by the offending behavior. It is the nature of the behavior that drives the penalty.

The present matter shares with the two cases cited *supra* the violations of *N.J.S.A.* 18A:12-24.1 (c) and (i); *i.e.,* respondent did not limit his actions as a board member to policy making, planning and appraisal, and breached the duty to support and protect school personnel. On the other hand, the two cited cases did not implicate a direct personal interest of the nature that underlay respondent's action in the present matter.

A school board member's ability to separate his personal interests from his service to the public is of utmost importance to the effectiveness of his service and to the public's trust in its school board. The record reveals, however, that by the date of respondent's email to the district superintendent, the issues pertaining to his wife's leave time had been reviewed by the school board and resolved. A significant economic interest was not involved here. On the other hand, as the Commission concluded, respondent did use his official position to attempt actions that another person – not similarly situated – would not have been privileged to take.

The Commission's decisions since its inception[2] have included relatively few instances – other than for delay in obtaining required board member training or filing required disclosure statements – where penalties of suspension have been imposed, and such suspensions as have been issued – including those in training and disclosure cases – have almost invariably been short-term, usually for one or two months. Having reviewed the positions of respondent and the Commission, and in consideration of prior precedent, the

[2] See http://www.state.nj.us/education/legal/ethics/index.html for decisions from January 1, 1997 and beyond; decisions from 1992-1996 resulting in the imposition of a penalty can be found in the *New Jersey Administrative Reports* (*N.J.A.R.* 2d).

Commissioner finds that the appropriate sanction to be imposed in this instance is a suspension of one month.

Accordingly, respondent, as a school official found to have violated the School Ethics Act, is hereby suspended for a period of one month from his membership on the Hillsborough Board of Education, to be effective as of the filing date of this decision.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/10/07

Date of Mailing: 9/10/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties. *N.J.A.C.* 6A:3-1.14(c).

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**SEC Docket No.: C53-05**
	:	**OAL Docket No. EEC4369-06**
DAVID KANABY,	:	
HILLSBOROUGH BOARD OF EDUCATION	:	**FINAL DECISION**
SOMERSETCOUNTY	:	
	:	

On June 2, 2006, the School Ethics Commission found probable cause to credit the allegations that David Kanaby, a member of the Hillsborough Township Board of Education (Board), violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-24.1(c) and (i) of the Code of Ethics for School Board Members when he sent an e-mail to the superintendent and copied the entire Board. In the e-mail, Mr. Kanaby was critical of the superintendent's handling of a matter involving Mr. Kanaby's wife and he asked the superintendent for an accounting of her personal leave. The Commission transmitted the finding to the Office of Administrative Law (OAL) for a hearing in accordance with N.J.S.A. 18A:12-29(b). On April 18, 2007, the Administrative Law Judge (ALJ) concluded in his Initial Decision that the probable cause finding was sustained and he found that Mr. Kanaby violated: 1) N.J.S.A. 18A:12-24(b) when he e-mailed the superintendent prior to her meeting with his wife, in an attempt to secure an unwarranted privilege for his wife by defending his wife, criticizing the superintendent and attempting to influence the superintendent in the supervision of his wife; 2) N.J.S.A. 18A:12-24(c) because, when he sent the e-mail to the superintendent and copied all of the members of the Board, he acted in his official capacity in a matter in which he had a direct financial involvement that might reasonably be expected to impair his objectivity or independence of judgment, and in a matter where both he and his wife had a personal involvement that created a benefit to both him and his wife; 3) N.J.S.A. 18A:12-24.1(c) when he sent the e-mail, because he failed to confine his Board action to policy making, planning and appraisal; and 4) N.J.S.A. 18A:12-24.1(i) because he failed to support and protect the superintendent in the proper performance of her duties as a superintendent when he sent the e-mail that was highly critical of her performance.

The record of this matter and the Initial Decision of the ALJ have been reviewed by the Commission. Mr. Kanaby, through his attorney, David B. Rubin, Esquire, filed exceptions to the Initial Decision in accordance with N.J.A.C. 1:1-18.4 and Deputy Attorney General (DAG), Cynthia Raymond, filed a reply to the respondent's exceptions. The respondent's exceptions and the reply exceptions were also reviewed by the Commission. At its meeting of June 26, 2007, the Commission adopted the conclusions of the ALJ that the probable cause finding was sustained and his finding that Mr. Kanaby, violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-24.1(c) and (i) of the Code of Ethics for School Board Members. The Commission also

voted to recommend to the Commissioner of Education that Mr. Kanaby be suspended from the Board for three months.

In his exceptions, the respondent maintains that the ALJ's factual findings were substantially consistent with the respondent's version of what occurred. The respondent relies on his post-hearing briefs dated February 20 and February 22, 2007 to argue that, the facts as established by the ALJ, do not support a finding that the respondent violated the School Ethics Act (Act) N.J.S.A. 18A:12-21 et seq. The respondent's first exception is that, "The thrust of the Commission's probable cause findings under N.J.S.A. 18A:12-24(b) and (c) was that the respondent attempted to use the weight of his Board membership to pressure [the superintendent] into conferring an unwarranted benefit on his wife." See, Respondent's February 20, 2007 post-hearing brief, pages 16 & 17. The respondent then argues that the evidence shows that he was not attempting to secure paid leave days or any other benefit for his wife because the superintendent had already granted his wife a paid leave for November 22nd and the Board had already acted on the matter of an unpaid leave for November 23rd. The complainant replies that, when the respondent e-mailed the superintendent just hours before a scheduled disciplinary meeting, he was seeking preferential treatment for his wife, which could not have been obtained had respondent not been a member of the Board.

While the Commission acknowledges prior resolution of the leave granted for November 22 and 23, it notes that the superintendent had information that "Mrs. Kanaby had called out sick on the two days in question...Thus, there were two reasons for Mrs. Kanaby's absence." See, Initial Decision, page 3. In order to determine the cause for Mrs. Kanaby's absence, the superintendent arranged a meeting with her. Only hours prior to that meeting, the respondent sent an e-mail to the superintendent, copying all of the members of the Board, the business administrator, assistant superintendent and his subordinate. The respondent's e-mail was critical of the superintendent and he attempted to influence the superintendent in the supervision of his wife. Thus, the unwarranted benefit that the respondent attempted to secure for his wife was influence over the superintendent in her treatment of Mrs. Kanaby. Therefore, the Commission agrees with the ALJ's finding that the respondent violated N.J.S.A. 18A:12-24(b) and (c).

The respondent's second exception is that N.J.S.A. 18A:12-24.1(i), which provides that the Board member shall support and protect personnel in the proper performance of their duties, is a broad statement of principle, offering little guidance to Board members on what conduct is required or prohibited. In support of his contention, the respondent relies on a ruling by Judge Metzger in I/M/O William O'Brien, OAL Dkt. No. EEC 6598-04. However, the Commission disagrees with Judge Metzger's conclusion that N.J.S.A. 18A:12-24.1(i) is only a statement of principle and, therefore, not enforceable without specific code language. It would be impossible and unnecessary to codify every type of conduct that may give rise to an ethical violation under N.J.S.A. 18A:12-24.1(i).

The respondent also argues that, based on Lauren Spicer v. John Della Vecchia, et al, C31-04, (February 22, 2005), the Commission has proceeded with caution in application of

N.J.S.A. 18A:12-24.1(i) to the superintendent. However, the Commission notes that its dismissal of a violation of N.J.S.A. 18A:12-24.1(i) in Spicer, was based on the specific facts presented in that matter. In Spicer, the allegation was that the board president openly expressed resentment of the superintendent's role as chief school administrator and ordered the superintendent to stop the work she was doing. This matter can be distinguished from Spicer. The respondent's e-mail was not only highly critical of the superintendent, it was also threatening and intimidating because the respondent asked the superintendent for an accounting of her personal leave and sent the e-mail to all of the Board members and the business administrator, assistant superintendent and his subordinate. The respondent also indicated that he took the superintendent's action toward his spouse as personal and his e-mail was a personal and highly critical expression of his anger towards the superintendent in the proper performance of her duties. Furthermore, the Commission agrees with the complainant's reply wherein she notes that, in Spicer, the Commission reasoned that "an administrator should never be made to feel that she is being intimidated into taking certain actions." Id., page 6. In this matter, as noted above, the respondent's e-mail was threatening and intimidating. Because it was sent just hours before the meeting between the superintendent and the respondent's wife and based on the content of the e-mail, it is reasonable for the superintendent to assume that the respondent wanted her to give preferential treatment to his wife.

The respondent next argues that, because the e-mail was not made public, the respondent should not be found in violation of N.J.S.A. 18A:12-24.1(i). The respondent refers to I/M/O Karen Jackson, C08-05, (December 20, 2005) where the Commission found a board president violated N.J.S.A. 18A:12-24.1(i) for publicly criticizing a student Holocaust project proposed by a teacher. This matter can be distinguished from Jackson because it involves the superintendent who reports directly to the Board. The respondent's e-mail, even though it was not made public, rises to the level of a violation of N.J.S.A. 18A:12-24.1(i) because the respondent copied all of the Board members on the e-mail and expressed criticism of how the superintendent was performing in her job duties. Therefore, the Commission agrees with the ALJ's finding that the respondent violated N.J.S.A. 18A:12-24(b) and (c).

DECISION

For the foregoing reasons, the Commission accepts the conclusions of the Administrative Law Judge and finds that David Kanaby violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-24.1(c) and (i) of the Code of Ethics for School Board Members when he sent an e-mail to the superintendent and copied the entire Board.

In considering the penalty, the Commission does not agree with the respondent that the respondent's conduct is a trivial matter and a *de minimis penalty* should be imposed. The Commission agrees with the complainant's reply wherein she argues that N.J.S.A. 18A:12-29 requires the Commission to recommend to the Commissioner of Education the reprimand, censure, suspension or removal of a school official found to have violated the Act. The Commission takes note of the ALJ's suggestion that the Commission consider "that the

respondent's intercessions were both unnecessary as well as understandable in making a determination as to the penalty." See, Initial Decision, page 4. However, the Commission agrees with the ALJ that, because of Mr. Kanaby's obligation to the public as a Board member, his natural support of his wife cannot involve his position as a member of the Board. Therefore, rather than recommending a penalty of removal, the Commission recommends to the Commissioner of Education that David Kanaby be suspended for three-months.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Rubin may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C53-05

Whereas, the Commission found probable cause to credit the allegations that David Kanaby violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-24.1(c) and (i) of the Code of Ethics for School Board Members when he sent an e-mail to the superintendent and copied the entire Board; and

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a hearing; and

Whereas, the Administrative Law Judge concluded that the probable cause finding was sustained and found that David Kanaby violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-24.1(c) and (i) of the Code of Ethics for School Board Members when he sent an e-mail to the superintendent and copied the entire Board; and

Whereas, the respondent filed exceptions to the ALJ's decision and complainant replied; and

Whereas, the Commission fully considered all of the documentation filed in response to the ALJ's decision and voted to accept the conclusions of ALJ's decision; and

Whereas, the Commission agrees with the written decision of its staff finding that David Kanaby violated N.J.S.A. 18A:12-24(b) and (c) and N.J.S.A. 18A:12-24.1(c) and (i) of the Code of Ethics for School Board Members and recommending to the Commissioner of Education that Mr. Kanaby be suspended for three months;

Now Therefore Be It Resolved that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini MST
Paul C. Garbarini, Chairperson

I hereby certify that the School Ethics Commission adopted this decision at its public meeting on July 24, 2007.

Mary E. Torres, Acting Executive Director

357-07

#357-07

OAL DKT. NO. EDU 3321-07
AGENCY DKT. NO. 45-2/07

L.J.S., on behalf of minor child J.J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/07

Date of Mailing: 9/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03321-07

AGENCY REF.NO.45-2/07

L.J.S. ON BEHALF OF MINOR CHILD, J.J.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,

Respondent.

Monica Dodd Palestis, Esq., for petitioner

Matthew P. DeMaria, Esq., for respondent

Record Closed: August 2, 2007 Decided: August 10, 2007

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on March 12, 2007 for determination as a contested case. A hearing was scheduled for March 22 and 23, 2007, which was adjourned due to unavailability of the witnesses. The matter was reschedule for July 18, and 23, 2007. The hearing date of July 18 was adjourned because of a possible settlement.

On July 20, 2007, the respondent's attorney faxed a letter stating that the matter had been amicably resolved between the parties. On August 2, 2007, the undersigned received the original copy of the Stipulation of Settlement. See attached copy.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/10/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 8-15-07

Mailed to Parties:

AUG 15 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

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MATTHEW P. DE MARIA, ESQ.
550 Boulevard
Elmwood Park, New Jersey 07407
(201) 794-6067
Attorney for Respondent
Elmwood Park Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUOS 03321-2007N
AGENCY REF. NO. 45-2/07

L.J.S., o/b/o J.J.O.,

Petitioner,

vs.

BOROUGH OF ELMWOOD PARK
BOARD OF EDUCATION,

Respondent.

STIPULATION OF SETTLEMENT

The matter in difference in the above entitled action having been amicably agreed to by and between the Petitioner, L.J.S., o/b/o J.J.O., and the Respondent, Borough of Elmwood Park Board of Education, it is hereby stipulated, settled and agreed between the parties as follows:

1. The student, J.J.O., shall be permitted to attend the Elmwood Park School District as an Affidavit Student while in residence with Petitioner, L.J.S.

2. The student, J.J.O., shall be considered a qualified Affidavit Student based on the information provided by Petitioner, L.J.S., and reviewed by the Elmwood Park School District Administration.

3. At the conclusion of the second marking period for the school year, 2007-2008, Petitioner, L.J.S., shall provide to the respondent, Elmwood Park Board of Education, a certification indicating whether or not any of the information previously provided to the Respondent, Elmwood Park Board of Education, has changed in any manner.

4. It is anticipated by the parties that the student, J.J.O., shall graduate upon the completion of the 2007-2008 school year. In the event that the student, J.J.O., requires additional educational services by the Elmwood Park School District beyond June 30, 2008, Petitioner, L.J.S., shall be required to provide a renewed application for Affidavit Student status on behalf of student, J.J.O., in order for said educational services to be provided.

Monica Dodd Palestis

MONICA DODD PALESTIS
Attorney for Petitioner

Dated: 7/27/07

MATTHEW P. DE MARIA
Attorney for Respondent

Dated: 7/30/07

351-07

OAL DKT. NO. EDU 206-07
AGENCY DKT. NO 458-12/06

S.D. on behalf of minor child M.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms with the following caveat. The terms of the settlement required that the compromised tuition fee be paid by April 28, 2007, a date that was three months before the settlement contract was signed (and ratified) by all parties, and several months before consideration by the Commissioner of Education.

The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same. The Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already

effectuated the settlement terms, or have agreed upon a mutually satisfactory alternate date for petitioner's payment of the compromised tuition fee.

The matter is hereby dismissed, subject to compliance with the terms of the settlement and the condition set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/13/07

Date of Mailing: 9/13/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 206-07
AGENCY DKT. NO. 458-12/06

S.D. O/B/O M.D.,

Petitioner,

v.

BOARD OF EDUCATION OF KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

Craig D. Becker, Esq., for petitioners, (Comegno Law Group, P.C.)

Raymond J. Zane, Esq., for respondent (Zane & Lozuke, attorneys)

Record Closed: July 30, 2007 Decided: July 31, 2007

BEFORE **ANA C. VISCOMI**, ALJ:

This matter, involving an appeal of the district board of education's residency determination, was transmitted to the Office of Administrative Law on January 11, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was then scheduled for a hearing before Honorable Joseph Lavery, ALJ on February 13, 2007. As Judge Lavery recused

himself due to a conflict, the matter was thereafter reassigned to me. The parents, then pro se, sought emergent relief, which was denied. Thereafter, present counsel was retained. The parties then placed a settlement on the record on March 28, 2007, and then executed a Settlement Agreement (J-1) which was submitted on June 18, 1007. The Board adopted a Resolution dated July 23, 2004, (R-1) ratifying the agreement.

I have reviewed the record and the terms of the settlement and Board Resolution and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures. The Board has passed a resolution approving the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 31, 2007

DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

AUG 3 2007

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/lam

2007 JUN 18 A 11:30
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGREEMENT

THIS AGREEEMENT entered into this _____ day of _____ 2007, between KINGSWAY REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION whose address is 213 Kings Highway, Woolwich Township, New Jersey 08085-9653 (hereinafter referred to as "School District") and SETH AND SUSAN DANIELS whose address is 44 Messina Drive, Woolwich Township, New Jersey 08085 (hereinafter referred to as "S.D.").

WITNESETH

WHEREAS, S.D. instituted an action before the Commissioner of Education captioned S.D. o/b/o M.D. vs. Kingsway Regional Board of Education, OAL Docket No.: EDU 206-07; and

WHEREAS, the parties wish to amicably resolve all differences by way of this Agreement; and

WHEREAS, the parties, through the attorneys, have negotiated a settlement that is acceptable to both parties to which they agree to be bound; and

WHEREAS, the terms of the Agreement are as hereinafter set forth.

AGREED

1. The parties agree that pursuant to an invoice dated November 20, 2006 prepared by the School District, S.D. was notified of an outstanding tuition bill for M.D. in the amount of $2,473.52. A copy of the invoice is attached hereto as Exhibit "A".
2. The parties have agreed to compromise the invoice to an amount of $1,500.00 under the following terms:

a. S.D. shall cause to be delivered to the School District a certified check in the amount of $1,500.00 made payable to Kingsway Regional School District on or before April 28, 2007 (30 days).

b. In the event that S.D. does not make the payment on or before April 28, 2007 (30 days) as aforementioned, then S.D. shall owe the entire tuition in the amount of $2,473.52 to the School District.

c. If and only if S.D. does not make payment of the $1,500.00 compromised tuition on or before April 28, 2007, (30 days) this Agreement shall become a consent judgment against S.D. for the entire amount of the invoice, that being $2,473.52, without the school district having to serve any further notice upon S.D. and this Agreement may be recorded as evidence of the judgment. If S.D. does make payment of the $1,500.00 compromised tuition on or before April 28, 2007, no judgment shall be entered against S.D.

d. If and only if S.D. Does not make payment of the $1,500.00 compromised tuition on or before April 28, 2007, (30 days) S.D. shall be responsible for any and all legal fees and costs associated with prosecuting the judgment listed in section 2, C.

3. It is agreed by the parties that M.D. shall receive no preferential or detrimental treatment from the School District as a result of this litigation and the facts of this case. M.D. shall be treated like any other member of the student body in accordance with existing policies.

4. It is agreed by the parties that M.D. shall serve the three (3) previously imposed detentions. The time and place that M.D. must serve the detentions shall be at the sole discretion of the School District and shall be served in accordance with existing School District policy.

5. Any and all other issues pertaining to this litigation have been resolved to the mutual satisfaction of the parties and the parties acknowledge that there are no remaining unresolved issues arising out of this litigation.

THE PARTIES hereby agree to be bound by the terms of this Agreement resolving all issues between the parties.

KINGSWAY REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION

BY: Mark R. Kbhoe
MARK KBHOE, for Respondent
SCHOOL BOARD PRESIDENT

Witness:

SETH DANIELS
Petitioner

SUSAN DANIELS
Petitioner

Witness: Clerk

Witness: Clerk

KINGS_ _\Y REGIONAL SCHOOL_ _STRICT
213 Kings Highway
Woolwich Township, New Jersey 08085

INVOICE

Date: 11/20/06

To: Seth and Susan Daniels

DESCRIPTION	AMOUNT
Parent Paid Tuition for Maya Daniels to attend the Kingsway Middle School 9/7/06 to11/20/06 - 49 days @ $50.48 per diem	$ 2,473.52
Total Due	$ 2,473.52
Please make all checks payable to Kingsway Regional School District and send to the indicated address above.	

DECLARATION BY VENDOR OR PERSON RENDERING SERVICE

I do solemnly declare and certify under the penalties of the law that the above bill is correct in all its particulars; that no bonus have been given or received by any person or persons with the knowledge of this claimant in connection with the above claim; that the amount therein stated is justly due and owing; and that the amount is a reasonable one.

Signature: Andrew R. Eubanks

Andrew R. Eubanks, RSBA/SS

RESOLUTION OF THE KINGSWAY REGIONAL SCHOOL DISTRICT AUTHORIZING SETTLEMENT IN THE MATTER OF S.D. VS. KINGSWAY REGIONAL SCHOOL DISTRICT, DOCKET NO.: EDU-206-07

WHEREAS, the parents of M.D. brought the above referred to action on behalf of their minor child, M.D.; and

WHEREAS, the parties have agreed to enter into a settlement of all issues pending; and

WHEREAS, the Board of Education of the Kingsway Regional School District has approved the terms of an Agreement and furthermore authorized the Board President, Mark Kehoe, to sign the Agreement on behalf of the Board of Education.

NOW, THEREFORE, BE IT RESOLVED that Mark Kehoe, the President of the Board of Education, is hereby authorized to sign the Agreement recommended by the Superintendent and reviewed by the Board's Attorney settling all issues in dispute in the matter referred to as S.D. vs. Kingsway Regional School District, Docket No: EDU 206-07.

THIS RESOLUTION was approved by the Board of Education on the 23rd day of July, 2007 ratifying the Agreement dated June 15, 2007.

ATTEST:

Mark R. Kehoe
MARK KEHOE, Board President

Andrew K. Eubanks
ANDREW EUBANKS, Board Secretary

2007 JUL 30 P 12:11
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

358-07

AGENCY DKT. NO. 137-5/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LISA KOVALOVICH WHITMORE, PARAMUS SCHOOL DISTRICT, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION

The motion by respondent for reconsideration of the Commissioner's August 10, 2007 decision ordering the suspension of respondent's teaching certificate, and the reply thereto filed by petitioner, have been reviewed.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), motions for reconsideration may be granted if they conform to one or more of the following four criteria:

> i. Claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
>
> ii. Newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
>
> iii. Newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation or misconduct could not have been previously known; or
>
> iv. Reversal of a prior judgment on which the present matter is based.

The parties both aver that prior to the Commissioner's above referenced August 10, 2007 decision ordering the suspension of respondent's teaching certificate, a settlement agreement had been executed by respondent and representatives of petitioner, and presented to the Paramus Board of Education for ratification. That settlement agreement was

subsequently approved by petitioner, by way of resolution, on August 27, 2007. Due to mistake or inadvertence, respondent failed to submit a response to the order to show cause advising the Commissioner that an amicable resolution to the controversy was being jointly pursued by the parties.

After consideration of the motion papers – including the affidavit of respondent's counsel and the copies of the stipulation of settlement and settlement agreement, and ratifying resolution by the Paramus Board of Education – the Commissioner concludes that respondent's reconsideration motion may be granted, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(i), *supra.* Further, the Commissioner is satisfied that the parties have voluntarily agreed to the terms of the proposed settlement, and that the settlement terms are consistent with the public interest.

Accordingly, The Commissioner's decision and order dated August 10, 2007 – suspending respondent's teaching certificate – is herewith vacated, and the proposed settlement submitted by the parties is approved.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/07

Date of Mailing: 9/14/07

[1] A copy of this decision shall be forwarded to the Office of Professional Standards and Licensing, and to the State Board of Examiners.

RECEIVED BY
CONTROVERSIES
& DISPUTES

2007 AUG 20 PM 2:

SPRINGSTEAD & MAURICE, ESQS.
COURTHOUSE TOWERS
39 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR RESPONDENT

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

AGENCY DKT. NO. 137-5/07

MOTION FOR RECONSIDERATION

TO: Cherie Adams, Esq.
Sills, Cummis, Epstein & Gross
One Riverfront Plaza
Newark, New Jersey 07102

PLEASE TAKE NOTICE that the undersigned attorney for the respondent, Lisa Kovalovich Whitmore, moves at such date and time as may set by the Commissioner of Education of New Jersey for an order vacating the Decision and Order of the Commissioner dated August 10,2007 in which respondent's teaching certification was suspended for one year.

The respondent shall rely on the certification of counsel, appended hereto, in support of this motion.

ALFRED F. MAURICE, ESQ.
Attorney for Respondent

Dated: August 17, 2007

SPRINGSTEAD & MAURICE, ESQS.
COURTHOUSE TOWERS
39 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR RESPONDENT

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

AGENCY DKT. NO. 137-5/07

DECISION AND ORDER

For Petitioner, Cherie Adams, Esq., Sills Cummis Epstein & Gross
Respondent, Alfred F. Maurice, Esq., Springstead & Maurice

This matter was opened before the Commissioner of Education by way of motion for reconsideration of our prior order of August 10, 2007. The motion was accompanied by a certification from Respondent's counsel attesting that the matter had been settled prior to the decision being rendered and that the Bureau was not notified due to inadvertence or other good cause.

No objection to the relief requested was received from the Petitioner and it appears that Petitioner and Respondent had independently resolved the matter in advance of the August 10, 2007 order. Accordingly:

IT IS ORDERED that the order of suspension of respondent's teaching certification is hereby vacated and that the subject Petition and Order to Show Cause of May 23, 2007 is hereby dismissed, with prejudice.

_____
COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: _____

SPRINGSTEAD & MAURICE, ESQS.
COURTHOUSE TOWERS
39 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR RESPONDENT

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

AGENCY DKT. NO. 137-5/07

CERTIFICATION OF COUNSEL

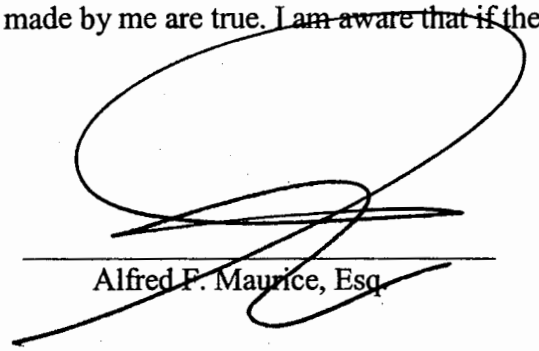
I, ALFRED F. MAURICE, of full age, hereby certify and say:

1. I am a partner in the law firm of **Springstead & Maurice**, Esqs., attorneys for Respondent in the within matter and am fully familiar with the facts and circumstances relating to the instant application..
2. I represent the Respondent, LISA KOVALOVICH WHITMORE with respect to the application of the Paramus School District to have Ms. Whitmore's teaching certification suspended.
3. Ms. Whitmore appeared in my office after having been served with a copy of the Board's petition and asked for our services.
4. Thereafter, I contacted Stephen Fleisher, Esq, of Sills, Cummis, Epstein & Gross, attorneys for the Paramus School District. Mr. Fleisher was assigned as counsel for the district.
5. As a result of that communication, the parties, Mr. Fleisher on behalf of the board, and I on behalf of the Respondent, began negotiations to bring about a settlement of the dispute.
6. The parties reached a meeting of the minds which resulted in the formulation of a settlement agreement that included the withdrawal of the Petition by the Board.
7. The agreement was completed and executed by Ms. Whitmore and forwarded to Mr. Fleisher on July 17, 2007. Shortly thereafter, the Agreement was executed by the Board.
8. The Board then placed the matter on its agenda for its August 2007 meeting to approve the settlement that had already been executed by the parties.

9. During the period between the execution of the agreement and Commissioner's action, Mr. Fleisher left the firm and the continuity between our respective offices was lost. Cherie Adams, Esq. is now assigned to the matter and the Board is prepared to move forward with its resolution approving the settlement.
10. Through inadvertence, no one notified the Commissioner's Office of the settlement and no answering pleadings were filed.
11. As a result, the Commissioner entered the Order of August 10, 2007, that the parties now seek to have vacated.
12. As a result of the error, Ms. Whitmore suffered a penalty that was not contemplated or intended by the parties because of the settlement. The Commissioner is respectfully urged to vacate the order of suspension in the interest of justice.

I certify that the forgoing statements made by me are true. I am aware that if they are willfully false, I am subject to punishment.

Dated: August 17, 2007



Alfred F. Maurice, Esq.

Springstead & Maurice

Attorneys at Law

Practice Limited to Labor Relations
39 Hudson Street, Hackensack, NJ 07601
(201) 487-1414 OR (201) 343-0003
Telecopier (201) 487-0212

ALFRED F. MAURICE
N.J. & Fl. Bars

HAROLD N. SPRINGSTEAD, L.L.M.
(certified criminal trial attorney)

LAUREN E. MCGOVERN

July 17, 2007

Steven M. Fleischer, Esq.
Sills, Cummis, Epstein & Gross
One Riverfront Plaza
Newark, New Jersey 07102

Re: Lisa Kovalovich Whitmore/ Paramus Board of Education

Dear Mr. Fleischer:

Enclosed please find an executed Original Stipulation of Settlement and Settlement Agreement. Please review the following and return a fully executed agreement to our office.

Please do not hesitate to contact our office should you have any questions.

Very truly yours,

ALFRED F. MAURICE

Enc.
Cc: Ms. Lisa Whitmore

SPRINGSTEAD & MAURICE, ESQS.
Court House Towers
39 Hudson Street
Hackensack, New Jersey 07601
(201) 343-0003
Attorneys for Respondent:

IN THE MATTER OF THE TEACHING CERTIFICATE OF LISA KOVALOVICH WHITMORE

SCHOOL DISTRICT OF PARAMUS, BERGEN COUNTY

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

DOCKET NO.

STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT

THIS STIPULATION OF SETTLEMEMNT AND SETTLEMENT AGREEMENT is entered into by and between the **SCHOOL DISTRICT OF PARAMUS** (hereinafter referred to as the "Board"), and **LISA KOVALOVICH WHITMORE** (hereinafter referred to as "Whitmore"), (hereinafter collectively referred to as the "Parties").

WHEREAS, Whitmore has been employed by the Board as a teaching staff member and has obtained tenure in that position; and

WHEREAS, Certain employment issues have arisen giving rise to the Board filing an Order to Show Cause with the Commissioner of Education, and

WHEREAS, the Parties find it to be in their best interests to reach an amicable resolution so as to avoid the time and expense associated with litigation.

NOW, THEREFORE, in consideration of the promises and mutual covenants, understandings and mutual agreements contained in this Stipulation of Settlement, it is hereby agreed by and between the Board and Whitmore as follows:

1. Whitmore will terminate her employment with the Board effective March 9, 2007 and shall be deemed to have surrendered all tenure and seniority rights to employment with the Board effective on that date. Whitmore shall also surrender any and all claims to compensation from the Board for services rendered prior to her separation date and acknowledges that she has received payment from the Board in full for all services rendered up through the date of her seperation.

2. Whitmore surrenders her employment rights with the Board knowingly, voluntarily and without duress, and after consultation regarding her rights and obligations with a representative of her choosing.

3. Whitmore, agrees not to apply for or engage in re-employment in the public schools of the State of New Jersey as a teaching staff member through June 30, 2008.

4. The Board agrees to withdraw its application, currently pending before the Commissioner of Education, respecting Whitmore's teaching license, with prejudice. The Board, reserves, however, the right to re-institute an action before the Commissioner or in another appropriate forum to enforce the terms of this agreement.

5. The Board, by Resolution, shall publicly approve this agreement and accept Whitmore's resignation of employment effective March 9, 2007.

6. The Parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Stipulation of Settlement and that each signs this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

7. This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

8. This Stipulation of Settlement and compliance with this Stipulation of Settlement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

9. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

10. All terms of this Stipulation of Settlement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the Parties.

11. The terms of this agreement and the underlying facts upon which it is based shall remain confidential among the parties except to the extent that disclosure is required by law. The parties are free to discuss the terms of this agreement among their attorneys and professional advisors who shall be bound to this provision in the same manner as their principals.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

_____

Board Secretary/Business Administrator

Dated: _____

PARAMUS BOARD OF EDUCATION

BY: _____

Board President

WITNESS:

_____

Dated: 6-28-07

BY: Lisa Kovaloind Whitmore

LISA WHITMORE

AGENCY DKT. NO. 137-5/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Sills Cummis Epstein & Gross

Respondent: No appearance by or on behalf of Lisa Kovalovich Whitmore

This matter was opened before the Commissioner of Education on May 23, 2007 by way of an Order to Show Cause served by petitioner, Paramus Board of Education, upon respondent, Lisa Kovalovich Whitmore, requiring respondent to show cause why an order should not be entered suspending her teaching certificate, pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8, for resigning without providing the amount of notice required by her contract with respondent, and for failing to provide the 60 days notice required by law. By notice dated May 23, 2007, the Bureau of Controversies and Disputes (the Bureau) acknowledged receipt of proof of service upon respondent of the order to show cause.

On June 26, 2007, the Bureau sent respondent a final notice, via regular and certified mail, directing respondent to file an answer within ten days. The final notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. A signed receipt for the notice sent by certified mail was returned on July 2, 2007, and the notice sent by regular mail was not returned.

No answer to the order to show cause has been filed as of this date.

As stated above, the final notice to respondent clearly advised that if an answer was not filed within ten days of receipt of same, each allegation in the papers supporting the order to show cause would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Commissioner now concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order suspending respondent's teaching certification. Accordingly:

IT IS ORDERED that summary decision is granted to petitioner, and respondent's teaching certification is suspended for a period of one year pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 8/10/07

Date of Mailing: 8/10/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SPRINGSTEAD & MAURICE, ESQS.
COURTHOUSE TOWERS
39 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
ATTORNEYS FOR RESPONDENT

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATION OF LISA KOVALOVICH WHITMORE SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

AGENCY DKT. NO. 137-5/07

CERTIFICATION OF MAILING

I, **MICHELE BERMAN**, of full age, hereby certify and say:

1. I am a paralegal employed by the law firm of **Springstead & Maurice**, Esqs., attorneys for Petitioner in the within matter.

2. On August 17, 2007, I mailed an original and two (2) copies of the within Motion for Reconsideration by Lawyers Service, to the Commissioner of Education, 225 West State Street, CN 500, Trenton, New Jersey 08625, and a copy of same having been served by Lawyers Service, upon:

Cherie Adams, Esq.
Sills, Cummis, Epstein & Gross
One Riverfront Plaza
Newark, New Jersey 07102

3. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/Michele Berman

MICHELE BERMAN

359-070

359-07

AGENCY DKT. NO. 245-8/07

IN THE MATTER OF THE TENURE HEARING OF WENDELL LEE, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION ORDER

Upon review of the tenure charges and answer filed in the above-captioned matter, the Commissioner notes that the record includes a copy of an investigative report issued by the Division of Youth and Family Services (Statement of Evidence, Exhibit F).

N.J.A.C. 6A:3-1.3(g) provides as follows:

> Consistent with the provisions of *N.J.A.C.* 1:10A-14, where a petition, or tenure charge pursuant to *N.J.A.C.* 6A:3-5, is filed in a matter involving allegations of child abuse and neglect reported to or investigated by the Division of Youth and Family Services (DYFS), the record of the matter shall be sealed to the extent necessary, pending further action by the ALJ [Administrative Law Judge] to whom a matter is subsequently assigned at the OAL [Office of Administrative Law], to protect all DYFS records and reports regarding such abuse and neglect.

Accordingly, the above-referenced exhibit is hereby SEALED pending further action by the Administrative Law Judge upon transmittal of this matter to the OAL.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 9/14/07
Date of Mailing: 9/17/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4-1.1 *et seq.*

360-07

ALBERT ZIEGLER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher with an instructional certificate in Skilled Trades – Employment Orientation, was employed by the respondent Board from 1984 until 1999, at which time he was terminated upon the Board's being advised by the NJDOE that the Employment Orientation certification did not authorize petitioner to teach the industrial arts courses to which he was assigned. Petitioner challenged his termination. On appeal in 2005, the petitioner prevailed before the State Board of Education, which ruled that his authorization extended to carpentry – the experience on which his Skilled Trades certification had been issued – and that he was improperly terminated from his tenured employment during the 1998-99 school year. The State Board directed the respondent to reinstate petitioner with back pay, less mitigation, and the matter was remanded to the OAL for determination of the appropriate amount to be awarded.

On remand, the ALJ found that: the petitioner adequately mitigated his damages, so that the appropriate back pay award is the total income the petitioner would have earned had he remained an employee of the Board, less actual income earned and unemployment benefits received; and petitioner is entitled to receive his accumulated sick time during periods of unemployment dating back to the date of termination, but is not entitled to compensation for out of pocket medical and dental expenses or reimbursement for tuition paid. The ALJ recommended that back pay be awarded in the amount of $187,762.24, covering the 1998-99 through 2005-06 school years.

The Commissioner adopted the Initial Decision of the OAL with modification. While concurring with the ALJ that petitioner did not fail to mitigate damages and was due accumulated sick leave, the Commissioner did not agree that the petitioner was entitled to back pay and sick time for the 2003-04 through 2005-2006 school years. Finding that the record supported the Board's representation that, after June 30, 2003, petitioner could not have been employed in the district because no position within the scope of his certification was vacant or held by a less senior tenured staff member, the Commissioner concluded that petitioner is due back pay in the amount of $140,167.24, and is to be credited with sick time for periods of unemployment from the date of his termination through the end of the 2002-03 school year.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 17, 2007

360-07R

OAL DKT. NO. EDU 11305-05
(EDU 1526-00 ON REMAND)
AGENCY DKT. NO. 21-2/99

ALBERT ZIEGLER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed, as have exceptions and replies filed by each party in accordance with *N.J.A.C.* 1-18.4 and 1-18.8.

In its exceptions, the Board of Education (Board) contends that the Administrative Law Judge (ALJ) erred in calculating petitioner's damages for the period at issue, basing them simply on the difference between petitioner's projected earnings as a teacher at Bayonne High School and his actual earnings together with unemployment compensation, without taking other factors into account. The Board urges the Commissioner to consider anew its arguments on failure to mitigate, and additionally to consider its arguments – not addressed by the ALJ – as to the unavailability of an appropriate position since the end of the 2002-03 school year and the effect of a delay in prior proceedings at the OAL.

The Board first asserts that petitioner had an obligation to mitigate his damages and failed to do so. According to the Board, petitioner should not be granted back pay or accumulated sick leave from February 1999 up until the time he obtained a position with the

Hunterdon County Polytech in October 2000, or from June 2001 until through January 2, 2002, the date he was employed by Union City; during these times, the Board avers, petitioner rejected appropriate and available work as a substitute teacher or applied for jobs for which he was either unqualified or uncertain of his qualification, thus using his time "collecting unemployment compensation and taking courses to earn a degree and become certified in an unrelated area" instead of making a good faith effort to find alternative employment. (Board's Exceptions and Reply at 4-8[1])

The Board further asserts that petitioner should not be entitled to damages for the 2003-04, 2004-05 and 2005-06 school years, since – subsequent to June 30, 2003 – there was no position at Bayonne High School to which he could have been assigned, so that he would have been placed on a preferred eligibility list rather than actually employed in the district. The Board explains that by the end of the 2002-03 school year, three of the four courses on which the State Board based its directive for reinstatement had been eliminated, while the remaining course (Industrial Technology I) had been completely revised to focus on building trades rather than woodworking and has since been taught solely by teachers certified in Industrial Arts; moreover, while the Board does offer carpentry courses which petitioner is presumably qualified to teach, they are taught almost exclusively by a full-time carpentry teacher with ten years' greater seniority. (Board's Exceptions and Reply at 8-10)

Finally, the Board renews its claim that, as a matter of fundamental fairness, no back pay should be awarded for the period from April 11, 2002 to August 8, 2003, which reflects a sixteen-month delay in the ALJ's issuance of an Initial Decision on the Commissioner's prior remand for determination of the scope of petitioner's certification. According to the Board, this

[1] The Board incorporates its primary and reply exceptions into a single submission.

delay "should not result in a windfall for Petitioner to the detriment of the Board of Education and the taxpayers of the City of Bayonne." (Board's Exceptions and Reply at 11)

In summation, the Board urges the Commissioner to limit petitioner's damages to $14,006.04, reflecting the difference between what he would have earned as a teacher in Bayonne and what he actually earned during those portions of the 2000-01 and 2001-02 school years when he was employed, less amounts attributable to the delay in the ALJ's earlier Initial Decision on Remand. (Board's Exceptions and Reply at 13-14)

Petitioner's exceptions urge adoption of the Initial Decision in all respects, except for modification to "restate the respondent's obligation to reinstate the petitioner," since that has not yet occurred. (Petitioner's Exceptions at 1) Consistent with its own exceptions, the Board replies that such contention must be rejected because there is not now – nor has there been since the end of the 2002-03 school year – any position for which petitioner qualifies that is not held by a more senior staff member. (Board's Exceptions and Reply at 12) Petitioner counters:[2]

> This assertion ignores both the scope of the remand order and the fact that the respondent was previously directed to reinstate the petitioner. Based upon the reinstatement order, it was respondent's legal and moral obligation to notify the petitioner if his reinstated position was to be eliminated. *N.J.S.A.* 18A:28-9 *et seq.* It did not do so. If it had, other legal rights and obligations may have arisen. It simply chose, once again, to ignore the law and the petitioner in the hope that this would all simply go away. It has not and the respondent may not deprive the petitioner of his legal remedies. (Petitioner's Reply Exceptions at 1)

Upon review, the Commissioner adopts the Initial Decision of the ALJ with modification as set forth below.

Initially, the Commissioner concurs with the ALJ that petitioner did not fail to mitigate his damages so as to warrant reduction of back pay. In this regard – being fully satisfied

[2] This argument is made by Petitioner in reply to the Board's primary exceptions. Petitioner's reply does not address the Board's other arguments.

that the ALJ carefully considered the arguments and evidence of the parties as to appropriate and available work, as well as petitioner's efforts to procure it – the Commissioner adopts the ALJ's analysis and conclusions as set forth in the Initial Decision. Nor is the Commissioner dissuaded by the fact that petitioner took college courses during 1999-2001 in order to obtain standard certification as a Teacher of the Handicapped (issued February 2002, Exhibit P-5); to the contrary, the record is clear that petitioner was having little success in locating comparable employment with his existing skilled trades credential, and that he either worked or continued seeking work during the periods he attended school (Exhibits P-1 and P-3) and promptly used his newly acquired certification to obtain a full-time teaching position which he held continuously thereafter. Additionally, the Commissioner concurs with the ALJ's determinations – to which neither party took exception – as to the types of emoluments due (or not due) to petitioner.

The Commissioner cannot agree, however, that petitioner is entitled to back pay and sick time for the entire period extending from the 1998-99 through the 2005-06 school years as recommended in the Initial Decision. Although the ALJ (inexplicably) did not address the Board's argument on this point,[3] the Commissioner finds nothing in the record to counter the Board's assertion, supported by Exhibits J-4 through J-9 as well as the stipulated facts, that as of June 30, 2003 – due to the elimination and redesign of various industrial arts/vocational courses – had petitioner been employed in the district, he would have been reduced in force and placed on a preferred eligibility list because the only positions within the scope of his Skilled Trades certification – even as construed by the State Board – were held by more senior staff members. In the absence of evidence – or indeed, even argument – to the contrary, the Commissioner must agree with the Board that, because petitioner would not have been employed in the district

[3] Clearly raised in the Board's Post-Hearing Brief at 16-18. The record included neither transcripts of proceedings nor a prehearing order.

subsequent to June 30, 2003 even if he had not been improperly terminated, he is entitled to neither back pay nor sick leave for the 2003-04, 2004-05 or 2005-06 school years, as found by the ALJ.[4]

Moreover, with respect to the 2005-06 school year, the Commissioner additionally notes that petitioner's entitlement to reinstatement arose with the State Board's decision of July 6, 2005, prior to the start of the 2005-06 school year, and that petitioner brought no action – either at the time of the State Board ruling or any time since[5] – alleging that the Board was failing to employ him as required. Where, as in the present instance, a teaching staff member is ordered reinstated following a finding of termination in violation of tenure/seniority rights, actual reemployment is necessarily contingent upon the existence of a position which the aggrieved party is qualified to fill and is not held by a more senior tenured staff member; otherwise the employee's rights are vindicated by placement on the appropriate preferred eligibility list(s) for recall when such a position becomes available, with any allegation of a board's failure to employ as required pursuable as a new cause of action. Having thus far made no such claim, petitioner cannot in this context be found entitled to back pay for the 2005-06 school year, nor can he use the present proceeding – the scope of which was expressly limited by the State Board to determining, in the absence of a record sufficient to permit its own findings, "the specific amount of damages to which the petitioner is entitled" (Slip Opinion at 7) – as a vehicle for demanding reinstatement to active employment.[6]

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[4] The Commissioner rejects any notion that the Board was required to notify petitioner of reductions prior to the State Board's ruling finding him qualified to teach courses other than employment orientation.

[5] The State Board's decision was neither stayed pending reconsideration and appeal, nor reversed.

[6] Nothing herein is intended to preclude the filing of a Petition of Appeal in pursuit of such claim, whether with respect to petitioner's Skilled Trades endorsement or the Teacher of the Handicapped endorsement he acquired in February 2002; similarly, nothing herein precludes the Board from raising such affirmative defenses, including untimely filing, as it deems appropriate in response to any such petition.

Finally, the Commissioner rejects the Board's contention – likewise not addressed by the ALJ – that petitioner's award should be further reduced as a result of a delay in proceedings at the OAL. In this regard, the Board does not even claim – let alone demonstrate – that petitioner was in any way responsible for such delay, and, absent a showing of fault, there is precedent in neither equity nor law for reducing an aggrieved party's damages based on the length of time it took to vindicate his right(s).

In summation, then, the Commissioner finds petitioner to be due back pay and sick leave as follows:

School Year	Projected Earnings	Actual Earnings	Unemployment	Offset
1998-99	$55,525.00	$36,107.00	$10,582.00	$8,836.00*
1999-00	$62,000.00	$0.00	$0.00	$62,000.00*
2000-01	$67,500.00	$41,773.16	$8,028.00	$17,698.84*
2001-02	$70,000.00	$32,457.60	$3,325.00	$34,217.40*
2002-03	$74,200.00	$56,785.00	$0.00	$17,415.00*
2003-04	$76,500.00	$61,271.00	$0.00	$0.00**
2004-05	$79,800.00	$63,807.00	$0.00	$0.00**
2005-06	$82,760.00	$66,387.00	$0.00	$0.00**
Total	**$568,285.00**	**$358,587.76**	**$21,935.00**	**$140,167.24**

* Sick Leave to accrue as found by the ALJ.
** No sick leave to accrue as held herein.

Accordingly, the Initial Decision of the OAL is adopted with modification as set forth above.[7] Back pay in the amount of $140,167.24 shall be remitted to petitioner, who is

[7] In the interest of accuracy, the Commissioner also clarifies the ALJ's statement (at 2) that the State Board "found that the petitioner's certification in Employment Orientation no longer existed and so, retroactively granted him a new certificate, entitling him to teach unspecified industrial arts courses." What the Board actually held was that, at the time petitioner's certificate was issued, regulations (as opposed to Department practice) provided for no specifications on the Skilled Trades endorsement, so that petitioner was not limited by the Employment Orientation specification on his certificate as issued, but was also entitled to teach courses falling within the scope of the carpentry experience on which the Skilled Trades endorsement had been based. Indeed, in a ruling on motion for

additionally to be credited with sick time for periods of unemployment from the date of his termination through the end of the 2002-03 school year. The Board is further directed to reimburse the Department of Labor, Division of Unemployment Compensation, for monies paid to petitioner, [8] and a copy of this decision shall be forwarded to the Division so as to facilitate prompt effectuation of such reimbursement.

IT IS SO ORDERED.[9]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Issue: 9/17/07

Date of Mailing: 9/17/07

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reconsideration of its July 6, 2005 decision, the State Board specifically denied granting petitioner "retroactive certification in carpentry" as claimed by the Board. (Decision on Motions, September 7, 2005, slip opinion at 5-7)

[8] See *John Scott and Charles Yarnall v. Board of Education of the City of Trenton, Mercer County, et al.*, decided by the Commissioner September 30, 2002, affirmed State Board June 2, 2004, appeal dismissed by Appellate Division January 11, 2005 (A 00637603T5).

[9] This decision, as the Commissioner's final determination in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11305-05
AGENCY DKT. NO. 21-2/99

ALBERT ZIEGLER,
Petitioner,
v.
BOARD OF EDUCATION OF BAYONNE,
Respondent.

ON REMAND
OAL DKT. NO. EDU 1526-00

Gregory T. Syrek, Esq., for petitioner Albert Ziegler (Bucceri and Pincus, attorneys)

Robert J. Merryman, Jr., Esq., for respondent Board of Education of Bayonne, Hudson County (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: August 2, 2007 Decided: August 2, 2007

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Albert Ziegler (petitioner or Ziegler) was a tenured teacher of the Bayonne Board of Education (respondent or Board). He was employed by the respondent from September 1984 until January 1999, and taught various subjects geared toward students who were not on a college preparatory track, i.e. students who

would be entering the workforce immediately following graduation. The courses he taught included "Employment Orientation," "Shop 9," "Shop 10," "Maintenance and Repair," and "Industrial Technology" (collectively, industrial arts courses). The petitioner was terminated on November 23, 1998 by formal Board action after the respondent was advised by the County Superintendent and State Department of Education that the petitioner's Employment Orientation Certificate did not authorize him to teach the industrial arts courses he was assigned to teach.

The petitioner challenged his termination, and the matter was transmitted to OAL, where I found in his favor and ordered his reinstatement with back pay. The Commissioner of Education remanded the matter for determination of what courses, if any, the petitioner was certified to teach. I found that by virtue of his certification and experience teaching, that the petitioner was qualified to teach the industrial arts courses, "Shop 9," "Shop 10," "Maintenance and Repair," and "Industrial Technology." The Commissioner rejected the decision and found that despite the petitioners' skills and experience, he did not hold a subject area certification, and was not authorized to teach industrial arts courses. The State Board of Education reversed the Commissioner, and found that the petitioner's certification in Employment Orientation no longer existed and so, retroactively granted him a new certificate, entitling him to teach unspecified industrial arts courses. The respondent was ordered to reinstate the petitioner with back pay, less mitigation. The matter was remanded to OAL for a determination of the appropriate amount of back pay to be awarded. On October 20, 2006, a hearing was held, three witnesses testified and several joint exhibits were entered into evidence, as well as a joint stipulation of facts.

STIPULATION

The parties agreed to stipulate to the following facts;[1]

[1] For purposes of efficiency, certain information has been condensed.

1. For the school years 1998-99 through 2005-06, the petitioners' earnings if he had remained a Board employee, his actual earnings and unemployment benefits received.

School Year	Projected Earnings	Actual Earnings	Unemployment	Offset
1998-99	$55,525.00	$36,107.00	$10,582.00	$8,836.00
1999-00	$62,000.00	$0.00	$0.00	$62,000.00
2000-01	$67,500.00	$41,773.16	$8,028.00	$17,698.84
2001-02	$70,000.00	$32,457.60	$3,325.00	$34,217.40
2002-03	$74,200.00	$56,785.00	$0.00	$17,415.00
2003-04	$76,500.00	$61,271.00	$0.00	$15,229.00
2004-05	$79,800.00	$63,807.00	$0.00	$15,993.00
2005-06	$82,760.00	$66,387.00	$0.00	$16,373.00
Total	**$568,285.00**	**$358,587.76**	**$21,935.00**	**$187,762.24**

2. After the 2002-03 school year, Shop 9, Shop 10 and Maintenance and Repair were no longer offered as courses by the respondent.

3. For the 1998-99 and 1999-00 school years, between January 31, 1999 and March 5, 2000, twenty different schools and school districts, located in Jersey City, North Plainfield, Linden, Union City, Elizabeth, Essex County Vo/Tech., Berkeley Heights, Glen Ridge, North Arlington, Millburn, Readington, the Passaic County Educational Services Commission, Cedar Grove, Hillside, and Irvington advertised for substitute teachers.

4. For the 2001-02 school year, between July 15, 2001 and January 13, 2002, fifteen different schools and school districts located in Linden, Orange, Summit, Somerset County Vo/Tech., Union County Educational Services Commission, Patterson, Millburn, Plainfield, Mountainside, and Springfield advertised for substitute teachers.

5. The teachers employed by the respondent to teach industrial arts courses from January 1999 to present, and their dates of hire and certifications.

Teacher	Date of Hire	Certifications
Alfred R. Pisciotti	September 1, 1964	Teacher of Industrial Arts – 1963 Teacher of Automotive Tech. – 1981
Michael Cantore	December 1, 1974	Teacher of Industrial Arts – 1974 Teacher of Carpentry – 1976 Teacher of Driver Education – 1997
Michael Hudacko	September 1, 1997	Vo-Tech Skilled Trades – Welding
Angelo Pacilio	December 1, 1997	Vo-Tech Skilled Trades – Plumbing
Dedicacion DeJesus	January, 1999	Teacher of Industrial Arts – 1999
Richard Roberts	May, 1999	Teacher of Industrial Arts – 1991 Teacher of the Handicapped - 1995

6. Messrs. Pisciotti and DeJesus are retired.

LEGAL DISCUSSION

Calculating Back Pay

Tenured school board employees who have been improperly denied reemployment pursuant to their tenure rights are entitled to such reemployment, along with back pay and emoluments. See N.J.S.A. 18A:6-30; Mueller v. Bd. of Educ., Hunterdon Central Reg. High School Dist., 93 N.J.A.R.2d (EDU) 419, 422; Bourhis v. Bd of Educ., Borough of Fort Lee, 92 N.J.A.R.2d (EDU) 540, 543; Snack v. Bd. of Educ., City of Orange, 92 N.J.A.R.2d (EDU) 509, 511. However, the employee has the duty to mitigate his or her damages and any award of back pay may be reduced for failure to mitigate. White v. Bd. of Trustees, Burlington County College, 77 N.J. 538 (1978); Mullen v. Bd. of Educ., Jefferson Twp., 81 N.J. Super. 151 (App. Div. 1963).

"Mitigation ... is the deduction of other income received, from the amount of back pay otherwise recoverable ... where other income is not actually received, the amount of back pay awarded may be reduced by the amount the discharged employee could or should have received by reasonable and sincere efforts to locate other employment." Zielenski v. Bd. of Educ., Township of Guttenberg, 1981 S.L.D. 759, 762. Any actual income earned by the employee, as well as unemployment benefits received must be deducted from the back pay award. Murray v. Newark Housing Authority, 311 N.J. Super. 163, 179 (Law Div. 1998); West Orange Supplemental Instructors Assn. v. Bd. of Educ., Township of West Orange, 92 N.J.A.R.2d (EDU) 288. Here, the petitioner would have earned a total of $568,285.00 for the school years between 1998 and 2006, if he had remained an employee of the respondent. His actual income, including unemployment benefits, totaled $380,522.76. The difference is $187,762.24. Therefore, unless the petitioner is found not to have mitigated his damages he shall be entitled to receive $187,762.24 in back pay.

Mitigation of Damages

Here, the petitioner did not fail to mitigate his damages. Failure to mitigate is an affirmative defense, and the burden of proof rests with the breaching employer. Roselle v. Lafera Contracting Co., 18 N.J. Super. 19, 28 (Ch. Div. 1952). When mitigating damages, individuals must exercise reasonable diligence and ordinary care. West Orange Supplemental Instructors Assn. v. Bd. of Educ., Township of West Orange, 92 N.J.A.R.2d (EDU) 288 (citing Associated Metal, Corp. et. al. v. Dickson Chemical, et. al., 82 N.J. Super. 281 (App. Div. 1964). What constitutes adequate mitigation has been "liberally construed" as an "honest attempt" to find comparable employment. Siegel v. Bd. of Educ., Garfield, 94 N.J.A.R.2d (EDU) 319. The term "comparable employment" has been interpreted to mean that the position is of a like character, which requires analysis of the particular responsibilities and skills of the job which the individual was denied. Goodman v. London Metals Exchange, 86 N.J. 19 (1981).

A teacher's duty to mitigate his damages does not require that he accept any offered teaching position without regard to the nature of the position or such factors as

the attending salary and benefits. Siegel, supra. Rather, the duty imposed upon a wrongfully discharged employee by the mitigation doctrine is to seek similar employment in order to reduce the amount of his or her damages. Ibid. (citing Goodman, supra). "Similar employment refers to the nature of the activity, location and rate of compensation ... thus it may be unreasonable to apply mitigation principles when the available job would require the applicant to move his home, or to accept a substantial reduction in pay." Ibid. (citing Goodman, supra at 36-37). In Siegel, the State Board of Education found that a teacher's refusal to accept substitute teacher work, after being illegally riffed, was not a failure to mitigate because substitute teaching is not comparable to being a full time staff member. Substitutes are paid substantially less, and are generally paid per diem, and unlike full time staff members, substitutes are generally not given benefits. Here, the only positions that the respondent has shown that the petitioner did not apply for between January 31, 1999 and January 13, 2002, were certain substitute teaching positions.[2] On the contrary, the petitioner has shown that he did apply for numerous full-time teaching positions throughout that time period, some of which he was unsure whether he was certified to teach. Regardless of whether he obtained employment in any of those positions, by applying for them, he made an honest attempt to find comparable employment. Just as importantly, unlike in Siegel, where the ALJ reduced the back pay award by the offered per diem rate, assuming a certain number of days of employment[3], here there is no guarantee that the petitioner would have obtained employment as a substitute[4], it is not known what his per diem rate would have been because the rates vary between school districts, nor is it known how many days the petitioner would have been able to work. Therefore, any reduction in the amount of back pay owed to the petitioner is not calculable because it is unknown how much he could have earned as a substitute in any of the other available positions.

The degree of comparability required may change with time, so that, "with the passage of time, circumstances may dictate that the claimant lower his sights and

[2] Petitioner applied for and received a long-term substitute teaching position at Hunterdon County Polytech from approximately November 31, 2000 to January 31, 2001, which was then extended by contract until June 30, 2001. The school did not renew his employment for the 2001-02 school year.

[3] The State Board overturned the ALJ on this point, on the basis that it was not knowable how many days the petitioner would have been able to work, and so no amount of mitigation could be calculated.

[4] Other than the employment noted in n. 5.

accept employment with lower pay with different work, or at a more distant location." Goodman, supra at 38. The applicability of the lower sights principle depends not only on the passage of a reasonable period of time, but also on the particular circumstances of the matter and "is to be applied with caution, for measured against the policy of promoting production and employment is the counter policy of righting the wrong attributable to an unlawful discrimination." Id. at 40. Moreover, a wrongfully discharged employee who lowers his or her sights too soon by accepting lower-paying work risks a reduction from damages in an amount equivalent to that which he or she should have accepted. Siegel, supra. Here, the petitioner ultimately did lower his sights, and after approximately one and one-half school years of searching, accepted comparable employment that paid substantially less than his former position. Thus, the petitioner did not fail to mitigate his damages by not lowering his sights.

Emoluments

The petitioner additionally requests reinstatement of his accumulated sick time, compensation for his out of pocket medical and dental expenses, and reimbursement for tuition paid. With the exception of the sick time, none of these items should be included in the award. The petitioner is entitled to retain his sick time during his periods of unemployment, dating back to his date of termination. However, his requests for reimbursement for medical and dental expenses are not supported because it is unknown whether the costs would have been covered by his medical and dental insurance had he remained an employee of the respondent. Additionally, tuition reimbursement is covered by the collective bargaining agreement between the school district and the teacher's union, and any classes for which reimbursement is sought must be (a) related to the teacher's field, and (b) pre-approved by the Superintendent. The classes that the petitioner took were to obtain a Teacher of the Handicapped Certificate, not to get additional industrial arts related certifications. Further, the petitioner did not request approval for reimbursement from the Superintendent. As such, his claims must be denied.

CONCLUSION

In conclusion, the appropriate back pay award is the total earnings the petitioner would have earned, had he remained an employee of the respondent, less actual income earned and unemployment benefits received. The petitioner adequately mitigated his damages, and the respondent is not entitled to a reduction in the award on this basis. Additionally, the petitioner is only entitled to receive his accumulated sick time dating back to the date of termination, during his periods of unemployment. He should not receive reimbursement for out of pocket medical/dental or tuition expenses as it has not been established that the insurance coverage existed or that the tuition reimbursement would have been approved.

ORDER

It is **ORDERED** that back pay in the amount of $187,762.24 be paid to petitioner.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

AUG 2 07

DATE

JEFFREY A. GERSON, ALJ

8/2/07

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 6 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

#361-07

OAL DKT. NO. EDU 10844-06
AGENCY DKT. NO. 280-8/06

JAMES BONNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the Board President signed the Stipulation of Settlement and Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney – who is the Board's duly authorized representative in litigation – the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement and Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/18/07
Date of Mailing: 9/18/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10844-06

AGENCY DKT. NO. 280-8/06

JAMES BONNER,

Petitioner,

v.

IRVINGTON BOARD OF EDUCATION,

Respondent.

Timothy R. Smith, Esq., for petitioner (Timothy R. Smith & Associates, LLC, attorneys)

Ronald L. Hamlin, Esq., for respondent (Hamlin, Hunt & Ridley, attorneys)

Record Closed: August 10, 2007 Decided: August 17, 2007

BEFORE **JOSEPH A. PAONE**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 27, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on June 11, 2007. Prior to the hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.
Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8-17-07
DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency: 8-22-07

Mailed to Parties:

AUG 22 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 201
South Orange, NJ 07079
Attorney for James Bonner

JAMES BONNER vs. IRVINGTON BOARD OF EDUCATION	Cross reference: State v. Bonner Summons No.: S-2005-004203 OAL Docket No.: EDUOR 10844-2006

RECEIVED
2007 AUG 10 P 4:

STIPULATION OF SETTLEMENT AND RELEASE

This Stipulation of Settlement and Release is made by and between the Irvington Board of Education (the "Board") with administrative offices located at 1 University Place, Fourth Floor, Irvington, New Jersey 07111 and James Bonner ("Bonner"), whose address is 21 Acken Drive, Clark, New Jersey 07066. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on December 12th, 2005, Bonner was employed as a teacher by the Board; and

WHEREAS, on that date, Bonner was charged with a criminal action for certain acts alleged to have occurred while Bonner was in the employ of the Board; and

WHEREAS, on May 18th, 2006, the criminal complaint against Bonner was dismissed by the Irvington Municipal Court; and

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Bonner's defense counsel forwarded a demand letter to the Board, on or about June 20th, 2006, seeking reimbursement from the Board

for Bonner's attorney's fees and cost associated with the legal defense of the criminal action with which Bonner was charged; and

WHEREAS, on or about August 10th, 2006, Bonner's defense counsel filed a Petition for Reimbursement of Legal Fees, which is currently being transmitted to the Office of Administrative Law; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to Bonner the sum of Four Thousand Three Hundred Dollars ($4,300.00) in full and complete satisfaction of the amount Bonner is claiming to be due and owing to him from the Board for Bonner' attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Bonner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Bonner, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the demand for reimbursement, now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Bonner acknowledges that he has reviewed this Stipulation of Settlement and Relea with his own independent legal counsel and that he enters into it without duress, and his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.

5. Bonner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to withdraw with prejudice the above referenced Petition for Reimbursement before the Commissioner of Education.

6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.

7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.

8. The Board's President is authorized to execute this Stipulation of Settlement and Relea on behalf of the Board.

9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE IRVINGTON BOARD OF EDUCATION:

By: Blue Burgess
, Board President

Date: 8-3-07

By: Corey Fogg
, Witness

FOR JAMES BONNER:

By: James Bonner
James Bonner

Date: 6/25/07

Sworn and subscribed to before me this
25 day of June, 2007

Judith Lois Wentlandt
Notary Public

JUDITH LOIS WENTLANDT
NOTATY PUBLIC OF NEW JERSEY
MY COMMISION EXPIRES 2/9/2012

362-07

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK KING,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF SALEM, SALEM COUNTY.	:	

SYNOPSIS

In March 2007, petitioning school district certified tenure charges of conduct unbecoming against respondent, a tenured teacher, setting forth general allegations of unprofessional conduct. Respondent sought to dismiss the tenure charges against him, asserting that the Board failed to comply with the requirements of *N.J.S.A.* 18A:6-11, *N.J.A.C.* 6A:3-5.1 and *N.J.A.C.* 6A:3-5.2 prior to sending the charges to the Commissioner. Respondent maintains that the charges – which do not contain a statement of evidence – are procedurally deficient, unspecific, and based on hearsay.

The ALJ found that: the only issue to be determined is whether or not the Board complied with the statutory provisions of *N.J.S.A.* 18A:6-11 when it certified tenure charges against petitioner to the Commissioner; the petitioning Board failed to provide respondent with a written statement of evidence as required by law; tenure charges submitted to the Commissioner lack specificity and are so general in nature that respondent is unable to defend against them. The ALJ concluded that the Board has failed to comply with the provisions of *N.J.S.A.* 18A:6-11; accordingly, respondent's motion to dismiss the tenure charges against him must be granted. The ALJ recommended that the tenure charges be dismissed, without prejudice, and that the respondent be reinstated to his tenured teaching position with back pay and emoluments.

The Commissioner concurred with the findings of the ALJ that infirmities in the tenure charges are sufficient to preclude them from proceeding to hearing and adjudication, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 18, 2007

OAL DKT. NO. EDU 4489-07
AGENCY DKT. NO. 117-4/07

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK KING,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF SALEM, SALEM COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that infirmities in the tenure charges filed against respondent by the Board of Education are sufficient to preclude them from proceeding to hearing and adjudication.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – dismissing the charges against respondent without prejudice and directing that respondent be reinstated with all salary and emoluments to which he would have been entitled if the charges had not been brought – is adopted as the final decision in this matter.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/18/07

Date of Mailing: 9/18/07

[1] The Initial Decision erroneously states (at 2) that respondent's Motion to Dismiss in Lieu of Answer was filed *subsequent* to transmittal of the tenure matter to the OAL; in fact, it was filed prior to transmittal pursuant to applicable rule.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4489-07
AGENCY DKT. NO. 117-4/07

IN THE MATTER OF THE TENURE HEARING OF FRANK KING, SCHOOL DISTRICT OF THE CITY OF SALEM, SALEM COUNTY

Roger Barber, Esq., for petitioner (Barbour & Barbour, P.A., attorneys)

Michael C. Damm, Esq., for respondent, Frank King (Selikoff and Cohen, attorneys)

Record Closed: July 16, 2007 Decided: August 22, 2007

BEFORE **LILLARD E. LAW**, ALJ, T/A:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of Salem (Board), certified charges to the Commissioner of Education (Commissioner) against respondent, Frank King, a teaching staff member with a tenure status with the Board, alleging, among other things, that respondent King engaged in conduct unbecoming a professional employee while in the performance of his teaching duties with the Board.

Subsequent to the Commissioner having transmitted the matter to the Office of Administrative (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to-15 and N.J.S.A. 52:14F-1 to -13, .respondent propounded a Motion to Dismiss the pending matter, in lieu of filing an Answer to the Board's charges. The Motion was submitted within the time period prescribed by N.J.A.C. 6A:3-5.3(a).

Oral Argument on respondent's Motion, was held on July 16, 2007, at the Atlantic City OAL, at which time, the herein record closed.

THE BOARD'S DETERMINATION AND RESOLUTION OF THE CHARGES AGAINST RESPONDENT AS SUBMITTED TO THE COMMISSIONER

1. The Board has reviewed the charges and allegations which have been filed against Frank King, a tenured teacher within the Salem City School District.

2. The Board has reviewed the evidence and certifications as to the charges and allegations which have been filed against Frank King.

3. The Board has provided Frank King and his representatives with the opportunity to respond to the charges and allegations, both in writing, and in person.

4. The Board hereby determines and resolves that the charges, allegations and evidence present a case of probable cause against Frank King for engaging in conduct unbecoming a professional, while carrying out his employment duties as a teacher in the Salem City School District.

5. The Board hereby determines and resolves that the charges, allegations and evidence against Mr. King warrant the filing of written tenure charges against Frank King, with the New Jersey Department of Education, Commissioner of Education, through the Office of County Superintendent of Schools.

6. The Board hereby authorizes and resolves that the Board Secretary shall forthwith certify and file the said tenure charges against Frank King.

LEGAL ARGUMENTS OF THE PARTIES

RESPONDENT'S POSITION

Pursuant to N.J.A.C. 6A:3-1.5(g), N.J.A.C. 6A:3-1.4 and N.J.A.C. 6A:3-5.3(a)1, respondent submitted his motion and letter brief in lieu of an Answer to the Complaint, seeking to dismiss the tenure charges filed against him by the Board.

RESPONDENT'S STATEMENT OF FACTS

Respondent asserts the basis for his motion concerns the issue of the failure of the Board to present the tenure charges against him to the Commissioner in accordance with the prerequisites of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b). Respondent asserts the most significant deficiencies involve the Board's failure to provide respondent with a copy of the charges within the time frame mandated by N.J.A.C. 6A:3-5.1(b), or at any time prior to certifying the charges to the Commissioner, in order for him to consider the charges and be afforded his statutory right to respond by way of a statement of position. Further, the charges, which do not contain a statement of evidence, are so vague that they do not meet the specificity requirements provided by N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b). For these reasons and those set forth below, the charges should be dismissed

Respondent observes that the Board, through its attorneys, sent a letter, dated April 18, 2007, together with the charges filed against him to the Commissioner (Exhibit "A"). The envelope containing the charges was postmarked April 21, 2007, and received by respondent's attorney on April 24, 2007 by first class mail. The Certification of Service accompanying the charges states that on April 24, 2007, they were mailed to the New Jersey Department of Education and respondent. Thus, respondent argues, the Certificate of Service was signed three (3) days before the alleged mailing. The

charges contain a certification of determination signed by Board Secretary Deborah Piccirillo, dated March 29, 2007, stating, among other things, that respondent was served with the charges prior to its certification, and given "the opportunity to respond." Respondent contends that there is no date set forth in the Board Secretary's certification as to when respondent was served with the charges prior to the charges having been certified. Nor is it clear exactly when the charges were considered by the Board. There is no proof of service of the charges served upon respondent attached prior to the Board having considered them. Respondent alleges that the Board did not serve him with the charges at any time prior to certifying them to the Commissioner, as required by law, in order to afford respondent his statutory right to respond. N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b).

Respondent contends that there is no statement of evidence submitted with the charges. Nor is the affidavit by the Superintendent of Schools accompanying the charges properly notarized; is not based on personal knowledge; is not supported by any evidence, and speaks of vague allegations for which no dates, times or locations of the alleged violations occurred.

POINT I

Respondent bases his Motion on the fact that the Board failed to comply with the procedural requirements of N.J.S.A. 18A:6-11, N.J.A.C. 6A:3-5.1 and N.J.A.C. 6A:3-5.2 prior to sending the charges to the Commissioner. The charges themselves, which do not contain a statement of evidence, are not only procedurally deficient, but are based on hearsay, and are unspecific as to permit respondent to properly respond. Accordingly, the charges should be dismissed.

Respondent asserts that the following outlines some of the deficiencies which form the basis for the dismissal of the charges.

1. The Board failed to serve respondent with a copy of the charges along with a statement of evidence prior to its consideration of the charges as required in

N.J.S.A. 18A;6-11 and N.J.A.C. 6A:3-5.1(b). As set forth in the attached Certification of respondent, he was never served with the charges at any time prior to the Board's consideration of them as required by N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1(b)2, so as to be afforded the opportunity to learn what constituted the charges and to exercise his statutory right to respond by way of a statement of position. The Certificate annexed to the charges by the Board Secretary to the effect that respondent was served and given such an opportunity is simply not true. In fact, the incomplete affidavit supporting the charges is dated the same day as the Certificate of Determination. The Board's failure to comply with this statutory prerequisite is fatal and the charges must be dismissed. Tenure Hearing of Barry Hamlin, Dunellen Board of Education, 1982 S.L.D. 687; Tenure Hearing of Marilyn Feitel,1977 S.L.D. 451, aff'd State Board of Education, 1977 S.L.D. 458. See also, N.J.A.C. 6A:3-5.1 as to the manner of service, proof of mailing or hand delivery. None was provided to respondent.

2. The Board failed to state with specificity the allegations and furnish a supporting statement of evidence executed under oath as required by N.J.S.A. 18A:6-11, N.J.A.C. 6A:3-5.1(b)1 and N.J.A.C. 6A:3-5.1(b)6. The aforesaid statute and regulations require that the charges, accompanied by a sworn statement of evidence, state with specificity the basis for the charges. Under N.J.A.C. 6A:3-5.1(b)1, the charges are then to be served on the tenured employee within three (3) days of being filed with the Board so that the employee is afforded due process and thereby not only given the opportunity to respond by way of statement of position, but the information necessary to be able to respond at a Board level prior to Board consideration. Respondent was not served with the charges or a statement of evidence at any time prior to Board consideration. Nor was he advised as to when the Board was to consider the written charges. Further, the affidavit executed by the Superintendent, which was not properly notarized and which purports to set forth the allegations, is not based on any personal knowledge, and is so vague and unspecified that it not only failed to provide respondent the information to respond a Board level, but at the Commissioner's level as well. Nor does it give the Commissioner the ability, as required by law, to properly consider as to whether or not they are sufficient to merit charges being filed. N.J.S.A. 18A:6-16; N.J.A.C. 6A:3-5.5. The charges contain no specifics as to dates,

times, persons involved or any other specifics in support of the charges. There is nothing in the charges to indicate the Board considered anything other than these vague assertions. As such, the charges should be dismissed. See Tenure Hearing of Edwards, East Orange Board of Education, 1982 S.L.D. 211 (Tenure charges dismissed where not sufficiently supported by specific allegation to permit tenured staff member to respond.) The Board was not permitted to cure deficiencies by amendments of it petition as that would have permitted the Board to circumvent the process set forth in the tenure statutes for notice and an opportunity to respond to charges at a Board level before certification to the Commissioner).

3. The Board failed to provide written notification of its determination to respondent within three (3) working days of that determination as required by N.J.A.C. 6A:3-5.1(5). Not only did the Board fail to provide respondent with a copy of the so-called tenure charges at any time prior to its consideration of the charges, but it failed to provide written notification of its determination to respondent within three (3) working days after that determination, as required by N.J.A.C. 6A:3-5.1(5). See also N.J.S.A. 18A:6-11, which requires that the respondent be notified "forthwith." In the instant matter, the certification submitted by the Board Secretary is dated March 29, 2007, and the charges were not sent to respondent until April 24, 2007, according to the predated Certification of Service, dated April 21, 2007, which accompanied the charges.

4. The Board failed to provide a certificate of determination indicating the date, place and time of the meeting at which the determination was made to certify the charges, as required by N.J.A.C. 6A:3-5.2. The certificate of determination accompanying the charges fails to indicate the actual date the Board met to determine the charges, requiring only that the certificate of determination was signed on March 29, 2007. Since it is not clear exactly when the Board considered the matter, there is no showing that the Board acted within forty-five days after receipt as required by N.J.S.A. 18A:6-13.

For each of the above reasons, the charges should be dismissed.

POINT II

Respondent should be reinstated to his teaching position together with back pay and emoluments in the event of any suspension without pay. Respondent should also be compensated for any losses incurred due to the termination of his benefits.

RESPONDENT'S CONCLUSION

In this case, as set forth above, the Board failed to comply with the requirements of N.J.S.A. 18A:6-11, N.J.A.C. 6A:3-5.1 and N.J.A.C. 6A:3-5.2 prior to sending the charges to the Commissioner. Not only are the charges, which do not contain a statement of evidence, procedurally deficient, but they are based on hearsay and are vague and unspecific so as not to permit respondent to properly respond. See In re Tenure Hearing of Dinich, Willingboro Township, 80 S.L.D. 729. (Commissioner dismissed without prejudice tenure charges of unbecoming conduct for procedural irregularities on the part of the Board.) The Board failed to provide tenured teacher with a copy of the charges, had not taken separate action to certify those charges, created no record as evidence of its determination of probable cause, failed to support its allegations, delayed the filing for four (4) months and filed incorrectly.

THE BOARD'S POSITION

In response to respondent's Motion to Dismiss the Tenure Charges, the Board submitted the following:

It asserts that on or about February 15, 2007, the Board's attorney faxed and mailed a letter to respondent's attorney, informing him that the Board planned to discuss the employment status of respondent at the Board's February 21, 2007, meeting. ON February 15, 2007, the respondent's attorney faxed a letter to the Board's attorney wherein he acknowledged receipt of the Board's letter. Respondent's attorney also instructed the Board's attorney to serve respondent directly. At the February 21, 2007 Board meeting, the Board instructed its attorney to proceed with the preparation

of tenure charges against respondent. The Board's attorney asserts that respondent chose no to appear at the February 21, 2007 Board meeting.

Subsequently, on February 26, 2007, the Board attorney served respondent a copy of the proffered tenure charges, a copy of the proposed affidavit of Superintendent of Schools Margaret Nicolosi in support of the charges, a Statutory Notice letter and, a Rice Notice letter. The Notices advised respondent that the tenure charges would be discussed at the March 7, 2007 Board meeting. Monday, February 26, 2007, the date of service, was the third business day after the Board instructed its attorney to proceed with preparing charges on February 21, 2007, and is in compliance with the statutory and regulatory provisions referenced by respondent's attorney. The documents were served upon respondent via regular U.S. mail, and certified mail, return receipt requested. The regular U.S. mailing was not returned to the Board's office by the postal service. However, the certified mail was returned to the Board's office as "UNCLAIMED" by respondent.

The notices to respondent informed him specifically that his employment would be discussed at the March 7, 2007 Board meeting. The Notices also informed respondent of his statutory rights pursuant to N.J.S.A. 18A:6-11, et seq., referencing the citation. The Notices specifically informed respondent of his right to appear before the Board and, of his right to submit a written statement of position to the Board. The Notices were copied directly to respondent's attorney.

Neither respondent nor his attorney chose to appear at the March 7, 2007, Board meeting. No written statements were submitted to the Board on respondent's behalf. At the March 7, 2007 Board meeting, the Board voted to certify tenure charges to the Commissioner.

On April a18, 2007, the Board's attorney filed the within tenure charges and supporting affidavit of Superintendent Nicolosi with the Bureau of Controversies and Disputes. The tenure charges were received by the Bureau on April 25, 2007.

It is the Board's position that the statutory notice and procedural requirements were followed, and respondent had full knowledge of the proffered charges and an opportunity to respond in accordance with law. As such, the Motion to Dismiss should be denied and the matter should go forward to hearing.

DISCUSSION

The only issue to be determined by this administrative tribunal is whether or not the Board complied with the statutory provisions embodied in N.J.S.A. 18A;6-11, when it certified tenure charges to the Commissioner against respondent, Frank King, a tenured teaching staff member in the Board's employ.

The provisions of N.J.S.A. 18A:6-11, provides, in pertinent part, as follows:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position...
>
> (Emphasis added)

The undisputed facts of this matter clearly demonstrate, among other things, that the Board failed to provide respondent with "a written statement of evidence," under oath. Rather, the tenure charges submitted to the Commissioner against respondent lack specificity and are so general in nature that respondent is unable to "submit a written statement of position." The tenure charges against respondent fail to state a time, or dates of the alleged violations. Nor has the Board provided respondent with the names of the alleged victim or victims which constitutes his "unprofessional conduct."

The decision of the case In the Matter of the Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451, aff'd 458, states there are procedural requirements which a board of education must follow when it brings tenure charges against a teaching staff member, pursuant to N.J.S.A. 18A:6-11. The tenure charge or charges must be in writing and accompanied by a written statement of evidence, under oath, in support of the charge or charges. It is simply not enough to allege, as done so here, that respondent has committed an unknown offense which constitutes conduct unbecoming a teaching staff member and which could result in the termination of his employment with the Board. Under the law, the Board is required to set forth the specific allegations, in writing, together with the facts upon which the Board intends to rely in support of its allegations and under oath.

In the instant matter, the Board has set forth general allegations of respondent's unprofessional conduct. There is no written statement of specific allegations to which respondent can respond or defend. Is respondent compelled to guess what the Board had in mind as to his unprofessional conduct? Is respondent required to wait until the tenure hearing to hear the specifics of the charges and then prepare a defense? How is respondent going to defend against the vague and unspecified charges?

It is without question that the Board has failed to comply with the provisions of N.J.S.A. 18A:6-11. Consequently, under the facts and circumstances, respondent's Motion to Dismiss the tenure charges against him must be granted.

ORDER

For the reasons set forth herein, it is hereby **ORDERED** that the tenure charges lodged against respondent be **DISMISSED,** without prejudice, and the respondent, Frank King, forthwith be reinstated to his tenured teaching position with all salary and emoluments to which he is and would have been entitled had the charges not been brought forth against him. Back pay shall be adjusted for any earned income during the period.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Lillard E. Law

August 22, 2007
DATE

LILLARD E. LAW, ALJ, T/A

Date Received at Agency: 8-22-07

Mailed to Parties:

AUG 27 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

None

For Respondent:

None

DOCUMENTS CONSIDERED

For Petitioner:

Motion to Dismiss in lieu of Answer

For Respondent:

Reply Brief

364-07

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELE BATTLE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF EAST ORANGE, ESSEX COUNTY.	:	
	:	

SYNOPSIS

Petitioning school district certified a tenure charge against respondent – a tenured secretary – alleging chronic absenteeism and persistent tardiness over the course of the past ten school years, and filed a motion for summary decision dismissing respondent from her tenured position. Respondent admits that she was repeatedly warned about her absences and punctuality commencing after the 1997-98 school year, but asserts that many of the absences were for excused medical reasons and covered by her paid time off; she further asserts that she was only late by a few minutes most of the time, and that her absences did not have a detrimental impact on the operations of the district.

The ALJ found that: respondent's certification in opposition to the Board's motion for summary decision does not create a genuine issue of material fact; over the course of nine years, respondent never challenged the Board's determination that she was excessively absent and tardy, and never objected to the discipline imposed upon her; respondent received nine separate written warnings to improve her punctuality and attendance since 1998, has been on probation since 1999, and has not received a salary increment due to her poor attendance record since that same year. The ALJ concluded that respondent's absences and tardiness are chronic and persistent, and constitute just cause warranting dismissal from her tenured position. The ALJ recommended the granting of respondent's motion for summary decision, and dismissal of the respondent.

The Commissioner concurred with the ALJ that the record is more than sufficient to establish chronic absenteeism and persistent tardiness. Accordingly, she adopted the Initial Decision of the OAL, sustaining the tenure charge of chronic absenteeism and dismissing the respondent from tenured employment as of the filing date of this decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 20, 2007

OAL DKT. NO. EDU 5655-07
AGENCY DKT. NO. 123-5/07

IN THE MATTER OF THE TENURE HEARING OF MICHELE BATTLE, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by respondent in accordance with *N.J.A.C.* 1:1-18.4 and the reply of the East Orange Board of Education (Board).

On exception, respondent contends that the Administrative Law Judge (ALJ) erred in deciding this matter on a summary basis, and in making findings of fact notwithstanding insufficient proof in the record. (Respondent's Exceptions at 1-4) In reply, the Board contends that the ALJ properly found respondent to have raised no issues of material fact sufficient to defeat its motion for summary judgment, and correctly ruled in favor of the Board based on the record presented. (Board's Reply at 1-4) In support of these contentions, the parties substantially renew and reiterate arguments previously raised at the OAL, which the Commissioner does not repeat here because they are adequately addressed in the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that the record of this matter is more than sufficient to establish chronic absenteeism and persistent tardiness on respondent's part, notwithstanding any excuses she may have had for individual instances of

absence or lateness and her contention that the Board's representations as to the number and dates of occurrence may not be precisely correct.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's charge of chronic absenteeism is sustained, and respondent is dismissed from tenured employment as of the filing date of this decision.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/07

Date of Mailing: 9/20/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5655-07
AGENCY DKT. NO. 234-5/07

IN THE MATTER OF THE TENURE HEARING OF MICHELE BATTLE, BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY.

Nicholas Celso, III, Esq., for petitioner East Orange Board of Education (Schwartz Simon Edelstein Celso & Kessler LLC, attorneys)

Joel P. Bogorad, Esq., for respondent Michele Battle (Oxfeld Cohen, P.C., attorneys)

Record Closed: August 9, 2007 Decided: August 21, 2007

BEFORE **JOSEPH A. PAONE**, ALJ:

On May 3, 2007, petitioner East Orange Board of Education (Board) filed a tenure charge against respondent Michele Battle, a tenured secretary, alleging neglect, misbehavior, chronic absenteeism, insubordination and/or other offense. On May 17, 2007, after reviewing the charge, the New Jersey Department of Education, Bureau of

Controversies and Disputes, transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On July 20, 2007, the Board filed a motion for an order granting summary decision dismissing respondent from her position as a tenured secretary. Along with the Notice of Motion, the Board submitted a brief and certifications from Assistant Superintendent Dr. Kenneth King and John G Geppert, Jr., Esq. On August 6, 2007, I received respondent's brief in opposition to the motion, along with respondent's certification. Oral arguments were heard on August 9, 2007, and the record closed.

Respondent has been employed by the Board as an Assistant Secretary since September 1992. The Board contends that respondent has repeatedly exceeded her annual allotment of twelve sick days under her collective bargaining agreement with the Board from the 1998-1999 though 2006-2007 school terms. The Board also contends that respondent has been persistently and excessively tardy during that same period, despite repeated written and verbal warning to improve her punctuality.

1) During the 1997-1998 school year, respondent was absent 22 days and tardy 23 times.
2) During the 1998-1999 school year, respondent was absent 22 ½ days and tardy 65 times.
3) During the 1999-2000 school year, respondent was absent 15 days and tardy 117 times.
4) During the 2000-2001 school year, respondent was absent 11 days and tardy 91 times.
5) During the 2001-2002 school year, respondent was absent 15 days and tardy 58 times.
6) During the 2002-2003 school year, respondent was absent 21 days and tardy 39 times.
7) During the 2003-2004 school year, respondent was absent 17 days and tardy 70 times.
8) During the 2004-2005 school year, respondent was absent 25 days and tardy 36 times.
9) During the 2005-2006 school year, respondent was absent 20 ½ days and tardy 57 times.
10) During the 2006-2007 school year, respondent was absent 25 days and tardy 78 times.

After the 1997-1998 school term, respondent was notified that her attendance and punctuality was unsatisfactory, had a negative impact on the school and she needed to immediately make improvement. Since she did not improve, at the

conclusion of the 1998-1999 school term she was again warned about her unsatisfactory performance, placed on probation and her salary increment was withheld. Due to her repeated unsatisfactory attendance and punctuality, respondent's probation was continued and her salary increment withheld until the 2005-2006 school year, when a professional improvement plan was added to her discipline. At the start of the 2006-2007 school year, respondent had been on probation for nine years and eight salary increments had been withheld. Notwithstanding, as of March 12, 2007, respondent was absent 25 days and tardy 78 times since the start of the school year. The Board contends that respondent's absences and tardiness have had a negative impact on office operations, placed an undue burden on the other staff members, who need to cover respondent's responsibilities when she is out of the office, and inconvenienced parents who rely on respondent to retrieve their children's records.

Respondent never contested the discipline imposed upon her commencing after the 1998-1999 school term and continuing into the 2006-2007 school term. She also admitted in answers to the Board's interrogatories that she was repeatedly warned about her absences and punctuality commencing after the 1997-1998 school term and continuing each year thereafter.

In opposition to the motion, respondent asserts in a certification that

> [a]lthough I admit I was absent from work on many of the days asserted by the Board of Education, I did provide medical notes for many of the absences and most of the absences were covered by my paid time off, or sick days.

In addition she certifies that "most of [her] alleged tardies were by a few minutes." Moreover, since she has not reviewed the "sign-in book" upon which the Board relies in charging respondent with tardiness, she will not agree that she was tardy to the extent alleged by the Board. She also explained that her tardiness was due to her need to care for her ill grandmother. Finally, she asserts that her absence did not have a "detrimental impact on the operations of the district." She explained that when she was absent, another secretary could attend to her job responsibilities.

The Board contends that of the 1430 days respondent could have worked between the 1998-1999 and 2006-2007 school terms, she was absent 172 days or twelve percent of the time and tardy 611 times or forty-three percent of the time. While respondent refuses to admit that the Board's allegation regarding the number of days she was absent or the number of times she was tardy is accurate, she does not dispute the Board's contention. She merely insists in a conclusory manner that she is not satisfied with the proof that the Board relies upon, and that material issues of fact exist regarding her justification for her absenteeism and tardiness.

I **FIND** that respondent's self-serving certification submitted in opposition to the Board's motion for summary decision does not create a genuine issue of material fact. It is undisputed that over the course of nine years, respondent never challenged the Board's determination that she was excessively absent and tardy and never objected to the discipline imposed. Now in her certification she contends that she has excuses for many absences, although she provides no details. She also contends that while she was tardy, it was often only by a few minutes. Nevertheless, it remains undisputed that she was absent twelve percent of the time and tardy forty-three percent over a nine-year period. Her refusal to admit that she was tardy to the extent alleged by the Board because she had not reviewed the sign-in book does not create a genuine issue in dispute. I **FIND** that respondent received nine separate written warnings to improve her punctuality and attendance since 1998. In 1999, she was placed on probation and has remained there since. She has not received a salary increment due to her poor attendance record since 1999. At the conclusion of the 2005-2006 school term, the Board implemented a professional improvement plan in order to address respondent's poor attendance record. In light of such a history, I **CONCLUDE** that after an employee is again absent twenty-five days and tardy seventy-eight times, her absences and tardiness are nothing less than chronic and persistent.

Since it undisputed that respondent has engaged in conduct constituting chronic absences and persistent tardiness, there are no genuine issues of material fact. Therefore, pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), the matter is ripe for summary decision. Respondent is tenured as a secretary, and as such, pursuant to N.J.S.A. 18A:17-2(c),

"shall hold [her] . . . employment . . . during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense . . . ." Tenure was designed to protect employees "from dismissal for 'unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985) (citing Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). "However, caution must be taken to avoid [the use of tenure] as a broad cover for individual incompetency or inefficiency." Campbell v. Department of Civil Serv., 39 NJ 556, 583 (1963). The Board's responsibility to manage with an awareness of budgetary constraints is high among its priorities. State-Operated School District of the City of Newark v. Gaines, 309 NJ Super. 327, 333 (App. Div. 1998). To that end, the Board cannot and should not countenance behavior that renders the workplace inefficient. Excessive absences and tardiness constitute such behavior. It matters not that someone is available to fill in for an absent employee. An employer has the right to expect, and "is not asking too much" that an employee, even if tenured, will appear "for work on a regular and timely basis." Ibid.

I, therefore, further **CONCLUDE**, pursuant to N.J.S.A. 18A:6-10, that respondent's chronic absences and persistent tardiness, which continued despite repeated warnings and discipline, constitute just cause warranting her dismissal from her position as an assistant secretary, and the Board is entitled to summary decision. Respondent's contentions in her certification in mitigation of her behavior are of no merit because she had been repeatedly and strongly warned that she must improve her attendance behavior. If the loss of nine years of salary increments cannot induce the appropriate behavior, nothing will. A pattern of excessive absenteeism over a protracted period of time, despite warning, warrants dismissal. State Operated School Dist. of Paterson v. Watson, 93 N.J.A.R.2d (EDU) 362 (1993).

Accordingly, I hereby **ORDER** that petitioner's motion for summary decision sustaining the tenure charge and dismissing respondent from her position as a secretary with the Board is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8-21-07
DATE

JOSEPH PAONE, ALJ

Date Received at Agency: 8-22-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 22 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Exhibits

For Petitioner:

P-1 Certification of Dr. Kenneth King

P-2 Certification of John G. Geppert, Jr., Esq.

For Respondent:

R-1 Certification of Michele Battle

365-07

OAL DKT. NO. EDU 1422-06
AGENCY DKT. NO. 338-11/05

DIANE SHAPIRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY	:	DECISION
RESPONDENT.	:	

The record and order of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. The record reflects that, by letter dated July 23, 2007, counsel for petitioner advised the Administrative Law Judge that – as a consequence of a Section 20 Settlement with Dismissal in the Workers' Compensation Court – she wanted the instant petition of appeal dismissed. The Commissioner determines, therefore, this matter is appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The withdrawal is approved and the Commissioner hereby dismisses this matter with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/07

Date of Mailing: 9/20/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF DISMISSAL

OAL DKT. NO. EDU 01422-06
AGENCY DKT. NO. 338-11/05

DIANE SHAPIRO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY.

Respondent.

Laurie W. Fielder, Esq., for petitioner, (Fielder & Schepis, attorneys)

Anthony P. Sciarrillo, Esq., for respondent (Lindabury, McCormick & Estabrook, P.A. attorneys)

Record Closed: August 17, 2007 Decided: August 24, 2007

BEFORE: **SANDRA A. ROBINSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on January 19, 2006, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13, and OAL scheduled a hearing for December 14, 2007. Simultaneously, the case was filed

with the Division of Worker's Compensation for the purpose of determining whether a qualified work-related injury existed.

On August 17, 2007, counsel for the petitioner advised the undersigned that the within matter has been settled with a "Section 20 Settlement with Dismissal in the Worker's Compensation Court." Counsel further advised that the matter has been completed in total and that a Dismissal of the case before the OAL, is desired.

Therefore, **IT IS** on this 24th day of August, 2007, **ORDERED**, that the matter of Diane Shapiro v. Board of Education of the City of Clifton, Passaic County, EDU 01422-06, is dismissed, as moot.

IT IS FURTHER **ORDERED**, that petitioner's counsel serve a copy of this **ORDER** upon all parties within 10 days hereof.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** or consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 24, 2007

DATE

Sandra A. Robinson

SANDRA A. ROBINSON, ALJ

Date Received at Agency: August 24, 2007

Mailed to Parties:

AUG 29 2007

DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

Lr/db

368-07

OAL DKT. NO. EDU 3949-07
AGENCY DKT. NO. 86-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID BRICE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. Pursuant to *N.J.A.C.* 6A:9-17.6 (a) 1, a copy of this decision shall be transmitted to the State Board of Examiners for action against respondent's certificate as the Board may deem appropriate.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/07
Date of Mailing: 9/21/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03949-07
AGENCY DKT. NO. 86-3/07

IN THE MATTER OF THE TENURE HEARING OF DAVID BRICE, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY

Ronald C. Hunt, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

Gregory T. Syrek, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: August 2, 2007 Decided: August 23, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter involves tenure charges of conduct unbecoming and dereliction of duty certified by the State-Operated School District of Irvington (District) against David Brice (Brice) under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Brice is a tenured teaching staff member employed by the District. The District accused Brice of fabricating student grades in math and reading for the marking period ending December 2006, uttering false information regarding the method in which he assessed student grades, uttering false information to a parent regarding a child's grades, failing to adhere to the rules and regulations in planning and accompanying students on an unauthorized field trip, failure to adhere to a sixty-day improvement plan in March 2006, and failing to accept and sign for a sixty-day improvement plan in December 2006.

On March 22, 2007, the District filed its written charges with the Commissioner of Education (Commissioner). Brice filed his answer on April 5, 2007. Subsequently, the matter was referred by the Commissioner to the Office of Administrative Law (OAL) where it was received on April 23, 2007 for a hearing as a contested case.

On August 2, 2007, the date scheduled for hearing, both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842, 846] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

> . . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interests.

On August 2, 2007, the OAL held a public hearing on the issue of whether or not the proposed settlement agreement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Brice testified that he fully understood and voluntarily agreed to the terms of the settlement. In addition, the parties have prepared a Stipulation of Settlement, which is attached to and fully incorporated in this decision. Counsel represented that on August 2, 2007 he was in contact with the District superintendent who approved the terms of settlement. Thereafter, by resolution dated August 15, 2007, the Irvington Board of Education (Board) approved the settlement.

Based upon my review of the record and the testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interests for the following reasons:

1. Brice has been employed as a teacher in the Irvington school system for the past six years.

2. It is anticipated that the hearing in this matter would be protracted and costly.

3. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.

4. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators and other personnel who would be required to testify to the incidence which led to the filing of the tenure charges.

5. Under the proposed settlement, Brice has submitted his resignation effective August 15, 2007. There will be no monies owed to Brice in exchange for his resignation.

6. Under the best of circumstances, the hearing needs to be conducted and then the administrative law judge would have forty-five days to prepare an initial decision and the Commissioner would have an additional forty-five days for review and issuance of a final decision.

7. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing.

8. From the District's viewpoint, the outcome under the settlement would be as good as or better than could be achieved if the District were to prevail after a lengthy or costly tenure battle. Money spent on litigation costs would be put to better use for the benefit of the children of Irvington.

9. Before entering into this agreement, Brice fully understood his rights and had adequate opportunity to consult with legal counsel.

10. In particular, Brice acknowledged his understanding that the Commissioner is required under N.J.A.C. 6A:9-17.4 to refer this matter to the State Board of Examiners for whatever action it deems appropriate.

11. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8-23-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 8-24-07

Mailed to Parties:

AUG 29 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

EVID
J-1

In the Matter of the Tenure Hearing of David Brice, Board of Education of Irvington Essex County	OAL Docket No. EDU No. 3949-07 Commissioner of Education Docket No. 184-4/06 STIPULATION OF Settlement

The parties having come before the Court for trial as a result of Tenure charges having been filed and certified by the Commissioner of Education, alleging: (1) Dereliction of Duty and (2) Conduct Unbecoming a Teacher and the parties having conferred with each other have reached a resolution of the matter in lieu of a trial and have agreed to the following terms:

1. The Respondent shall tender his Resignation as a Teaching Staff member of the Irvington Board of Education effective August 15, 2007 in consideration of the district withdrawing its tenure charges

2 The Irvington School District shall pass a Resolution accepting Respondent's resignation at its next Board meeting scheduled on August 15, 2007

3. The school district shall withdraw its tenure charges in consideration of the Respondent's submission of a letter of resignation

4 The Employment records maintained by the school district shall indicate that Respondent resigned from the district in "good standing" effective 8/15/07

5 The Court makes no finding as to the veracity of the allegations made by the district or the denial by the Respondent.

6 The parties acknowledge that the within Settlement must be approved by the Burlington Board of Education, the Office of ~~Administrative~~ Law than and the Commissioner of Education, if this Agreement is not so Approved, the Respondent's Letter of Resignation will be

deemed null and void and the school district's withdrawal of its tenure charges will be similarly void and the parties shall return to status quo and consider litigation of the matter anew.

Dated: August 2, 2007

Irvington Board of Education

Dated: August 2, 2007

David Brice

IN THE MATTER OF THE TENURE HEARING OF DAVID BRICE AND THE IRVINGTON BOARD OF EDUCATION RESOLUTION
AGENCY NUMBER 154-4/06

RECEIVED
2007 AUG 20 A 8:42

WHEREAS, David Brice, a former Teaching Staff member was the subject of Tenure Charges filed with the Commissioner of Education alleging, dereliction of duty and conduct unbecoming a teacher and;

WHEREAS, on the day of trial, the parties reached a resolution which concluded the matter and avoided an extended trial and/or additional legal expenses and;

WHEREAS, Mr. Brice has agreed to resign from the district effective **August 15, 2007** in "good standing" and the district has agreed to withdraw its tenure charges, with no additional compensation to Mr. Brice and;

WHEREAS, the parties having appeared before the Honorable J. Howard Soloman, A.L.J., on August 2, 2007 for purposes of a hearing and agreed to resolve the within dispute by the terms cited herein above and;

NOW THEREFORE BE IT RESOLVED, that the Irvington Board of Education agrees to resolve the matter entitled **In the Matter of the Tenure Hearing of David Brice and the Irvington Board of Education**, Agency Docket No.: 154-4/06 pursuant to the terms cited above at no additional cost to the Board school district.

ACTION:
Motion by: _____ Seconded by: _____
Roll Call:

Approved 5-0 8/15/07

_____
Renee Burgess, Board President

367-07

OAL DKT. NO. EDU 11212-06
AGENCY DKT. NO. 347-9/06

MIRVA RIVERA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner were filed in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4.

Counsel for petitioner submitted, in relevant part, the following exception:

> As recounted in the initial decision, this matter appeared to have been settled on June 11, 2007. At that time, petitioner was "voir dired" as to her acceptance of the settlement. She also signed a settlement agreement which is attached to the initial decision.
>
> The settlement agreement did not speak of the release and waiver language that found its way into a subsequent settlement agreement. This also was not a part of the voir dire of the petitioner. When the formal settlement agreement was forwarded to the petitioner, she did not attach her signature. Subsequently, she informed me because of personal issues she was not in a position to make a final [sic] on the settlement agreement, inclusive of the waiver and release language. I so informed the court and counsel during the conference of August 16, 2007. As the petitioner wishes to have more time to consider the settlement inclusive of the waiver and release language found in the final settlement agreement, it is respectfully submitted that the matter should be remanded to allow for the petitioner to explore her position.

In light of counsel's representations, the Commissioner determines to reject the recommended decision of the OAL, as she cannot bind petitioner to a settlement agreement which includes subsequently added terms over and above those she agreed to on the record on June 11, 2007, particularly ones intended to extinguish her legal rights.

Accordingly, the recommended Initial Decision is rejected and this matter is hereby remanded to the OAL for such further action and/or proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/07

Date of Mailing: 9/21/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11212-06
AGENCY DKT. NO. 347-9/06

MIRVA RIVERA,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner
Joanne L. Butler, Esq., for respondent
(Schenck, Price, Smith and King, attorneys)

Record Closed: August 22, 2007 Decided: August 23, 2007

BEFORE **JOANN LASALA CANDIDO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 30, 2006, the petitioner received notification that her increment for the 2006-2007 school term was being withheld based on conduct unbecoming a Paterson principal. On September 26, 2006 Ms. Rivera filed a Petition of Appeal with the Department of Education. On October 13, 2006 the School District filed its Answer. The matter was forwarded to the Office of Administrative Law (OAL) on November 17,

2006. On June 11, 2007 a hearing was held at the OAL in Newark, on which date petitioner, Mirva Rivera agreed on the record to the following terms:

1. Petitioner will be placed at the appropriate step of salary as of July 1, 2008;
2. There will be no increment for the school year 2006-2007.
3. The increment withholding for the 2006-2007 and 2007-2008 school year will be restored in the 2008-2009 school year.
4. By virtue of this settlement, petitioner will not be reimbursed for the 2006-2007 and 2007-2008 increase she did not receive.
5. This 2008-2009 increment is conditioned upon petitioner receiving satisfactory evaluations.

Petitioner was voir dired as to her acceptance of this settlement. Petitioner also agreed to the terms of this settlement upon advice of counsel. However, after the June 11, 2007 hearing date petitioner had not returned the additional settlement to her attorney. [1]

On August 1, 2007 Ms. Butler sent out correspondence reiterating the June 11th agreement and the necessity of incorporating the waiver and release language into a final agreement. On August 16, 2007, Ms. Butler, again, sent out correspondence to petitioner's legal representative advising of the language being incorporated into the settlement. The undersigned advised petitioner's legal representative to forward an objection in writing stating the reasons for the objections. Failure to respond by August 22, 2007 will result in the entry of an Order without any further opportunity to respond. To date we have still not heard from respondent or her representative. The language with respect to the waiver and release is incorporated into the settlement and it reads:

> Petitioner waives and releases any and all claims against respondent which petitioner raised or could have raised in, or any claims arising out of the Petition of Appeal bearing OAL docket number EDU-11212-2006N, including claims for reimbursement of monies withheld from petitioner as

[1] Petitioner did sign a settlement agreement at the hearing of June 11, 2007 and is attached to this Decision. It did not, however, include the waiver and release language.

the result of the increment withholding, any claims for damages, as well as attorneys fees and costs of suit.

Therefore it is **ORDERED** that the above terms inclusive of the waiver and release language are **AFFIRMED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 23, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: August 23, 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 24 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

(1-5/03-OAL)

OAL DKT. NO. : EDU-11212-06
RIVERA

STIPULATION OF SETTLEMENT

and

~~WITHDRAWAL OF FAIR HEARING REQUEST~~

for

~~DIVISION OF FAMILY DEVELOPMENT~~

A hearing was requested in this case because Petitioner Mirva Rivera challenged the appropriateness of Respondent's action to withhold her employment adjustment increments as of the 2006-2007 school year.

The Petitioner Mirva Rivera and Respondent State Operated School District have reached an agreement. The terms of the settlement are as follows:

Basis and Terms of Settlement or Withdrawal: Petitioner's increments will be restored prospectively as of 7/1/08, subject to positive evaluations in 2006-07 and 2007-08, as will be more fully addressed and specified in a formal typed settlement document to be filed with the Court, with appropriate waivers and releases.

Robert M. Schwartz

Joanne L. Butler

_____ is/is not entitled to benefits as of _____ in the amount of _____.

This ~~agreement~~ becomes effective upon approval by the Division of ~~Family~~ Development.

Date of Settlement or Withdrawal: _____

Mirva Rivera
Petitioner ~~Client~~

c: Client
CWA
DFD
OAL Clerk (2)

_____
Agency Representative

N.J. State Board Consultant, Atty

369-07

#369-07

OAL DKT. NO. EDU 12147-05
AGENCY DKT. NO. 204-8/05

CREATE (CENTER FOR RESPONSIBLE ECONOMIC, ACADEMIC AND TECHNOLOGICAL EXCELLENCE) CHARTER HIGH SCHOOL, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and Stipulation of Settlement transmitted by the Office of Administrative Law have been reviewed. Because the agency is a party to this matter, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the settlement agreement is deemed to be the final decision.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/07

Date of Mailing: 9/21/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12147-05

AGENCY DKT. NO. 204-8/05

CREATE (CENTER FOR RESPONSIBLE ECONOMIC ACADEMIC TECHNOLOGICAL EXCELLENCE) CHARTER SCHOOL,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Amrita Basu, Esq., for petitioner (Schumann Hanlon, LLC, attorneys)

Melissa T. Dutton, Deputy Attorney General, for respondent (Stuart Rabner, Attorney General for the State of New Jersey, attorney)

Record Closed: August 17, 2007 Decided: August 27, 2007

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 4, 2005, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on January 12, 2007. On the date of hearing the parties settled the matter. The attached Stipulation of Settlement and Board Resolution were submitted on August 17, 2007, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 27, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: AUG 30 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 30 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

da

STUART RABNER
Attorney General of New Jersey
Attorney for Petitioner, New Jersey
Department of Education,
Office of Compliance Investigation
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Melissa T. Dutton
Deputy Attorney General
(609) 633-1972

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2007 MAR 29 P 12:48

CENTER FOR RESPONSIBLE ECONOMIC, ACADEMIC and TECHNOLOGICAL EXCELLENCE CHARTER HIGH SCHOOL, INC. Petitioner, v. DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW Docket No. EDUOT 12147-05N STIPULATION OF SETTLEMENT

WHEREAS, petitioner, Center for Responsible Economic, Academic and Technological Excellence Charter High School, Inc. ("CREATE"), and respondent, New Jersey Department of Education, Office of Compliance Investigation ("Department"), have mutually agreed to settle the above-captioned matter, with Eugene T. Paolino, Esq., appearing on behalf of CREATE, and with Stuart Rabner, Attorney General of New Jersey, (Melissa T. Dutton, Deputy Attorney General appearing) on behalf of the Department; and

WHEREAS, this matter arose from CREATE's appeal of the Department's October 28, 2004, Report of Examination which

determined that CREATE must refund the General Fund State Aid the amount of $245,709.56, which was subsequently reduced to $202,566.94; and

WHEREAS, on September 14, 2005, after exhausting the Office of Compliance's appeal process, CREATE filed a petition of appeal challenging the Department's May 12, 2005 final determination regarding the Report of Examination with the Commissioner of Education and the matter was subsequently transferred to the Office of Administrative Law as a contested case; and

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this matter in the public interest; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. CREATE shall refund the sum of $142,590.38 of State Aid to the Department.

2. In lieu of remitting the payment directly to the Department, CREATE agrees that the Department shall withhold an amount of $11,882.53 from twelve (12) of CREATE's quarterly State Aid payments over a period of three years, totaling the sum of $142,590.38. The first payment shall be withheld from CREATE's

January 2008 quarterly State Aid payment and the last payment shall be withheld from CREATE's October 2010 quarterly State Aid payment.

3. Upon execution of this stipulation of settlement, CREATE will withdraw its appeal of the Department's May 12, 2005 final determination regarding the various violations identified in the Department's Report of Examination dated October 28, 2004.

4. CREATE does not concede that the allegations in the petition in this matter were not justified, nor does the Department admit or concede the truth of the allegations contained in the petition filed in this matter and both parties have entered into this agreement for the purposes of settlement only.

5. The parties agree that this stipulation of settlement fully resolves all issues between them arising from the Department's Report of Examination dated October 28, 2004, and the Final Appeal Determination issued May 12, 2005, that are the subject of this appeal.

Date March 9, 2007

Eugene T. Paolino, Esq.
Attorney for Petitioner,
CREATE Charter High School

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: March 15, 2007 By:

Melissa T. Dutton
Deputy Attorney General

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RESOLUTION OF THE BOARD OF TRUSTEES OF CREATE CHARTER HIGH SCHOOL

WHEREAS, CREATE Charter High School (the "School") has filed a Petition to Appeal certain fines imposed by the New Jersey Department of Education against the School in a matter entitled **Center for Responsible Academic and Technological Excellence Charter High School, Inc. v. New Jersey State Department of Education** under **OAL Docket No. EDUOT 12147-2005N ("OAL Petition")**; and,

WHEREAS, CREATE Charter High School requested that the fines be reduced to an amount set forth in detail in the Office of Administrative Law Petition (the "OAL Petition Demand"); and,

WHEREAS, the Board of Trustees (the "Board") of CREATE Charter High School has reviewed the matter with its attorneys who have advised that the New Jersey Department of Education is amenable to settling the matter;

NOW THEREFORE, be it resolved by the Board of CREATE Charter High School on this, the 21st day of December that the School's attorneys be, and they hereby are, authorized to negotiate a settlement with the New Jersey Department of Education and is further authorized to settle the matter for an amount that shall not exceed the amount set forth in the OAL Petition Demand.

Record of Vote:

Introduce By:	Edward A. Wiersielis
Seconded By:	Wanda Benitez

TRUSTEE	AYE	NAY	ABSTAIN	ABSENT
Wanda Benitez	X			
Raafat S. Boles				X
Helen Castillo				X
William H. Kron, Jr.	X			
Stephen Stamos	X			
Edward A. Wiersielis	X			
La-Shay Wilson-Godfrey				X

Stephen Stamos, President

December 21, 2006
Date

ALSO PRESENT:

AMRITA BASU, ESQ., BOARD ATTORNEY

Tape Transcription of the above-entitled matter by JOANNE M. OPPERMANN, a Certified Shorthand Reporter (License No. 1435) and Notary Public of the State of New Jersey.

THE CHAIRMAN: We're now in Executive session at a time of 8:21 PM.

Go ahead.

MS. BASU: We don't have too many items on the Board Attorney's report. As you were previously advised through an e-mail from Gene Paolino, we have settled the OAL petition matter for $142,000. We were not able -- we were unable to get the number lower than that. However, we negotiated the payment schedule in the following manner.

There will be no payments this year. You will start making payments on a quarterly basis over the next two years, starting in 2008. 2007, no payments. 2008 and 2009, every quarter there will be a payment. So essentially the $142,000 will be divided by eight over the course of two years.

The OAL hearing was actually adjourned until we get the settlement papers signed and together (inaudible.) The Attorney General will take care of filing the papers and will be getting it to me, hopefully by the beginning of next week.

That's really all that we have that

is pending with respect to the board's litigation matters.

Are there any questions?

THE CHAIRMAN: Go ahead, Bill.

MR. KRON: As soon as you finish with this I have a question.

THE CHAIRMAN: On this issue?

MR. KRON: No.

THE CHAIRMAN: It might be wise if we try to set aside $47,000 for each of the next three years so that we can make the payments.

MS. BASU: My understanding is that the full amount of the original settlement was already set aside. Is that correct? So we already have the funds available.

THE CHAIRMAN: Is there any further discussion on the legal report?

I have one question, Amrita. Has Jim Dronzek made decisions on --

MS. BASU: Mr. Dronzek has advised me that he will most likely proceed with instituting an action against the New Jersey Insurance Board. However, as we advised you previously, this will be done on a contingency matter. He wants to at least follow through with

the discovery process to see what information we can get from the insurance, the insurance board company, to see what we can find out, and then take it further after that point. He will be here, I believe at next meeting, to further discuss the complaint and the procedure that he's going to follow.

THE CHAIRMAN: Very good, thank you. Bill.

MR. KRON: That was my question.

THE CHAIRMAN: Okay. Is there any further discussion or question on the legal report?

Can we come out of Executive Session?

MS. BASU: Yes, we can.

THE CHAIRMAN: Can I have a motion to come out of Executive Session?

MR. WIERSIELIS: Make a motion to come out of Executive Session.

THE CHAIRMAN: Ed.

MS. CASTILLO: Second.

THE CHAIRMAN: Helen.

We'll take a vote:

Helen.

382-07

OAL DKT. NO. EDU 6419-07
AGENCY DKT. NO. 213-8/07

N.A.C. on behalf of minor children, O.C. and B.T.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	

The record of this matter, including the revised petition, the audio tape of the August 17, 2007 hearing, and the recommended Order of the Office of Administrative Law (OAL) have been reviewed. For the reasons that follow, petitioner's application for emergent relief is denied.

Originally, petitioner appealed the retention of her son, O.C., in sixth grade, and her daughter, B.T., in tenth grade. At the hearing, petitioner withdrew from emergent consideration the respondent's actions regarding her daughter. The testimony and argument centered on the question of whether an emergency order should be issued requiring respondent to promote O.C. to the seventh grade.

Petitioner's testimony reflected the allegations in her petition. She acknowledged that her son was not performing well academically, but attributed it to a failure by respondent to provide sufficient intervention and assistance. Further, petitioner attributed her son's difficulties, in part, to insufficient communication from respondent's staff, allegedly precluding her from taking ameliorative action. She contended, for instance, that O.C.'s basic skills teacher waited a

Issued- September 28, 2007

month before advising her that O.C. had not been showing up at the appointed times for instruction. Respondent presented no witnesses or other evidence to rebut this particular assertion.

Additionally, petitioner stated that she had attended a meeting in April 2007 with several of respondent's employees, at which time she understood them to agree that retention was not appropriate for O.C., and that he should be promoted with a requirement to attend summer school. She testified that she heard nothing further on the matter until after the last report card, when she was notified that O.C. would be retained in the sixth grade. Respondent did not present evidence to rebut this testimony by petitioner.

In further support of her position that her son should be promoted, petitioner relied upon standardized testing that showed O.C. to be proficient in some subject areas and partially proficient in other areas. The record contains no copies of the testing results, but respondent did not challenge petitioner's characterization of same.

In sum, petitioner believes that retention is harmful to a child, that O.C.'s performance would have been better if respondent's employees had communicated with her more often, and that O.C.'s standard test results show that he can handle seventh grade.

Counsel for respondent presented no witnesses. He offered the following information, which he stated he received from employees of the respondent board of education:

1. O.C. had been specifically assigned to two of his school's best teachers;

2. O.C. had the benefit of a program called AIM, which provided the students with "one-on-one time" with teachers, during the teachers' preparation periods, to help the students finish assignments.

3. O.C. exhibited "social" problems, demonstrated in part by his habit of putting his head down on his desk when he did not know the answer to a question asked of him.

4. O.C. failed all of his subjects in the 2006-2007 school year. (Counsel offered the ALJ documentary evidence supporting this statement, but the ALJ declined to enter it into evidence.) There appears to be no disagreement with the fact that a significant component of O.C.'s unsatisfactory grades was his failure to complete assignments.

The parties both agree that O.C. has shown signs of emotional problems, and has availed himself of the services of the school counselor. Petitioner agreed that O.C. had been provided with basic skills instruction and/or the AIM program, and conceded that he had failed all of his sixth grade subjects.

Finally, the parties agreed that O.C. was evaluated, but found not to be eligible for a special education classification.

Respondent's position is that promoting O.C. to seventh grade without a sufficient academic foundation would be harmful to him. In respondent's view, it is not standardized test results that indicate readiness for work in a higher grade, but rather performance on school work and assessments which, in O.C.'s case, was unsatisfactory.

Another consideration raised by respondent is the difference between the middle school in which the sixth grade is housed, and the intermediate school, which includes the seventh grade. The intermediate school is more stressful and requires more independence.

In summary, while counsel for respondent acknowledged that determination of the best course of action for O.C. was difficult, he explained that the respondent had carefully weighed the options and ultimately concluded that it would be better for O.C. to be retained in the sixth grade. It would offer another opportunity for O.C. to acquire the academic foundation necessary for success in the seventh grade, and the middle school would provide O.C. with several advantages: 1) the teachers in the middle school know O.C.; 2) O.C. could continue with the middle school counselor; 3) the middle school environment is less stressful; and

4) as a result of its identification as a school in need of improvement, the middle school will receive grants to provide more services to students.

Additionally, respondent's counsel proposed that O.C. receive another, independent evaluation regarding possible special education classification. If O.C. were to be classified, he would be eligible for more services and accommodations.

While respondent's counsel did not specifically address the four standards for emergent relief as distinguished from the merits of the petition, it was clear that respondent opposed petitioner's application for emergent relief.

As the ALJ related, the instant application for emergent relief must be evaluated pursuant to the standards set forth in *N.J.A.C.* 6A:3-1.6 (b) and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) at 132-134. Petitioner has the burden of showing, by a preponderance of the evidence, that (1) the relief is necessary to prevent irreparable harm, (2) the legal right underlying petitioner's claim is settled, (3) petitioner has a reasonable probability of ultimate success on the merits, and (4) a balancing of the equities reveals that petitioner would suffer greater hardship than respondent if the requested relief were denied. Failure to prove any one or more of these four standards bars petitioner from the requested relief.

The Commissioner determines that the facts support a finding of irreparable harm, insofar as O.C. would lose time in the seventh grade were he to begin school in the sixth grade and, ultimately, be allowed to matriculate in seventh grade for the 2007-2008 school year.[1] However, there are three further standards to be met by petitioner.

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[1] Harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In cases denying applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this type actually fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board*

In the course of discussing the third standard of *N.J.A.C.* 6A:3-1.6(b), *i.e.*, petitioner's likelihood of success, the ALJ correctly identified the "settled right" at issue in the second standard. More specifically, petitioner has the right to be free of arbitrary and capricious determinations by respondent.[2]

As for the third standard of *N.J.A.C.* 6A:3-1.6(b), *i.e.* the likelihood of success on the merits, the ALJ could not conclude, based upon the parties' presentations, that petitioner would be able to show that respondent's actions were arbitrary and capricious. The Commissioner agrees.

While the Commissioner notes with disapproval the failure of respondent to present any witnesses or certifications at the OAL hearing, certain agreed-upon facts mitigate against a decision in favor of petitioner. First, as stated above, documentary evidence was offered by respondent showing that – notwithstanding the standardized testing results, which may be designed to measure issues unrelated to a child's readiness for promotion to the next grade – O.C. failed every subject for his sixth grade year. This creates a very strong inference that he is unprepared for seventh grade.

Second, petitioner herself mentioned that O.C. was given academic support by way of basic skills instruction, and did not disagree with respondent's counsel's representation that O.C. was put in a program referred to as "AIM," which provided O.C. with one-on-one help with completing assignments. The fact that O.C. nonetheless failed all of his subjects strengthens the inference that he is not ready to progress to a more difficult grade.

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of Education of the Township of Manchester, Ocean County, OAL Dkt. No. EDU 2437-03, decided by the Commissioner May 2, 2003.

[2] The Commissioner will not address, for purposes of this emergent application, petitioner's allegations concerning alleged deficiencies in respondent's assistance to O.C. There is nothing in the record that indicates that petitioner appealed respondent's actions or alleged inaction.

Third, petitioner herself referenced the fact that O.C. has been experiencing emotional problems. When that fact is added to O.C.'s poor academic showing, respondent's decision not to put O.C. into the more stressful and demanding intermediate school cannot, under the circumstances, be regarded as arbitrary and capricious. While retention may affect O.C.'s self esteem, it is not capricious or unreasonable to conclude that sending O.C. into a more demanding academic and social environment without adequate academic foundation and social and emotional skills might also have a significant negative impact upon his self esteem.

Fourth, respondent identified some advantages that would be available to O.C. in the middle school, such as continuation with the same counselor that he saw in sixth grade and access to programs provided by new funding. In addition, if a second evaluation identifies him as in need of special education, the resources available to him would – according to respondent's counsel – most likely be in the middle school.

Even without the information provided by respondent's counsel about new programs or location of special education resources, there is enough information before the Commissioner – either undisputed or presented by petitioner herself – to support a conclusion that petitioner is not likely to prevail on the merits of her claim that respondent's decision to retain O.C. is unreasonable.

Because the Commissioner finds that petitioner has not satisfied the third standard of *N.J.A.C.* 6A:3-1.6(b), and because all four standards must be met, it is unnecessary to address the fourth standard, *i.e.,* the question of whether the possible harm to O.C. is more severe than the harm that would flow to respondent if it was stripped of its discretion to determine whether a student is prepared to progress to the next grade, and if it was forced to promote an unprepared student to a higher grade.

In light of the foregoing, the Commissioner adopts the ALJ's recommended order and denies petitioner's application for emergent relief.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/28/07

Date of Mailing: 10/01/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 6419-07-07
AGENCY DKT NO. 213-9/07

N.A.C. ON BEHALF OF MINOR CHILDREN O.C. AND B.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY.

Respondent.

N.C., petitioner, pro se

Karl N. McConnell, Esq., for respondent (Quinlan, Dunne & McConnell, attorneys)

BEFORE **DOUGLAS H. HURD**, ALJ:

N.A.C., on behalf of her minor children, O.C. and B.T., filed a amended petition on August 3, 2007, with the Department of Education. The amended petition seeks to have O.C. and B.T. matriculate to the 7th and 11th grades, respectively. O.C. and B.T. are students of the Pennsauken Board of Education School District. The amended petition was transmitted to the Office of Administrative Law (OAL), where it was filed on August 9, 2007. The matter was transmitted to the OAL without an Answer from Respondent, the Pennsauken Board of Education, due to the expedited nature of the filing.

At the hearing, brief testimony was allowed by petitioner. The Board did not file any certifications due to the expedited nature of the hearing date, August 17, 2007. Counsel for the Board placed the Board's position on the record.

At the beginning of the hearing, petitioner placed on the record that she was withdrawing her petition with respect to B.T. Thus, the only issue for the emergent petition was her request that O.W. matriculate to the 7th grade.

The standards which must be met by the petitioner in an application for emergent relief are embodied in Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

For the 2006-2007 school year, O.C. was in 6th grade. Based on his failing grades in all subjects, the Board of Education determined that O.C. should remain in 6th grade for the 2007-2008 school year. In April 2007, O.C. was evaluated to determine if he qualified for special education, but the evaluation indicated that he did not meet the eligibility standards to be so classified. The Board and petitioner, at the time of the emergent hearing, were considering having O.C. evaluated again to determine eligibility.

O.W., according to petitioner, suffers from emotional issues, such as depression and self-esteem. His failing grades are in large part due to not completing homework and assignments. Petitioner contends that the school should have recognized O.W.'s issues and addressed them so that he could succeed academically. Petitioner contends that the school should have provided more intervention and remediation services to address O.W.'s specific needs. Petitioner further contends that the school did not communicate with her regarding O.W.'s failing grades. In this regard, she testified that as late as April 2007 she was told by school officials and teachers that O.W. would be moving on to the 7th grade. She then found out very late in the school year that the school decided to retain O.W. for the 6th grade year. Petitioner contends that O.W. is ready to move to the 7th grade since he scored in the proficient range on the standardized testing.

The Board points to the fact that O.W. did fail his subjects in 6th grade as the primary reason he must be retained. The Board also is concerned about O.W. moving to the 7th grade, which is a part of the middle school, and how that would affect his emotional/social issues. The Board further points out that it did provide O.W. with intervention services and tried to address his specific needs.

Based on the foregoing, petitioner has not satisfied the standards set forth above to be granted emergent relief. As noted above, she must satisfy all four prongs of the Crowe test. Given the limited testimony and oral argument presented at the hearing, I do not find that petitioner has a likelihood of prevailing on the merits of the underlying claim. Petitioner, at the plenary hearing, will have to demonstrate that the Board acted in an arbitrary, capricious or unreasonable manner in deciding to retain O.W. in the 6th grade. This is a high burden of proof for petitioner and I cannot conclude based on the emergent hearing that she has a likelihood of meeting that burden. Given petitioner's failure to meet this prong of the Crowe test, I **CONCLUDE** that her emergent relief petition must be **DENIED**.

The matter will be scheduled for a plenary hearing. I am, currently available to schedule the matter on September 18 or October 1, 2007. I am directing the parties to advise me, in writing, of their availability on these dates, by or before August 24, 2007.

This order on application for emergency relief may be adopted, modified or rejected by the **Commissioner of the Department of Education**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If Commissioner does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 17, 2007

DATE

DOUGLAS H. HURD, ALJ

/lam

383-01

OAL DKT. NO EDU 2330-07
AGENCY DKT. NO. 70-3/07

IN THE MATTER OF THE TENURE	:	COMMISSIONER OF EDUCATION
HEARING OF ROBERT ARMSTRONG,	:	DECISION
SCHOOL DISTRICT OF THE TOWN OF	:	
HAMMONTON, ATLANTIC COUNTY.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following comment. The Commissioner of Education's responsibility to review and approve or disapprove a settlement of tenure charges against a teaching staff member – pursuant to *N.J.A.C.* 6A:3-5.6(a), which articulates the standards set forth in *In re Cardonick*, 1990 *S.L.D.* 842, 846 (State Board, April 6, 1983) – is independent of the Superior Court's determination to allow respondent's admission into a pre-trial program.

The Commissioner finds that the six standards articulated in *N.J.A.C.* 6A:3-5.6(a) have been met in this case. Most specifically, the Commissioner finds that standards 2 and 5 are satisfied by respondent's resignation and the submission of the matter to the State Board of Examiners.

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille Edy
COMMISSIONER OF EDUCATION

Date of Decision: 10/02/07
Date of Mailing: 10/02/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2330-07

AGENCY DKT. NO. 70-3/07

IN THE MATTER OF THE TENURE HEARING OF ROBERT ARMSTRONG, SCHOOL DISTRICT OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY.

William S. Donio, Esq. for the petitioner, Town of Hammonton (Cooper Levenson, attorneys)

John C. Eastlack, Jr., Esq., for respondent Robert Armstrong (Holston, MacDonald, Uzdavinis, Eastlack, Ziegler & Lodge, attorneys)

Record Closed: August 20, 2007 Decided: August 23, 2007

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the School District of the Town of Hammonton, Atlantic County, brings charges of unbecoming conduct against respondent, Robert L. Armstrong, a tenured employee holding the position of Assistant Principal. Petitioner alleges that respondent is guilty of promoting gambling in violation of N.J.S.A. 2C:37-2

of the New Jersey Code of Criminal Justice; that respondent is guilty of failing to exhibit a level of self-restraint and controlled behavior requisite of his position when he promoted gambling in violation of N.J.S.A. 2C:37-2 resulting in his arrest; that respondent is guilty of conduct unbecoming an elementary school assistant principal by promoting gambling in violation of N.J.S.A. 2C:37-2; and that respondent is guilty of conduct unbecoming an elementary school assistant principal by engaging in activities during school hours in furtherance of the promotion of gambling in violation of N.J.S.A. 2C:37-2. Petitioner asserts that the charges are sufficient to warrant dismissal pursuant to N.J.S.A. 18A:6-11. This matter was transmitted to the Office of Administrative Law on March 29, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing in this matter commenced on July 11, 2007, and was continued on July 12, 2007. Prior to continuing the hearing on July 12, 2007, the parties engaged in further discussions in an effort to resolve the matter amicably, and reached a tentative settlement of the matter, subject to review and approval by their respective clients.

The parties subsequently prepared a Settlement Agreement indicating the settlement terms. On August 20, 2007, the parties submitted the fully executed Settlement Agreement accompanied by an original resolution of the Board of Education of the Town of Hammonton adopted on August 16, 2007, authorizing the execution of the Settlement Agreement. The Settlement Agreement is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I make the following **FINDINGS**:

1. N.J.A.C. 6A:3-5.6(a) provides that once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval, and that any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the standards established in In re Cardonick, 1990 S.L.D. 842, 846 (State Board

decision, April 6, 1983). N.J.A.C. 6A:3-5.6(a) further provides that any proposed withdrawal or settlement be accompanied by documentation as to the nature of the charges, explain the circumstances justifying settlement or withdrawal, be consented to by both the charged and charging parties, indicate that the charged party entered into the agreement with a full understanding of his or her rights, and contain a showing that the agreement is in the public interest. In addition, where the charged party is a teaching staff member, the documentation must show that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. After a careful review of the Settlement Agreement, I **FIND** that it fully complies with the foregoing requirements. I specifically **FIND** that Mr. Armstrong has agreed to this settlement with a full understanding of his rights, and that Mr. Armstrong was advised of the Commisioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of any certificates held by him. I also **FIND** that it is in the public interest to conclude this matter in the manner agreed to by the parties. I feel that it is appropriate to note that no testimony or evidence was presented at the hearing to show that Mr. Armstrong engaged in activities in furtherance of the promotion of gambling during school hours.

2. N.J.A.C. 6A:3-5.6(b) provides that where tenure charges have been certified to the Commissioner by a district board of education, any proposed settlement shall indicate, by signature of the board attorney or inclusion of a district board of education resolution authorizing settlement, that the district board of education has consented to the terms of the settlement. I **FIND** that the submitted Settlement Agreement is signed by the board attorney and is accompanied by resolution of the Board of Education of the Town of Hammonton authorizing the board attorney to enter into the Settlement Agreement.

3. I **FIND** that the parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

4. I **FIND** that the settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I **APPROVE** the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 23, 2007
DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency:

AUG 27 2007
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

William S. Donio, Esquire
Cooper Levenson April Niedelman
& Wagenheim, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
File No.: 50696-426
Attorneys for Petitioner,
Hammonton Board of Education

RECEIVED
2007 AUG 20 P 2:45
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF ROBERT S. ARMSTRONG, SCHOOL DISTRICT OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY, NEW JERSEY	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DKT. NO.: 70-3/07 OAL DKT. NO.: EDU 2330-07 **SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Agreement") is made effective as of the 12th day of July, 2007 by and between the Petitioner Board of Education of the Town of Hammonton, Atlantic County, New Jersey (hereinafter referred to as the "Board") and the Respondent Robert S. Armstrong (hereinafter referred to as the "Respondent")(collectively "the parties").

WHEREAS, the Board is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities for the management and administration of the Town of Hammonton School District in Atlantic County, New Jersey; and

WHEREAS, the Respondent is presently employed by the Board as a tenured Assistant Principal of the Board's Warren E. Sooy Jr. Elementary School; and

WHEREAS, the Board filed certain charges against Respondent alleging unbecoming conduct based on his alleged participation in and arrest for alleged violations of New Jersey Criminal Code of Conduct 2C:37-2, promoting gambling, and sought to remove Respondent

from his tenured position, said charges more specifically contained in a Statement of Charges filed by the Board and dated February 7, 2007 (the "Statement of Charges" attached hereto as Exhibit A); and

WHEREAS, the Respondent, by formal Answer and as later supplemented by Supplemental Answer (together the "Answer" attached hereto as Exhibit B), denied the charges contained in the Statement of Charges and further denied that such charges contained in the Statement of Charges, if proven, would constitute unbecoming conduce sufficient to warrant Respondent's removal from his tenured position; and

WHEREAS, the Commissioner of Education for the State of New Jersey (the "Commissioner") referred said charges to the Office of Administrative Law for a plenary hearing before the Honorable Joseph F. Martone, A.L.J.; and

WHEREAS, the parties appeared before the Honorable Joseph F. Martone, A.L.J. on July 11, 2007 and July 12, 2007 for such hearing; and

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the Statement of Charges, the defenses and counterclaims, if any, contained in the Answer and any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Respondent; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Respondent admits any liability to either, but both have reasons to desire a resolution of the matter; and

WHEREAS, the Board and Respondent specifically recognize and acknowledge that any settlement is contingent upon approval by the Commissioner as required by and consistent with *New Jersey Administrative Code* § 6A:3-5.6 and *In the Matter of the Tenure Hearing of Frank*

Cardonick, State Board of Education decision of April 6, 1983 (1990 School Law Decisions, S.L.D. 842, 846); and

NOW THEREFORE, in consideration of the agreements, promises, covenants and conditions contained herein, the adequacy and sufficiency of which are expressly acknowledged by the parties hereto, the parties agree as follows:

1. **DISMISSAL OF ACTION**.

(a) The Board will pay Respondent a lump sum payment of $15,000.00. Said payment shall constitute full and absolute payment by the Board to Respondent for all salary, benefits, emoluments, or other claims, rights or privileges Respondent has, may have, claim or may claim, including but not limited to salary for any period, accumulated sick leave, vacation or other paid leave, benefits, fringe benefits, pension contributions, in-kind or other contributions, opt-out or other payments. Respondent within one (1) week (five (5) business days) of the execution of this Agreement shall direct the Board how such payment shall be allocated. Upon receipt of Respondent's direction, the Board shall issue such check or checks payable to the order of Respondent or his assignee, and shall place such checks with the Board's attorney to be held in escrow without interest to be released upon the approval of the Commissioner of Education of this Agreement. Contemporaneously with the deposit of said payment check or checks with the Board's solicitor, Respondent will deposit with Respondent's attorney, an irrevocable letter of resignation effective July 12, 2007 resigning from any and all positions, tenured or untenured, held or claimed by Respondent with the Board.

(b) Upon the approval of the Commissioner of Education of this Agreement, the Board will withdraw and dismiss the Statement of Charges, forward Respondent the checks provided for in 1(a) of this Agreement and Respondent's letter of resignation will become operative.

2. **RELEASE**. Respondent, personally and for his assignee, estate and/or heirs, waives, releases and gives up any and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Respondent's employment with the Board or the Statement of Charges. Respondent specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal or state statutes, regulations, or common law or Board policies or regulations. Respondent specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of *N.J.S.A.* 18A:6-10 *et seq.* as claimed in Respondent's Answer.

3. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Respondent waives his right to file any charge or complaint in his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law.

4. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

5. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this Agreement, nor any other action taken by the Respondent in conjunction with the Board's claims or this settlement, constitute admission by the Respondent of any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by the Board as to the merits of its claims or the lack thereof.

6. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

7. **BOARD RESOLUTION.** Attached hereto as Exhibit C is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

8. **COMMISSIONER'S APPROVAL.** It is expressly understood that this Settlement Agreement, and the settlement pursuant to the terms above must first be approved by the Commissioner of Education and must meet the following standards as enumerated in *N.J.A.C.* 6A:3-5.6(a):

(a) Accompaniment by documentation as to the nature of the charges: Attached hereto as Exhibit A with the Answer at Exhibit B.

(b) Explication of the circumstances justifying settlement or withdrawal: The Board represents and asserts that a withdrawal of the Statement of Charges is appropriate because such withdrawal is specifically contingent upon Respondent's resignation, such withdrawal is not contrary to the determination of the State of New Jersey which allowed Respondent to enter the Pre-Trial Intervention ("PTI") without forfeiture of his position and dismissed all criminal charges, and such withdrawal is financially appropriate.

(c) Consent of both the charged and charging parties is evidenced by this Agreement.

(d) Indication that the charged party entered into the agreement with a full understanding of his or her rights is evidenced by this Agreement.

(e) A showing that the agreement is in the public interest as evidenced by this Agreement, the separation of the parties, the cost associated thereto by the public which is significantly less than the cost associated with prosecuting the Statement of Charges and by the State of New Jersey's previous willingness to allow Respondent to enter PTI without forfeiture of this position.

(f) Where the charged party is a teaching staff member, a showing that the teaching staff member has been advised, and by recitation of this provision Respondent is advised, of the Commissioner's duty to refer tenure determination s resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

9. **NON DISCLOSURE.** Except as may be otherwise required of the Board pursuant to the *Open Public Records Act* and /or *Open Public Meetings Act*, as such obligations may be modified by federal or state statutory or administrative provisions as to the privacy of personnel records, no party will broadcast or publicize financial or other elements of this settlement to any

third party. The parties are free to respond to inquiries made of them by indicating that the matter has been amicably resolved or satisfactorily settled, and recognize that the Board may disclose the substantive details of this settlement pursuant to a lawful request by providing a lawful request with a copy of this Settlement Agreement

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year first written.

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, PA

William S. Donio, Esquire
Attorney for Petitioner

Dated: 8/17/07

HOLSTON MACDONALD UZADAVINIS EASTLACK, ZIEGLER & LODGE

John C. Eastlack, Jr., Esquire
Attorney for Respondent

Dated: 8/7/07

Robert S. Armstrong, Respondent

Dated: 8-7-07

STATE OF NEW JERSEY)
)SS
COUNTY OF ATLANTIC)

MARY LOU DEFRANCISCO, of full age, being duly sworn according to law upon her oath deposes and says:

1. I am the Superintendent of Schools of the Hammonton Public School District, Atlantic County, New Jersey, and have been such since March 25, 2003. As Superintendent of Schools, I oversee the day to day management of the District's operations, which includes, but is in no manner limited to, the supervision of certified and non-certified personnel.

2. The attached documents consist of the charges of unbecoming conduct as well as supportive evidence against Robert S. Armstrong. As more specifically referenced in the attached documents, I assert that Robert S. Armstrong, a tenured staff member, engaged in specific acts, as well as a course of conduct in dereliction of his duties, in violation of New Jersey School Law and the Policies and Regulations of the Hammonton Public Schools.

3. The charges are based upon the District's records and the District's investigation into allegations of unprofessional conduct against Robert S. Armstrong.

4. I have reviewed the information compiled by the Gloucester County Prosecutor's office in connection with its investigation into this matter.

5. The charges and supportive evidence are true and correct to the best of my knowledge, information and belief.

Mary Lou DeFrancisco

MARY LOU DEFRANCISCO

Sworn and Subscribed to before me
this 7th day of February, 2007.

Paula Olivo

Attorney At Law

PAULA OLIVO
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JUNE 16, 2009

STATEMENT OF CHARGES AND SPECIFICATIONS REGARDING THE EMPLOYMENT OF ROBERT S. ARMSTRONG, A TENURED FACULTY MEMBER WITHIN THE EMPLOY OF THE BOARD OF EDUCATION OF THE TOWN OF HAMMONTON

Robert S. Armstrong, a tenured elementary school Assistant Principal employed by the Board of Education of the Town of Hammonton (the "Board"), engaged in the following conduct unbecoming an elementary school assistant principal, all of which was continuing, flagrant and unjustifiable, as follows:

CHARGE 1: Robert S. Armstrong, a tenured Assistant Principal employed by the Board engaged in conduct unbecoming to an elementary school assistant principal by Promoting Gambling in violation of the New Jersey Code of Criminal Justice, N.J. Stat. Ann. 2C:37-2:

> **SPECIFICATION:** On or about and in between November 1, 2005 to December 14, 2005 Robert S. Armstrong unlawfully and knowingly received more than (5) bets totaling more than $1,000.00 in violation of New Jersey law.

CHARGE 2: Robert S. Armstrong, a tenured Assistant Principal employed by the Board engaged in conduct unbecoming to an elementary school assistant principal by failing to exhibit the level of self-restraint and controlled behavior requisite of his position as an Assistant Principal when he Promoted Gambling in violation of the New Jersey Code of Criminal Justice, N.J. Stat. Ann. 2C:37-2 resulting in his arrest on April 25, 2006:

> **SPECIFICATION:** On or about April 25, 2006, Robert S. Armstrong was placed under arrest by the New Jersey State Police as a direct result of an undercover gambling

investigation and was charged with Promoting Gambling in violation of N.J.S.A. 2C:37-2.

CHARGE 3: Robert S. Armstrong, a tenured Assistant Principal employed by the Board, engaged in conduct unbecoming to an elementary school assistant principal by Promoting Gambling in violation of the New Jersey Code of Criminal Justice, N.J.S.A. 2C:37-2:

SPECIFICATION: On or about September 29, 2006, Robert S. Armstrong appeared before the Superior Court of New Jersey, Law Division, and was ordered to enter a Pre-trial Intervention Program as a direct result of his being charged with Promoting Gambling in violation of N.J.S.A. 2C:37-2.

CHARGE 4: Robert S. Armstrong, a tenured Assistant Principal employed by the Board, engaged in conduct unbecoming to an elementary school assistant principal by engaging in activities during school hours in furtherance of the promotion of gambling in violation of N.J.S.A. 2C:37-2:

SPECIFICATION: Robert S. Armstrong, a tenured Assistant Principal employed by the Board, did engage in numerous communications during work hours directly related to and in furtherance of the promotion of gambling in violation of N.J.S.A. 2C:37-2. Such communications occurred during work hours on dates, including, but not limited to, December 2, 2005 and March 24, 2006.

LAW OFFICES
HOLSTON, MACDONALD, UZDAVINIS, EASTLACK,
ZIEGLER & LODGE
A PROFESSIONAL CORPORATION
66 EUCLID STREET
P. O. BOX 358
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ARTHUR J. MacDONALD, JR.
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TERI S. LODGE*

AUGUSTA J. PISTILLI*
SAMUEL J. MYLES
DAVID P. PERRI*

OF COUNSEL:
CHERYL L. COOPER

+CERTIFIED CIVIL TRIAL ATTORNEY AND CERTIFIED CRIMINAL TRIAL ATTORNEY
*ALSO ADMITTED IN PENNSYLVANIA

E-MAIL:JEASTLACK@HOLSTONLAW.COM

February 21, 2007

Via Facsimile 609-561-3567 & Certified & Regular Mail
Barbara Prettyman
Business Administrator/Board Secretary
Hammonton Public Schools
Post Office Box 631
Hammonton, New Jersey 08037-0631

Re: Robert Armstrong

Dear Ms. Prettyman:

Kindly be advised that this firm will be entering its appearance on behalf of Robert S. Armstrong, a tenured Elementary School Assistant Principal employed by the Township of Hammonton Board of Education. Kindly be advised that Mr. Armstrong enters a plea of not guilty as to each of the four (4) charges and specifications filed against Assistant Principal Armstrong.

Furthermore, pursuant to New Jersey Administrative Code, I am hereby demanding all documents, evidence and writings of whatever kind, together with a list of witnesses (names, addresses, job position and telephone numbers) that you have in your possession and/or are intended to call as witnesses at the time of any such hearing.

Kindly be advised that I am requesting the following specific information:

1. A list of names, addresses, job titles and telephone numbers of all individuals that Board of Education intends to introduce at the time of any hearing;

2. A list of names, addresses, job titles and telephone numbers of any persons that are claimed to have relevant knowledge concerning the subject matter of charges 1 through 4 made against Mr. Armstrong;

3. Copies of all investigative reports of the Hammonton Board of Education, Hammonton Public Schools, or any affiliated entities concerning the subject matter of the charges brought against Mr. Armstrong;

4. Copies of any documents from any law enforcement agencies which are in the possession of the Hammonton Board of Education, Hammonton Public Schools or any affiliated agencies which are intended to be introduced at the time of any hearing, or are in the possession of these entities;

5. Copies of any and all statements of Mr. Armstrong whether handwritten, typewritten, recorded, video taped or stored in any other fashion concerning the subject matter for the four (4) charges and specifications;

6. Statements of any and all witnesses whether the same are handwritten, typewritten, recorded, video taped or stored in any other fashion concerning the subject matter for the four (4) charges and specifications;

7. The entire personnel file of Robert Armstrong, including but not limited to, the following:

   - Copies of performance evaluations of Robert Armstrong from the inception of his employment to the present
   - Copies of all prior disciplinary actions and related investigatory documents, charges and/or findings
   - Copies of all certifications possessed by Mr. Armstrong
   - Copies of all documents evidencing job duties and/or assignments
   - Copies of all documents evidencing the qualifications of Mr. Armstrong
   - Copies of all documents evidencing the salary of Mr. Armstrong from the inception of his employment through to the present
   - Any and all other documents and/or writings contained within Mr. Armstrong personnel file

8. Copies of any and all documents exchanged between the Hammonton Board of Education, Hammonton Public Schools or any related agency or agent on their behalf with any other or prior attorney representing Mr. Armstrong;

9. Copies of all correspondence and/or documents exchanged between the Hammonton Board of Education, Hammonton Public Schools, or any related entities or agents on their behalf, and any law enforcement entity including

the Atlantic County Prosecutor's Office, Gloucester County Prosecutor's Office or any police department which in any way relates to the charges and specifications filed against Robert Armstrong.

Please advise as to any intended hearing date to be scheduled for the charges and the intended hearing officer or panel which will be hearing this matter.

Thank you for your anticipated cooperation regarding the providing of the documents and other materials requested.

Very truly yours,

HOLSTON, MacDONALD, UZDAVINIS, EASTLACK, ZIEGLER & LODGE

By: _____
John C. Eastlack, Jr.

JCE/jms
cc: William S. Donio, Esquire, Board Solicitor (Via Facsimile)
Wayne Oppito, Esquire (Via Facsimile)

Holston, MacDonald, Uzdavinis, Eastlack, Ziegler & Lodge
66 Euclid Street
P.O. Box 358
Woodbury, New Jersey 08096
(856) 848-5858
Attorneys for Defendant, Robert S. Armstrong

In the matter of the Tenure Hearing of Robert S. Armstrong	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
	Agency Docket No: 70-3/07
	RESPONSENT'S ANSWER TO TENURE CHARGES

In accordance with N.J.A.C. 6A:3-5.3, Respondent, Robert S. Armstrong, hereby makes the following response to Tenure Charges that have been filed against him by the Township of Hammonton Board of Education, Atlantic County:

ANSWER TO CHARGE 1: Robert S. Armstrong is a tenured Assistant Principal employed by the Board of Education of the Township of Hammonton. Mr. Armstrong denies that he was engaged in "conduct unbecoming" by engaging in the promotion of gambling which would be a violation of N.J.S.A. 2C:37-2.

ANSWER TO CHARGE 2: Robert S. Armstrong acknowledges that he is a tenured Assistant Principal employed by the Board of Education of the Township of Hammonton. Respondent denies being engaged in conduct unbecoming. Although, Mr. Armstrong was arrested on April 25, 2006 for an alleged violation of N.J.S.A. 2C:37-2, promotion of gambling, Mr. Armstrong, without indictment, was entered into the Gloucester County Pre-Trial Intervention Program by Order of the Honorable Walter L. Marshall, Jr., P.J.Cr., on September 29, 2006. A copy of said Consent Order is attached hereto as Exhibit "A".

ANSWER TO CHARGE 3: Robert S. Armstrong acknowledges that he is a tenured Assistant Principal employed by the Board of Education of the Township of Hammonton. The charge and specification as contained in Charge 3 is denied. Mr. Armstrong was not ordered to enroll in the Gloucester County Pre-Trial Intervention Program as stated in the specification as if the Program were deemed to be some kind of punishment under New Jersey law. Rather, Mr. Armstrong, voluntarily, and with the consent of the Gloucester County Prosecutor's Office, made application to the Pre-Trial Intervention Program. As part of the process, under New Jersey Rule of Court 3:28, the Court signs an Order accepting the admittance of an individual into the Pre-Trial Intervention Program which was accomplished by way of an Order dated September 29, 2006, attached hereto as Exhibit "A".

ANSWER TO CHARGE 4: Robert S. Armstrong acknowledges that he is a tenured Assistant Principal employed by the Board of Education of the Township of Hammonton. Respondent denies that he engaged in conduct unbecoming, or that he engaged in any activities during school hours as alleged in Charge 4. Furthermore, Respondent was entered into the Gloucester County Pre-Trial Intervention Program, pursuant to New Jersey Rule of Court 4:3-28, without a plea or finding of guilty, and without indictment.

Respectfully Submitted,

HOLSTON, MacDONALD, UZDAVINIS, EASTLACK, ZIEGLER & LODGE

JOHN C. EASTLACK, JR.
Attorney for Respondent, Robert S. Armstrong

Dated: March 22, 2007

Exhibit "A"

SUPERIOR COURT
GLOUCESTER COUNTY
FILED
SEP 29 2006
CRIMINAL CASE
MANAGEMENT OFFICE

SEAN DALTON
COUNTY PROSECUTOR
COUNTY JUSTICE COMPLEX
EUCLID AND HUNTER STREETS
POST OFFICE BOX 623
WOODBURY, NEW JERSEY 08096
(856) 384-5500

BY: JANIS R. MELFI
Assistant Prosecutor

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION – GLOU. COUNTY
Plaintiff,	:	CRIMINAL
	:	FILE NUMBER: 06001231
ROBERT S. ARMSTRONG,	:	
	:	**CONSENT ORDER**
Defendant.	:	

THIS MATTER having been brought before the Court by Assistant Prosecutor Janis R. Melfi, on behalf of the State of New Jersey, with Rocco Santora, Esquire, appearing on behalf of the defendant Robert S. Armstrong, and the parties having agreed:

IT IS, on this 29th day of September, 2006

ORDERED that defendant be admitted into the Pre-trial Intervention Program with the following conditions:

1. That defendant comply with all rules and requirements of the Pre-trial Intervention Program.

WALTER L. MARSHALL, JR., P.J.Cr.

I hereby consent to the form and entry of this Order.

Rocco Santora, Esquire
Attorney for the Defendant

9/24/06
Date

Janis R. Melfi, Assistant Prosecutor
Gloucester County Prosecutor's Office

9/19/06
Date

RESOLUTION

WHEREAS, the Board of Education of the Town of Hammonton (the "Board") wishes to enter into a Settlement Agreement attached as Exhibit A to this Resolution, with employee Robert Armstrong ("Employee"); and

WHEREAS, Employee is presently employed by the Board as a tenured Assistant Principal of the Board's Warren E. Sooy Elementary School; and

WHEREAS, the Board filed tenure charges against Employee for unbecoming conducted based on Employee's alleged participation in and arrest for alleged violations of New Jersey Criminal Code of Conduct 2C:37-2, promoting gambling; and

WHEREAS, the Board sought to remove Employee from his tenured position as contained in a Statement of Charges filed by the Board dated February 7, 2007; and

WHEREAS, Employee denied the charges contained in the Statement of Charges and denied such charges would constitute unbecoming conduct sufficient to warrant Employee's removal from his tenured position; and

WHEREAS, the Commissioner of Education for the State of New Jersey referred said charges to the Office of Administrative law for plenary hearing; and

WHEREAS, the Board and Employee wish to settle all controversies, including any and all related or unrelated claims, known or unknown, which could have been asserted by the Board or Employee; and

WHEREAS, the Board and Employee recognize and acknowledge that any settlement is contingent upon approval by the Commissioner of Education; and

NOW THEREFORE, BE IT RESOLVED that for the consideration of the agreements, promises covenants and conditions contained herein, the parties do enter into the Settlement Agreement attached as Exhibit A to this Resolution and incorporated as if set forth herein at length.

BE IT FURTHER RESOLVED that the Board's Resolution to enter in the Settlement Agreement is specifically and expressly, but not solely, subject to Employee's fulfillment of all conditions, requirements and obligations contained in said Settlement Agreement; and

BE IT FURTHER RESOLVED that the Board of Education of the Town of Hammonton specifically finds that this Settlement Agreement is in the best interest of the pupils, staff and residents of the Board of Education for the reasons set forth therein; and

BE IT FURTHER RESOLVED that the Board of Education of the Town of Hammonton authorizes the Board's attorney to enter into said Settlement Agreement.

Adopted:

ATTEST:

Barbara Prettyman, Secretary

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON

By:

Loretta Rehmann, President

IT IS HEREBY CERTIFIED that the foregoing is a true and correct copy of a Resolution duly adopted by the Board of Education of the Town of Hammonton, Atlantic County, New Jersey at a meeting of the Board held on August 16, 2007.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Board of Education, this 16th day of August, 2007

Barbara Prettyman, Secretary

384-07

IN THE MATTER OF THE TENURE HEARING OF NINO IGLESIAS, BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In September 2006, the West New York Board of Education certified tenure charges of unbecoming conduct against respondent, a tenured school custodian, as a result of allegations that he stole petitioner's property. Criminal charges were later filed, and the tenure matter was rendered inactive during the criminal proceedings. Respondent subsequently pled guilty to the criminal charges, and a judgment was issued that included forfeiture of his public employment.

The ALJ found that by virtue of respondent being required to forfeit public employment as a part of his sentence, the issue of tenure charges is now moot. Consequently, the ALJ concluded that the matter should be dismissed.

Upon a full and independent review of the record, the Commissioner concurs with the ALJ that the judgment renders the tenure charges moot; accordingly, the petition is hereby dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 2, 2007

OAL DKT. NO. EDU 10934-06
AGENCY DKT. NO. 341-9/06

IN THE MATTER OF THE TENURE HEARING OF NINO IGLESIAS, BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and Initial Decision have been reviewed. No exceptions have been filed.

Petitioner brought tenure charges against respondent, a tenured custodian, as a result of allegations that respondent stole petitioner's property. Respondent was indicted for same. In consequence of a guilty plea to the criminal charges, a judgment was issued against respondent that included the forfeiture of public employment.

The Commissioner agrees with the Administrative Law Judge (ALJ) that the judgment renders the tenure charges moot, and accordingly dismisses the petition.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/02/07

Date of Mailing: 10/02/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 10934-06
AGENCY DKT. NO. 341-9/06

IN THE MATTER OF THE TENURE HEARING OF NINO IGLESIAS, BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY

Mark S. Tabenkin, Esq., on behalf of petitioner (Scarinci & Hollenbeck, LLC, attorneys)

Gregory T. Syrek, Esq., on behalf of respondent (Bucceri & Pincus, attorneys)

Record Closed: August 28, 2007 Decided: August 28, 2007

BEFORE: **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Town of West New York, Hudson County ("Board"), brings charges of unbecoming conduct against respondent, Nino Iglesias ("Iglesias"), a tenured custodian, and seeks his removal. On September 22, 2006, the Board filed the following with the Department of Education: sworn tenure charges and

statement of evidence, certificate of determination for filing tenure charges and proofs of service. On October 6, 2006, the respondent's answer was filed with the Department.

The Department transmitted the matter to the Office of Administrative Law ("OAL") on November 2, 2006 for a hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b). On November 9, 2006, the case was assigned to me and on November 13, 2006, a telephone conference was held in order to set forth a proposed schedule for the hearing of this matter. The Court was advised by Counsel that criminal charges had been filed against Iglesias and a grand jury indictment was imminent. By letter of December 6, 2006, the Court advised Counsel that in light of the filing of criminal charges, the matter of the tenure hearing of Nino Iglesias would be considered inactive for purposes of addressing the requirements of expedited adjudication as provided for in N.J.S.A. 18A:6-14, N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-10.1.

On August 23, 2007, Counsel for the Board provided the OAL and petitioner's counsel with the attached copy of the Amended Judgment of Conviction in the criminal case against Iglesias. The Amended Judgment of Conviction specifically provides as part of the sentence, that Iglesias is to "forfeit public employment".

FINDING

Having reviewed the record in this matter, I **FIND**, that by virtue of respondent being required to forfeit public employment as part of his sentence, the issue of tenure charges is moot.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that this matter is **DISMISSED.**

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** or consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 28, 2007

DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8/28/07

Mailed to Parties:

AUG 29 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

PG#-06-2495
TAPE #129/07

State of New Jersey

v.

Defendant: (Specify Complete Name) **NINO IGLESIAS**

DATE OF BIRTH 09/23/62	SBI NUMBER 634547D
DATE OF ARREST	DATE INDICTMENT/ ACCUSATION FILED 12/19/06
DATE OF ORIGINAL PLEA 01/30/07	ORIGINAL PLEA ☒ Not Guilty ☐ Guilty

New Jersey Superior Court
Law Division – Criminal
Hudson County

☒ JUDGMENT OF CONVICTION
☐ CHANGE OF JUDGMENT
☐ ORDER FOR COMMITMENT
☐ INDICTMENT / ACCUSATION DISMISSED
☐ JUDGMENT OF ACQUITTAL
X **AMENDED AS TO SENTENCE (6/27/07)**

ADJUDICATION BY

☒ GUILTY PLEA DATE: 03/21/07 ☐ NON-JURY TRIAL DATE:
☐ JURY TRIAL DATE: ☐ DISMISSED / ACQUITTED DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
2192-12-06	1	Theft by Unlaw Taking		2C:20-3a
	2	Official Misconduct		2C:30-2
	3	Recv. Stln. Prop.		2C:20-7
	4	Conspiracy to Commit Theft		2C:5-2, 2C:20-3a

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE
1	Theft by Unlaw. Taking	3rd	2C:20-3a

It is, therefore, on March 30, 2007 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

4 years probation; forfeit public employment;
Defendant has 45 days Right to Appeal;
Dismissal: Remaining Counts of the Indictment;

☐ The defendant is hereby sentenced to community supervision for life.
☐ The defendant is hereby ordered to serve a _____ year term of parole supervision which term shall begin as soon as defendant completes the sentence of incarceration.
☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.
☐ The court finds that the defendant is amenable to sex offender treatment.
☐ The court finds that the defendant is willing to participate in sex offender treatment.
☒ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☒ Defendant is to receive credit for time spent in custody (R. 3:21-8).	TOTAL NUMBER OF DAYS	DATE: (From/To) DATE: (From/To)
☐ Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).	TOTAL NUMBER OF DAYS	DATE: (From/To) DATE: (From/To)

Total Custodial Term _____ Institution _____ Total Probation Term 4 years

State of New Jersey v. **NINO IGLESIAS** S.B.I. # **634547D** Ind / Acc # **2192-12-06**

Total Fine $_____

Total RESTITUTION $12,054.00

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☒ Assessment imposed on

count(s) 1

is $50. each.

Total VCCB Assessment $50.00

Installment payments are due at the rate of

$_____ per _____

beginning through probation

(Date)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

_____ 1st Degree @ $3000 _____ 4th Degree @ $750

_____ 2nd Degree @ $2000 _____ Disorderly Persons or Petty Disorderly Persons @ $500

_____ 3rd Degree @ $1000

Total D.E.D.R. Penalty $_____

☐ Court further Orders that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. _____ Offenses @ $50.

Total Lab Fee $_____

3) Name of Drugs involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED.

The suspension shall begin today, _____ and end _____.

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth **09/23/62**

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____

☐ Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c. 9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. (P.L. 1993, c.220) 75.00

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month $_____.

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered. 30.00

If the crime occurred on or after May 4, 2001, and the defendant has been convicted of aggravated sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endanger the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a minor under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor, kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3) or (4), or an attempt to commit any of these crimes, a $800 Statewide Sexual Assault Nurse Examiner Program Penalty is ordered for each of these offenses.

Name (Court Clerk or Person preparing this form)	Telephone Number	Name (Attorney for Defendant at Sentencing)
L. Knight, Judicial Secretary	(201)795-6668	Smith - Cassata

STATEMENT OF REASONS – Include all applicable aggravating and mitigating factors

Aggravating Factors: (9) The need for deterring the defendant and others from violating the law;
Mitigating Factors: (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense; (10) The defendant is particularly likely to respond affirmatively to probationary treatment;
Mit. o/w Agg.

Judge (Name)	Judge (Signature)	Date
SHEILA A. VENABLE, J.S.C	Sheila A. Venable	6/27/07

#385-07R

385-07

OAL DKT. NO. EDU 3998-07
(EDU 5343-03 ON REMAND)
AGENCY DKT. NO. 133-4/03

C.G., ON BEHALF OF MINOR CHILD, T.G.,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, : DECISION ON REMAND

RESPONDENT. :

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law (OAL) on remand from the Commissioner pursuant to a decision of the State Board of Education, have been reviewed in accordance with *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the settlement terms and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 10/02/07
Date of Mailing: 10/02/07

* It is noted that the State Board of Education did not retain jurisdiction of this matter.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03998-07

AGENCY DKT. NO. 133-4/03

C.G. ON BEHALF OF MINOR CHILD T.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

David R. Giles, Esq., for petitioner

March H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Record Closed: August 17, 2007 Decided: August 29, 2007

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 24, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on July 13, 2007. On the date of hearing the parties settled the matter. The attached Settlement Agreement and Certified Board Resolution

were submitted on August 17, 2007, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 29, 2007
DATE

MUMTAZ BARI BROWN, ALJ

Date Received at Agency: 9-4-07

Mailed to Parties:

SEP 4 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for East Orange
Board of Education

C.G. o/b/o T.G.,	:	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 3998-07 AGENCY DOCKET NO.: 133-4/03
Petitioner,	:	PRIOR OAL DOCKET NO.: EDU5343-03
v.	:	
EAST ORANGE BOARD OF EDUCATION,	:	**SETTLEMENT AGREEMENT AND RELEASE**
Respondent.	:	

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2007 AUG 17 P 4:5

WHEREAS, an action was brought by C.G. on behalf of T.G. in 2004 regarding an alleged deprivation of her rights to procedural due process and to education guaranteed under State law and the New Jersey Constitution by the East Orange Board of Education (hereinafter "Board"), while T.G. was a minor; and

WHEREAS, following a full hearing on the merits of that claim, the Honorable Mumtaz Bari-Brown issued an initial decision in favor of the Board finding no deprivation of T.G.'s rights; and

WHEREAS, the Commissioner dismissed Petitioner's claim adopting the decision of Judge Bari-Brown; and

WHEREAS, T.G. attained the age of majority while the proceedings were still pending and authorized counsel previously representing her mother to act on her behalf as well; and

WHEREAS, the State Board of Education rendered a decision on April 4, 2007 finding that the Board had denied T.G. of educational opportunities guaranteed to her by the New Jersey State Constitution and laws for the period of September 2002 through late January 2003 and remanded the matter to the Commissioner for the fashioning of an appropriate remedy; and

WHEREAS, the parties in good faith have agreed that the remedy for the deprivation of educational opportunity found by the State Board will be as follows:

1. The Board will assist T.G. in locating and enrolling in a mutually agreeable GED program. T.G. agrees to regularly and consistently attend GED programming. The Board agrees to pay any costs of same, if there are any, conditioned upon T.G.'s regular and consistent attendance and fulfillment of course requirements. Failure to meet these conditions will result in a suspension of the Board's District's support for T.G.'s continued participation in same.

2. The parties will investigate the possibility of T.G. receiving vocational training concurrently with the GED programming. If a vocational training program is available concurrently with the chosen GED program, the Board agrees to fund T.G.'s participation therein subject to the parties finding a mutually agreeable program. The Board's continued support of T.G.'s participation in vocational programming is conditioned upon T.G.'s regular and consistent attendance and fulfillment of course

requirements. Failure to meet these conditions will result in a suspension of the Board's support for T.G.'s continued participation in same.

3. Vocational training will only be provided if both parties agree upon a GED program that offers it and T.G. agrees that she wants to pursue it.

4. While T.G. is attending GED programming, the Board agrees to provide her with two sessions of tutoring per week for a total of 1 ½ to 2 hours a week. The continuation of the tutoring is contingent upon T.G.'s attendance and participation therein. The Board will permit T.G. to cancel tutoring or "no show" up to 9 times each school year. If T.G. does not cancel the tutoring session within 24 hours, it will be considered a "no show". If T.G. "no shows" 2 times in a row or cancels/"no shows" 9 times in a school year, the tutoring will be suspended. The Board agrees to monitor the ongoing efficacy of the tutoring and make adjustments in personnel as needed. Tutoring will be provided at a mutual location such as the library or one of the schools in district.

5. Should T.G. fail to fulfill her responsibilities as outlined herein for participation in GED programming, vocational programming, and/or tutoring, and any of those services are suspended by the Board, T.G. may write to the Administration and request reinstatement of the suspended service(s). In that letter, T.G. agrees to provide the reasons she failed to fulfill the requirements, of this Agreement, the reasons she is requesting reinstatement of services and any relevant documentation. A district administrator will decide whether to reinstate the suspended service(s) within 21 days of receipt of any such request from T.G.

6. The District agrees to provide T.G. with career counseling, either through the guidance department in district or through her GED program. This will include providing T.G. with information about community resources, such as those that would assist her with finding a job.

7. The services and supports outlined herein will be provided by the Board for up to 2 school years from her enrollment in the program outlined in Paragraph 1, which is anticipated to be in September 2007. The supports outlined in this Agreement represent the entire obligation of the Board to T.G. with regard to her education. In exchange for the Board's support for T.G. as outlined herein, C.G. individually, C.G. on behalf of T.G. and T.G. individually hereby release and forever waive any and all other claims that were or could have been raised of any nature against the Board, collectively and individually, its agents or assigns, to date, including but not limited any claims under IDEA, Title 18A, Title 6A, the New Jersey Law Against Discrimination, Title VII, Title IX, the New Jersey and United States Constitutions, private therapy services, any services beyond the period of this Agreement, any monetary damages, any compensatory education, and any claims for attorneys fees. Nothing in this release shall prevent T.G. from bringing an action to enforce the terms of this Agreement, should the need arise. It is agreed and acknowledged that neither party is a prevailing party for any purpose.

8. T.G. and C.G. acknowledge that they have entered into this Agreement freely, willingly and voluntarily, without duress or coercion and with the opportunity to consult with counsel or other advisor(s) of their choosing and option and that they fully

understand its terms and conditions. They acknowledge that they did in fact consult with David R. Giles, Esq. prior to executing this Agreement and Release.

9. The Board President is authorized to execute this Agreement on behalf of the Board.

Date: 8/1/07

Carol Graham

Carol Graham, Individually and o/b/o T.G.

Sworn and subscribed before me on this 1st **day of** August, **2007**

David R. Giles
New Jersey Licensed Attorney

Date: 8/1/07

Tiesha Graham

Tiesha Graham, Individually

Sworn and subscribed before me on this 1st **day of** August, **2007**

David R. Giles
New Jersey Licensed Attorney

EAST ORANGE BOARD OF EDUCATION

Date: 8-7-07

Bi Bi Stewart-Garvin

Bi Bi Stewart-Garvin, Board President

Sworn and subscribed before me on this 7th **day of** August, **2007**

Jamie Adams

JAMIE ADAMS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/17/2010

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, August 7, 2007 at 6:15 p.m.

The following members of the Board were present:

Ms. Theresa Combs, Ms. Belinda Jackson, Mr. J. Garfield Jackson, Jr., Mr. Everett Jennings, Mr. Vernon Pullins, Jr., Mr. Arthur L. Wright, and Mrs. Bibi Stewart Garvin

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Ms. Belinda Jackson and adopted by the Board of Education:

RESOLUTION

esolved, that the Board hereby approves the Settlement and Release in the matter captioned C.G. o/b/o T.G. v. East Orange Board of Education, bearing Agency Reference #133-4/03 and OAL Docket #EDU5343-03, in accordance with the terms and conditions set forth therein; and

Be it further resolved that the Board President is authorized to execute this Agreement on behalf of the Board and a copy of the Agreement shall be included in the permanent minutes of this meeting.

RECEIVED
2007 AUG 17 P 4:57

ROLL CALL: AYES: 7
NOES: 0

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Victor R. Demming, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, August 7, 2007, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 15th day of August 2007.

Victor R. Demming

Victor R. Demming, Board Secretary

388 0

OAL DKT. NO. EDU 9649-04
AGENCY DKT. NO. 277-8/04

CHRISTOPHER MOLOKWU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/03/07

Date of Mailing: 10/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09649-04
AGENCY DKT. NO.: 277-8/04

CHRISTOPHER MOLOKWU,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Benjamin A. Spivak, Esq., for petitioner Christopher Molokwu (Oxfeld Cohen, attorneys)

Joanne L. Butler, Esq., for respondent State Operated School District of the City of Paterson, Passaic County (Schenck, Price, Smith & King, attorneys)

Record Closed: August 1, 2007 Decided: August 27, 2007

BEFORE **IRENE JONES**, ALJ:

On August 10, 2004, petitioner, Christopher Molokwu, filed a petition with the Commissioner of Education alleging that respondent, State-Operated School District of the

City of Paterson, Passaic County, improperly reduced his salary in violation of his tenure rights. On September 22, 2004, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearing on April 25 - 29, 2005. Those dates were adjourned and the matter was held in abeyance pending disposition of petitioner's tenure hearing, OAL Docket No. EDU 0650-04. Thereafter, on May 17, 2007, the parties notified the undersigned that the matter had been settled between the parties. A Settlement Agreement was signed by the parties and forwarded to the OAL on July 27, 2007 and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/28/07
DATE

IRENE JONES, ALJ

Date Received at Agency: 9-4-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 4 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej/pb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
State Operated School District of Paterson

RECEIVED
N.J.
OFFICE OF ADMINISTRATIVE LAW
2007 JUL 32 A 10: 29

CHRISTOPHER MOLOKWU, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF PATERSON Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR 9649-2004N **SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

WHEREAS, the Parties, CHRISTOPHER MOLOKWU ("Molokwu") and the State Operated School District of Paterson ("Paterson"), desiring to resolve all matters of dispute between them as specified below, without further expenditure of time, money and resources do hereby enter into this Settlement Agreement and Release of Claims ("Agreement") knowingly and voluntarily, and

WHEREAS, Molokwu has a petition pending against Paterson before the Office of Administrative Law as Christopher Molokwu v. State Operated School District of Paterson, Docket No. EDUOR 9649-2004N, related to the salary adjustment made due to the unaccredited status of the educational institute from which Molokwu obtained his doctoral degree.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, both Parties being separately advised by counsel and intending to be legally bound, hereby covenant and agree as follows:

1. All the foregoing is incorporated herein as part of this Agreement.

2. In consideration of the mutual acts, covenants and promises herein, it is agreed as follows:

a Paterson will pay to Molokwu the sum of $969.38, representing one-half of the entire amount Molokwu's salary was adjusted and withheld during the time period between the date of adjustment and the effective date of Molokwu's tenure dismissal (minus the 120 days of unpaid suspension following the certification of tenure charges); and

b. Molokwu shall voluntarily dismiss, with prejudice, the within Petition bearing Docket No. EDUOR 9649-2004N.

3. In exchange for the promises made by Paterson in this Agreement, and the reimbursement to which Molokwu is entitled by virtue of this agreement, Molokwu, his heirs, legal representatives, and assigns, hereby releases and forever discharges Paterson and its employees, officers, agents, agencies and assigns from any and all claims, demands, obligations, actions, causes of action, damages, attorney's fees, costs, expenses, and compensation of any kind whatsoever, both legal and equitable and including but not limited to any and all claims for compensatory damages, punitive damages, back pay, front pay and the interest thereon and any claims under N.J.S.A. 18A:29-1, *et* seq., which Molokwu now has or may hereafter acquire against Paterson specifically set forth in, or arising out of, the current Petition bearing Docket No. EDUOR 9649-2004N or any other action, including but not limited to any civil rights or discrimination claims or any expressed or implied contract between Paterson and Molokwu, whether oral or written, or any collective negotiations agreement, or any other Federal, State, County, or local statutes, ordinances, resolutions and regulations, or any employment manual or handbook or personnel policies.

4. In consideration of the undertakings and agreements of Paterson set forth in this Agreement, Molokwu agrees to acquit and release fully from any and all claims of whatsoever nature and sort, including attorney's fees and costs, that Molokwu has or may have against Paterson and its officers, employees and agents which are set forth in or arising out of the current Petition bearing Docket No. EDUOR 9649-2004N or any other claim, which claims are described in Paragraph 3 above.

5. It is agreed and understood that nothing in this Agreement constitutes an admission of guilt or wrongdoing by either party, in an individual or employment capacity, or that any statute, rule, regulation or legal obligation has been violated.

6. Molokwu declares that he has read and reviewed this Agreement with his representative and fully understands the terms of such Agreement and that he voluntarily accepts it for purposes of making a full and final compromise of all claims which are set forth in or arising out of the current Petition bearing Docket No. EDUOR 9649-2004N, which claims are described in Paragraph 3 above.

7. The Parties to this Agreement agree and pledge to cooperate and communicate in good faith to implement and abide by its terms.

IN WITNESS WHEREOF, Molokwu and Paterson, intending to be legally bound, have set their hands and seals to this Agreement as of the day and year written below.

Christopher Molokwu
CHRISTOPHER MOLOKWU

Date: 5/25/07

Michael E. Glascoe
Dr. Michael Glascoe, Superintendent
State-Operated School District of Paterson
Date:

389-07

OAL DKT. NO. EDU 2211-07
AGENCY DKT. NO. 71-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF TONY DENNIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF BRIDGETON, CUMBERLAND COUNTY.	:	

The record of this matter, the parties' Settlement Agreement, Approved Leave of Absence and Resignation, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/03/07
Date of Mailing: 10/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2211-07

AGENCY DKT. 71-3/07

IN THE MATTER OF THE TENURE HEARING OF TONY DENNIS, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY.

Paul Kienzle, Esq., appearing for the petitioner

Ned P. Rogovoy, Esq., appearing for respondent

Record Closed: August 29, 2007 Decided: September 10, 2007

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 21, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing commenced on June 21, 2007. Prior to the next scheduled hearing date the parties reached a settlement.

A Settlement Agreement indicating the terms thereof, is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9-10-07
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency:

SEP 13 2007

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

RECEIVED
2001 AUG 29 A 10:46
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RESOLUTION
OF
THE BOARD OF EDUCATION
OF THE CITY OF BRIDGETON

WHEREAS, the Board of Education has filed tenure charges against Tony Dennis for inefficiency; and

WHEREAS, one day of hearing has transpired in connection with the hearing; and

WHEREAS, there are extensive documents, proofs and trial days possible; and

WHEREAS, the parties have conferred;

NOW THEREFORE, BE IT RESOLVED, as follows:

The Bridgeton Board of Education hereby determines that it is in its best interests and the best interests of the public to agree to the settlement agreement attached hereto which includes the resignation of Tony Dennis from the employment of the Bridgeton Board of Education and resolves the tenure charge;

BE IT FURTHER RESOLVED, that among the reasons the Board of Education determines that this is in its best interest are as follows:

1. It is anticipated that trial in this matter may take an additional six (6) to eight (8) full days.

2. The anticipated trial would result in substantial financial expense to the Bridgeton Board of Education both with respect to attorney's fees and loss of staff time.

3. It is anticipated that the loss of work days for the Superintendent of Schools, the Principal of Cherry Street School, the Assistant Principal of Cherry Street School, the two Supervisors involved in this case as well as school personnel witnesses would amount to over thirty (30) days in lost time for school personnel.

4. But for the agreement between the parties, the Board of Education would have to commence paying Tony Dennis his salary under the tenure hearing law beginning September 1, 2007, which in fact will be avoided by reason of the settlement agreement.

5. It is clearly a business decision to come to the agreement between the Board of Education and Tony Dennis as it will clearly save the Board of Education money and the agreement will provide to the Board of Education the desired result of having Mr. Dennis resign from the School District.

BE IT FURTHER RESOLVED, that the President of the Board of Education and the School Business Administrator are hereby authorized to execute this agreement on behalf of the Bridgeton Board of Education.

The foregoing resolution was moved by Marie Bernstein; and seconded by Jonathan Griffin.

ROLL CALL VOTE

NAME	AYES	NOES
Marie Bernstein	X	
Angelia Edwards	X	

NAME	AYES	NOES
J. Curtis Edwards	X	
Jonathan Griffin	X	
Kenny SmithBey	X	
Willie Tukes	X	
Jack Surrency	X	

CERTIFICATION

I, Nicole M. Schoener, School Business Administrator of the Board of Education of the City of Bridgeton, herewith certify that the foregoing Resolution was approved by the Bridgeton Board of Education in a roll call vote as herein set forth in executive session, at the regular meeting of the Bridgeton Board of Education held on August 14, 2007.

Dated: 8/14/07

NICOLE M. SCHOENER
SCHOOL BUSINESS ADMINISTRATOR

CASAROW, KIENZLE & RACZENBEK
COUNSELLORS AT LAW
32 North Pearl Street
P.O. Box 337
Bridgeton, New Jersey 08302

John A. Casarow, Sr. (1897-1989)
John A. Casarow, Jr.
A. Paul Kienzle, Jr.
David F. Raczenbek

Telephone No.: (856) 455-0566
Telefax No.: (856) 455-6593

August 22, 2007

RECEIVED
2007 AUG 29 A 10:46
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Honorable Dennis P. Blake, ALJ
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625

RE: In the Matter of the Tenure Hearing of Tony Dennis, School District of the City of Bridgeton, Cumberland County
OAL Docket NO.: EDU 2211-07
Agency Docket NO.: 71-3/07

Dear Judge Blake:

Regarding the above-captioned matter, please find enclosed herewith the following:

1. Original and two copies of the Resolution of the Board of Education of the City of Bridgeton approving the settlement agreement between the Board and Mr. Dennis.

2. Three copies of the settlement agreement between the Board of Education and Mr. Dennis.

Please note that Mr. Rogovoy will be forwarding to you by separate documentation the Affidavit of Mr. Dennis regarding his understanding of the entire matter including the consequences of the agreement as entered into and those things that are required by the Commissioner of Education to approve the decision.

Thank you for your cooperation.

Respectfully yours,
CASAROW, KIENZLE & RACZENBEK

A. PAUL KIENZLE, JR.

APK/dg
cc: Ned P. Rogovoy, Esquire
H. Victor Gilson, Ed.D, Superintendent of Schools

APPENDIX B

Joint Statement of
Tony Dennis, Cumberland County

Tony Dennis was employed by the Board on or about September, 2002 and he resigned when his unpaid leave of absence expired on _____.

RECEIVED
2007 SEP -4 A 11: 08
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF TONY DENNIS, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY
AGENCY DOCKET NO. 71-3/07
OAL DOCKET NO. EDU 2211-07

AFFIDAVIT OF TONY DENNIS

STATE OF NEW JERSEY)
:ss
COUNTY OF CUMBERLAND)

TONY DENNIS, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I have reviewed the Settlement Agreement and all of its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have continued with the trial and had the judge make a determination as to whether or not the Board of Education had, by a preponderance of evidence, proved that I had been "inefficient" pursuant to the facts when applied to existing law.

3. I have entered into the Settlement Agreement freely and voluntarily and no one has forced or coerced me to resign, but I have done so at my own free will, knowing the perils and in some cases, benefits, that I will or could derive.

SWORN & SUBSCRIBED TO
Before me this 27th 31st day of
August, 2007.

Tony A. Dennis (L.S.)
TONY DENNIS

Attorney of N.J.

390-07

OAL DKT. NO. EDU 11846-06
AGENCY DKT. NO. 377-10/06

BRUNO ACUNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 10/03/07

Date of Mailing: 10/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11846-06

AGENCY DKT. NO. 377-10/06

BRUNO ACUNA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner

Joseph R. Morano, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: September 11, 2007 Decided: September 11, 2007

BEFORE **JESSE H. STRAUSS**, ALJ:

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on December 22, 2006 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. As a result of several conferences, the parties settled the matter.

On September 11, 2007, the parties submitted the attached copies of a Stipulation of Settlement and the Board's Resolution.

Having reviewed the record and the settlement terms, I **FIND**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 11, 2007
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 9-17-07

Mailed to Parties:

SEP 17 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

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2007 SEP 11 A 7:58
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BUCCERI & PINCUS, ESQS.
1200 US Highway 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

BRUNO ACUNA,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	AGENCY REF. NO. 377-10/06
v.	:	OAL DKT. NO. EDUOA 11846-2006N
HOBOKEN BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between Bruno Acuna (hereinafter "Mr. Acuna"), who resides at 1121 Jefferson Street, Apt. W502, Hoboken, New Jersey 07030, and the Hoboken Board of Education (hereinafter "the Board") having its offices at 1115 Clinton Street, Hoboken, New Jersey 07030. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Acuna is an employee of the Board; and

WHEREAS, on or about August 30, 2005, the Board adopted a resolution stating, in part:

> RESOLVED, THAT THE APPOINTMENT OF THE FOLLOWING FROM Full/Time custodian to Full/Time Maintenance

effective September 1, 2005, be and is hereby approved.

* * *

Bruno Acuna - $24,818.00;

WHEREAS, on or about June 26, 2006, the Board appointed Mr. Acuna to a position of employment as a full-time custodian; and,

WHEREAS, on or about August 22, 2006, the Board established Mr. Acuna's annual salary at a rate less than $24,818.00 and took steps to recoup an alleged overpayment of salary for the months of July and August, 2006; and,

WHEREAS, Mr. Acuna filed a petition with the Commissioner alleging that he had gained tenure pursuant to *N.J.S.A.* 18A:17-3 and that the Board had reduced his salary in violation of his tenure status; and,

WHEREFORE, the Board filed an answer denying the allegations made by Mr. Acuna; and,

WHEREFORE, the parties have agreed to an amicable resolution of this matter in lieu of further litigation; and,

IT IS on this _____ day of August, 2007, agreed as followed:

1. Prior to the execution of this Agreement, the Board has reinstated Mr. Acuna to his position of employment as a full-time maintenance worker at his proper salary.

2. The Board will pay Mr. Acuna at the annual salary rate of $24,818.00, effective July 1, 2006 and continuing until

the effective date of the Board's reinstatement of Mr. Acuna to his position of employment as a full-time maintenance worker.

3. All back pay due and owing as the result of this salary adjustment shall have all appropriate payroll deductions and withholdings made.

4. The amount of back pay owed to Mr. Acuna as the result of this salary adjustment will be paid within thirty (30) days of the approval of this Stipulation of Settlement by the Commissioner of Education.

5. Mr. Acuna acknowledges that he has been advised that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Stipulation of Settlement, and has done so, and that he signs this document as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

6. The undersigned representatives of the Board hereby acknowledge that they are authorized to sign this Agreement pursuant to the terms of the attached resolution of the Board approving this Stipulation of Settlement.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

8. Both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Stipulation of Settlement and all of these stipulations, agreements, acknowledgements, whether contained herein or

attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

WITNESS:

~~Gregory T. Syrek~~
Edward T. Stevens
Dated: 9-4-2007

Bruno Acuna

HOBOKEN BOARD OF EDUCATION

Dated:

BE IT RESOLVED, upon the recommendation of the Superintendent, that the following administrative disciplinary and personnel matters be amicably resolved, be and hereby is approved.

PERC Docket No. AR-2007-203 (O'Connor)
OAL Docket No. EDUOR-1123-2006N (Settembre)
OAL Docket No. EDUOR-01042-2007N (Settembre)
OAL Docket No. EDUOR-0116-2007N (Lisa)
OAL Docket No. EDUOA-11846-2006N (Acuna)

RECEIVED
2007 SEP 11 A 7:59
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The above is a true copy of a resolution approved by the Hoboken Board of Education at the Stated Session held on August 14, 2007.

David Anthony
Board Secretary

397-07

#397-07

BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,

PETITIONER,

V.

L.A. AND C.A., ON BEHALF OF MINOR CHILDREN, P.A. AND T.A.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

This matter arose out of a dispute between the parties over the continued enrollment of L.A. and C.A.'s children as tuition students in Port Republic schools, and was resolved through a settlement agreement in February 2005. Thereafter, the Board filed a complaint in Superior Court alleging that respondents had failed to adhere to the terms of the settlement, and seeking to enforce the settlement through removal of the children from school, or tuition for the 2004-05 school year. The matter went to trial in Superior Court; after several days of hearing, the judge suspended proceedings and referred the matter to the ALJ who had heard earlier proceedings in the matter at the OAL for clarification of the issues to be resolved pursuant to the meaning of the language of the agreement.

The ALJ found, *inter alia,* that: issues in this action are limited to those directly addressed in the February 2005 settlement agreement; paragraph 7 of the settlement agreement is controlling in this matter, and includes a sentence that says that the paragraph does not apply if respondents failed to establish residency as required in paragraph one of the settlement; it is uncontested that respondents failed to establish residency within the time frame required in the settlement; therefore, under the express language of paragraph 7, the Board has no cause of action in this matter. The ALJ concluded that the Board has not prevailed, and is not entitled to attorney's fees and costs; ultimate disposition of this issue, however, remains with the Superior Court judge who retained jurisdiction. The ALJ ordered the petition dismissed with the exception of the issues related to attorney's fees and costs, and ordered the matter returned to the Superior Court for final disposition.

The Commissioner concurs with the findings and conclusions of the ALJ, and adopts the Initial Decision as the final decision in this matter. The matter is returned to Superior Court for final resolution of the issues of attorney's fees and costs.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 9, 2007

OAL DKT. NO. EDU 4154-06
AGENCY DKT. NO. 152-4/06

BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
L.A. AND C.A., ON BEHALF OF MINOR CHILDREN, P.A. AND T.A.,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and respondents' reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.[1]

The Board's exceptions charge that in his Order of March 6, 2007 establishing the issues to be resolved in this matter, the Administrative Law Judge (ALJ) disregarded the directive of the Honorable William Nugent, J.S.C. which specifically directed that he determine whether respondents established residency in Port Republic for the entire 2004-05 school year. (Board's Exceptions at 3) The Board further excepts to the ALJ's interpretation of paragraphs 1

[1] By letter dated September 19, 2007, the Board urged that respondent's reply exceptions – filed on September 18, 2007, in response to the Board's primary exceptions filed on September 12, 2007 – were untimely and, therefore, should not be considered by the Commissioner. It is noted that, pursuant to *N.J.A.C.*1:1-18.4(d) and *N.J.A.C.* 1:1-1.4, reply exceptions are due no later than 5 *business days*, after a party's receipt of primary exceptions. Consequently, respondents' submission in this regard was timely filed.

and 7 of the Settlement Agreement; his failure to ascribe proper weight to the testimony of its witnesses; and his failure to find the Board the prevailing party in this matter. (Id. at 5-6)

Upon careful and independent review of the record, according due deference to the Administrative Law Judge's (ALJ) credibility determinations[2] and finding the Board's exceptions without merit, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons clearly articulated in his decision. In so doing, the Commissioner is in full agreement with and hereby adopts the ALJ's comprehensive Order dated March 6, 2007, which specifically clarifies and sets the parameters for the issues referred to him for adjudication by the Honorable William Nugent, J.S.C. In framing these issues, he read Judge Nugent's Order within the context of the Settlement Agreement and the causes of action set forth in the Board's Superior Court complaint, and further utilized his familiarity with the case and found:

> [t]he Complaint filed before Judge Nugent sought to enforce the Settlement Agreement. Nowhere does the Settlement Agreement address future residency issues. While it is true that the Complaint demands removal of the children from the Board's school district, that demand must be read within the context of the language of the Settlement Agreement. ***While paragraph 2 of Judge Nugent's Order refers to "(whether her children were consistently sleeping at the premises located at 144 Pomona Avenue during the school year)", I conclude that said language represents a misconception of the intent of the Settlement Agreement. Judge Nugent left it to me [to] reconfigure the issues herein, and I have relied upon my knowledge of the case to do so. (ALJ's March 6, 2007 Order at 3-4)

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal, with the exception of those issues over which jurisdiction has been retained

[2] The Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner provides no cause for modification or rejection in this regard.

by Superior Court, is hereby dismissed. This matter shall be returned to the Honorable William E. Nugent, J.S.C., Superior Court of New Jersey, Law Division, Atlantic County, for final resolution of the issues of attorney's fees and costs.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/07

Date of Mailing: 10/09/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4154-06
AGENCY DKT. NO. 152-4/06

BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,
Petitioner,
v.
L.A. AND C.A., ON BEHALF OF MINOR CHILDREN, P.A. AND T.A.,
Respondents.

William S. Donio, Esq., for petitioner (Cooper, Levenson, April, Niedelman & Wagenheim, P.A., attorneys)

Duane T. Phillips, Esq., for respondents

Record Closed: August 8, 2007 Decided: August 22, 2007

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, L.A., filed a petition against petitioner Board of Education (Board) seeking emergent relief in January 2005 (Docket Number EDU 34-05). That petition arose out of a dispute between the parties over the continued enrollment of L.A.'s

children, T.A. and P.A., as tuition students in the Board's district. The matter was resolved through a settlement agreement which I then embodied in an Initial Decision (ID) Settlement on February 4, 2005 (R-1). The ID Settlement was subsequently affirmed by the Commissioner.

Thereafter, on June 3, 2005, the Board filed a complaint in the Superior Court alleging that L.A. had failed to adhere to the terms of the settlement and seeking to enforce said settlement. That action sought, inter alia, either removal of the children from the school, or, in the alternative, tuition. This matter went to trial before the Honorable William Nugent, J.S.C. After several days of testimony, Judge Nugent suspended the proceedings and referred the matter to the Office of Administrative Law with an Order directing as follows:

> 1. This matter be referred to Judge Bruce Gorman, A.L.J. with respect to breach of an Order incorporating a settlement between the parties placed on the record in a matter heard by Judge Gorman on January 7, 2005 as Judge Gorman may have more insight as to the meaning of the language in the agreement.
>
> 2. For a determination by Judge Gorman as to whether Defendant [L.A.] established residency in Port Republic for the school year 2004-2005 (whether her children were consistently sleeping at the premises located at 144 Pomona Avenue during the school year).

On March 6, 2007, I issued an Order holding that the following are the issues to be decided in this case:

> 1. Did L.A. fail to establish residency in Port Republic within thirty days of January 10, 2005?
>
> 2. If she failed to do so, are L.A.'s children permanently barred from enrolling in the Port Republic school system?
>
> 3. If L.A.'s children are not so barred, what other remedy, if any, is the Board entitled to?

4. What constitutes a "prevailing party" in this matter, and has either party established itself as such?

The matter was scheduled for a hearing on April 26, 2007, in Atlantic City, New Jersey. The hearing proceeded on that date and was further tried on June 28, 2007 and on August 1, 2007. The parties submitted post-hearing briefs, and the record closed on August 8, 2007.

STIPULATIONS OF FACTS

The parties stipulated certain facts. They were as follows:

1. Under the terms of the prior settlement (R-1), L.A. was required to establish residency in Port Republic, New Jersey within thirty calendar days of January 10, 2005. Establishing residency was defined as "settling on home and children sleeping in home."

2. L.A. and C.A. settled on a home located at 144 Pomona Avenue, Port Republic, New Jersey on February 9, 2005, within the thirty day limitation. However, the children did not commence sleeping in the home within the thirty day limitation. Accordingly, respondents stipulated that they failed to meet the requirements of the Settlement Agreement (R-1), thereby resolving issue number one in the matter now before me.

3. The Settlement Agreement specified that in the event L.A. failed to establish residency within the thirty day window, she would pay $2040.00 in back tuition to the Board. Both parties stipulated that said monies had heretofore been paid.

4. The Board stipulated that it had not complied with the requirements of N.J.S.A. 18A:38-1.

5. The Board stipulated that L.A.'s failure to establish residency within the thirty day window specified in the Settlement Agreement did not permanently bar her from enrolling her children in the Port Republic District, thereby resolving issue number two in the matter now before me.

6. The parties stipulated that the Board allowed L.A.'s children to return to class in the Port Republic School on February 14, 2005.

FINDINGS OF FACT

The stipulations disposed of issues one and two as set forth in the Amended Prehearing Order. Respondents admitted they failed to move into 144 Pomona Avenue by February 9, 2005, the date specified in the Settlement Agreement. The Board acknowledged that respondents' breach of the agreement does not permanently bar the children from attending school in the Port Republic system.

The parties also stipulated that the Board was entitled to back tuition in the amount of $2040, and that the respondents had paid those monies. Given that the Board has already recouped $2040 from L.A., the sole remaining substantive question is, what other remedy, if any, is the Board entitled to as a result of L.A.'s failure to meet the thirty day deadline set forth in paragraph 1 of the Settlement Agreement?

The Board acquiesced to the return of T.A. and P.A. to class on Monday, February 14, 2005. Paragraph 1 of the Settlement Agreement allowed the children to remain in school for "30 calendar days from January 10, 2005." That time period ended February 9. However, paragraph 2 of the Agreement specified that $680 was to be paid to the Board to be held in escrow. That paragraph goes on to state that, "This represents the tuition rate for January 10, 2005 through February 10, 2005."

February 11, 2005, was a Friday, and was clearly not within the contemplation of the Settlement Agreement. Whether February 10 was covered by the $680 is subject

to my construction of the ambiguity between paragraphs 1 and 2 (see Legal Analysis, supra). February 12 and 13 were weekend dates, when the school was closed.

Accordingly, one of the questions before me is whether the Board is entitled to additional tuition for February 11 and, arguably, February 10.

To address that issue, the Board subpoenaed and called to the stand T.A. T.A. is the elder son of respondents L.A. and C.A. He is fourteen years old and currently attends St. Augustine Preparatory School, a Catholic high school.

T.A. had no recollection of the specific dates involved in this matter. He remembered that the family moved into the Port Republic house in February 2005. He knows that on several occasions he and his brother were dropped off at the school only to be barred from their classes by the Superintendent, Rose Anne Fiore, and were compelled to remain in the school office.

T.A. believed this happened on more than two occasions, but was not certain. His confusion was understandable. I take official notice that during the course of the prior litigation (Docket No. EDU 34-05), both parties acknowledged that T.A. and P.A. were likewise barred from their classes and compelled to sit in the school office on certain dates during January 2005.

T.A. recalled that during those days, his mathematics teacher sent his schoolwork down to the office for him, and he spent his time doing that work.

I found T.A. to be credible and believable.

Rose Anne Fiore testified for petitioner Board. Fiore was the superintendent of the Port Republic School District from August 2004 until her retirement in June 2006.

Fiore testified that T.A. and P.A. were relegated to the school office on February 10 and 11 because she did not expect them to come to school. When she did not

receive confirmation that L.A. had established residency in Port Republic in accordance with paragraph 1 of the Settlement Agreement by February 9, on that date she sent respondents a letter requesting a "change of address" form showing that they were transferring to another school (P-2). The letter went on to state that the children would not attend classes on February 10 unless a settlement sheet and certificate of occupancy for the Port Republic house were submitted to the school.

Fiore stated such proof was ultimately submitted late in the day on February 11 by respondent's counsel (P-3). For that reason, she permitted T.A. and P.A. to return to class on February 14.

The letter from respondent's counsel (P-3) was accompanied by an affidavit signed by respondents. This affidavit confirmed that the closing on the 144 Pomona Avenue was completed on February 9. Paragraph 7 of the affidavit goes on to state as follows:

> We are living there now with the children. I, Chris, am there with the children most nights because Louise works nights.

This affidavit comprised the basis for Fiore's decision to permit the children to reenter the school.

On March 10, 2005, Fiore sent another letter to respondents (P-6). This letter stated that the Port Republic code enforcement officer had told her no conditional Certificate of Occupancy had been issued for 144 Pomona Avenue, and that therefore the family could not reside in that premises. On that basis, Fiore demanded tuition for the period beginning February 11, 2005. The code enforcement officer did not testify.

Beginning April 1, 2005, Fiore began keeping a "Surveillance Log" of 144 Pomona Avenue (P-7). She compiled this log by asking certain school employees to note whether they saw a car in the driveway or lights on at that location. The

employees were L.W. (Linda Walk, office clerk), B.D. (Betsy Daniels, secretary), H.S. (Herb Snyder, custodian), and herself. Walk. Daniels and Snyder did not testify.

P-7 contains twenty-one entries between April 1 and April 19. Thereafter, the entries decline. There are five entries between April 25 and April 29, one entry for May 4, one entry for May 9, four entries for May 23 through 27, and one entry for June 1. With the exception of four entries by Fiore, all of the observations were by persons who did not testify. On three occasions the children were seen arriving at 144 Pomona Avenue and walking across the street to the school, but none of those observations was made by Fiore. P-7 does not address February or March of 2005.

Fiore testified she observed 144 Pomona Avenue every morning when she arrived at school and every evening when she left. But other than the four entries cited above, she did not record her observations on the Surveillance Log.

Paragraph 6 of the Settlement Agreement reads as follows:

> Petitioner shall present evidence of residency which is defined as an electric bill within 45 days of settlement.

Addressing the issue of whether the required electric bill was submitted, Fiore stated that at one point a bill of some kind was provided to her by L.A. She did not remember when it was submitted, nor did she remember whether it was an electric bill, a telephone bill or a gas bill. But she confirmed that a bill was submitted.

Fiore resumed her testimony during the second day of trial. At that time, her testimony regarding the utility bill became confused. First she stated she did not receive a utility bill. Then she stated she received a utility bill in October 2005. Finally, she said she was relying on her notes, and her notes did not indicate she received a utility bill during the spring of 2005. She herself had no personal recollection of receiving one.

I **FIND** Fiore's testimony on this issue to be unreliable. Her change in story between the two days of testimony is troubling, and her multiple explanations culminating in reliance upon unproduced notes give me serious reservations about the value of her testimony.

On cross examination, Fiore admitted she had no personal knowledge of whether a continuing certificate of occupancy (CCO) was issued to respondents for 144 Pomona Avenue. Nor could she say whether a CCO was required before respondents could take up residence there.

Fiore admitted that respondents had paid and the Board had accepted the tuition specified under paragraphs 2 and 3 of the Settlement Agreement (P-1).

Clement F. Lisitski testified for respondent. Lisitski has been an attorney at law of New Jersey for over thirty years. He has served as Board Solicitor to the Port Republic Board of Education for over twenty years, including the 2004-2005 school year. He has practiced school law since the 1970s.

Lisitski first became familiar with respondents during the 2002-2003 school year when their children were tuition students. Lisitski proceeded to describe the checkered history of the relationship between the Board and the respondents from that time through the settlement of the litigation resulting in P-1, none of which is relevant to this proceeding

Lisitski represented the Board in the litigation that produced the Settlement Agreement at issue here (P-1). He asserted that the Board entered into P-1 in good faith. When respondents showed no proof of compliance with paragraph 1 of P-1, he supported Fiore in her decision to bar the children from the school. Similarly, when respondents submitted their affidavit asserting that they now lived at 144 Pomona Avenue (P-3), Lisitski agreed that the children should be readmitted to the school.

Lisitski asserted that the children had been readmitted under false pretenses. He claimed P-3 stated the children had slept at 144 Pomona Avenue on February 9, 2005, the night specified in paragraph 1 of the Settlement Agreement (P-1). He stated that because the affidavit was written on February 11, the words "most nights" must necessarily include February 9, because only two nights had passed between that night and February 11. Therefore, he concluded, the affidavit meant that the children had slept at 144 Pomona Avenue on February 9, a fact which respondents now admit to be untrue. On that basis, Lisitski contended that respondents had sworn a false affidavit.

Lisitski reviewed the Settlement Agreement (P-1). He stated that paragraph 1 required the children to sleep at 144 Pomona Avenue on February 9. Since they did not do so, he asserted respondents were in violation of P-1.

Lisitski stated that paragraphs 2 and 3 required escrows for tuition for dates prior to P-1. These monies were to be retained by the Board if respondents did not comply with paragraph 1. Lisitski asserted that those monies are now forfeit, but admitted respondents have paid those monies and that the Board has retained them.

Lisitski agreed that paragraph 6 required production of the electric bill described by Fiore. He himself never saw such a bill and believed none was ever provided.

Lisitski then addressed the last sentence of paragraph 7. That sentence is pivotal to this proceeding and states:

> This paragraph does not apply if petitioner fails to settle and establish residency pursuant to the terms of paragraph one.

Lisitski stated this sentence was intended to deal with intermittent residency. It assumes that respondents will remove their children from the school if they fail to comply with paragraph 1. He insisted that the failure of respondents to remove the children from the school when they failed to comply with paragraph 1 voided the last sentence of paragraph 7, cited above. He also stated that the sentence in question

was inserted at the request of respondents' attorney because he feared that if respondents failed to meet the requirements of paragraph 1, the Board would attempt to obtain additional tuition from respondents. Lisitski asserted that the sentence also pertained to the difference between the tuition rate and the cost per pupil rate.

On cross examination Lisitski admitted his letter of February 23, 2005 (P-5) stated that the escrow monies were being retained by the Board because of respondents' failure to comply with paragraph 1 of P-1. He also acknowledged that P-5 contained no specific demand to remove the children from the school. He admitted that he had no personal knowledge of where the children slept on the night of February 9, 2005. He continued to insist that respondents' failure to remove their children from the school voided the last sentence of paragraph 7.

Lisitski acknowledged that if the Board believed respondents were not domiciled in Port Republic, it could have proceeded under the normal statutory procedure for removal of non-resident children (N.J.S.A. 18A:38-1). He stated the Board chose to attempt to enforce the Settlement Agreement (P-1) because it believed using this procedure would result in a faster disposition of the matter.

C.A. testified for respondents. C.A. is the father of T.A. and P.A. and the husband of L.A.

C.A. was asked only one question on direct examination: Did he drop off the children at school on February 11, 2005? His response was that he did not.

On cross examination, C.A. stated he did not take the children to school on February 11 because he had been instructed not to by the school.

On cross examination, C.A. admitted failing to move into the Pomona Avenue house by February 9. He explained that the seller had not yet vacated the premises. Consequently, C.A. and his family were unable to move in. The seller ultimately

removed his possessions, and the family moved in. At that point, C.A. started sending the children to the Port Republic School again.

CONCLUSIONS OF LAW

The Board's case is based upon its reading of paragraph 7 of the Settlement Agreement. That paragraph states that if the board is able to prove in a court of law or administrative tribunal that L.A. did not establish residency during the 2004-2005 school year, then she would be responsible for "investigation fees and attorneys fees and tuition...from October 28, 2004 and (L.A.) agrees to remove the children from the school upon the day after the date of such a finding.

On the basis of that language, the Board seeks the removal of the children from the school, or, in the alternative, tuition for the 2004-2005 school year commencing October 28, 2004. The Board contends that respondents never truly established residency in Port Republic, and that in fact they reside in neighboring Galloway Township.

The argument fails for two reasons. First and foremost, paragraph 7 contains an additional sentence that reads as follows:

> This paragraph does not apply if (L.A.) fails to settle and establish residency pursuant to the terms of paragraph one.

Respondents, L.A. and C.A., have not contested their failure to establish residency pursuant to the terms of paragraph 1. They have stipulated that the children did not sleep at the Port Republic property until after the February 9 deadline. Their subsequent efforts at establishing residence, whether successful or not, are irrelevant to the issue before me. L.A. did not establish residency in accordance with the terms of paragraph 1. Therefore, under the express language of paragraph 7, the remedy established therein is not available to the Board.

The Board Solicitor, Clement Lisitski, Esq., attempted to assert that the last sentence of paragraph 7 was void. I **FIND** and **CONCLUDE** that his explanation was at best inadequate. I further **FIND** and **CONCLUDE** that paragraph 7 is controlling in this matter.

The Board has argued that I should consider the greater issue of whether respondents have ever established residency in Port Republic. Such an inquiry is inappropriate in this matter. It is essential to remember that this case emanates from an action to enforce a settlement initially brought in the Superior Court. For that reason, the issues before me are limited to the four corners of the Settlement Agreement. The Settlement Agreement does not address residency in general. It is limited to two matters: whether L.A. settled on the Port Republic house *and* had T.A. and P.A. sleeping at that location by February 9, 2005 (paragraph 1); and whether L.A. produced an electric bill for the Port Republic home within forty five days of settlement (paragraph 6). No other challenge to respondent's residency can be made within the confines of this action.

If the Board seeks to challenge respondents' residency on grounds outside the four corners of the Settlement Agreement, then it must comply with the statutory requirements set forth in N.J.S.A. 18A:38-1. That statute is specifically structured to afford L.A. and C.A. and their remaining child, P.A., appropriate due process. The Board has admitted that it has not complied with that statute, but has instead relied upon the limited language of the Settlement Agreement.

Accordingly, I **FIND** and **CONCLUDE** that the Board has no cause of action under paragraph 7 of the Settlement Agreement.

Three issues remain. First, although it specifies no remedy for failure to comply, paragraph 6 imposed upon L.A. a requirement to supply an electric bill to the Board within forty five days of settlement. Fiore initially testified that a bill was submitted, although she was not certain when, nor did she know if it was an electric bill. Despite

the fact that she attempted to modify her testimony during the second day of hearing, I am satisfied that her testimony on the first day of trial was her best recollection, and that testimony is sufficient to establish L.A.'s compliance with that requirement.

Second, the question of whether respondents should pay tuition for February 11, 2005, must be resolved. The Settlement Agreement (P-1) deals with tuition for the period leading up to February 10, 2005. The stipulation of the parties specifies that those monies were paid. The children were readmitted to school on February 14, and, as set forth above, any challenge to residency from that point on must be brought pursuant to N.J.S.A. 18A:38-1. Such a challenge has yet to occur.

February 11, 2005, lies in the no man's land between the term contemplated by the Settlement Agreement, which terminated February 10, 2005, and the readmission of the children to the school on February 14.[1] I note that February 11 falls outside the scope of the Settlement Agreement, and therefore is not the subject of this action. However, since much testimony was elicited about that day, in order to produce a complete record, I make the following findings.

Fiore testified that the children were in the school on February 11, but were not permitted to attend classes. Instead, they were confined to the principal's office. C.A. denied taking the children to school on February 11. T.A. remembered spending time in the principal's office, but could not say if this event occurred on February 11.

Regardless of which scenario is correct, all witnesses seem to agree that the children did not attend classes on February 11. I **FIND** and **CONCLUDE** that whether the children were in the school is irrelevant. If they were not in class, the Board is not entitled to tuition for that date.

Finally, there remains the issue of prevailing party. Paragraph 9 of the Settlement Agreement states as follows:

[1] February 12 and 13, 2005, fell on a weekend.

9. If any party has to enforce this order, the prevailing party receives attorney's fees and costs from the other party.

Respondents did not contest their failure to meet the requirements of residency set forth in paragraph 1 of the Settlement Agreement. Not only did they not contest this issue, but prior to the bringing of this action, the Board converted the escrow monies to satisfy the outstanding tuition obligation. Accordingly, the Board cannot be said to have "prevailed" on that issue. It takes two parties to make a controversy. The Board cannot "prevail" if the other side does not choose to fight. And there was nothing to fight about. The Board had received the tuition to which it was entitled without the necessity of filing this suit.

On all other issues, the Board has failed to prove its case. Accordingly, I **FIND** and **CONCLUDE** that the Board has not prevailed in this matter, and is not entitled to attorney's fees and costs.

If the failure of the Board to prove its case constitutes victory for L.A. and C.A., then they can be considered to have "prevailed" in this matter. By conceding their failure in advance and paying the $2040 required under the Settlement Agreement, respondents may well have placed themselves in a positive position with regard to paragraph 9. Of course, such a holding would appear to be an anomaly, given that respondents had to pay over $2000 to the Board. The more logical conclusion would be that like the Board, respondents too failed to "prevail."

Fortunately, I have no enforcement power to award fees and costs; I can only offer an opinion. Ultimate disposition of this issue remains with Judge Nugent, who retained jurisdiction thereof. Accordingly, the matter should be returned to him for final resolution of the issue of attorney's fees and costs.

ORDER

I **ORDER** that the petition be **DISMISSED,** with the exception of the issues over which jurisdiction was retained by the Superior Court.

I **ORDER** that this matter be returned to the Honorable William Nugent, J.S.C., for final disposition of the any and all issues retained by him.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/22/07
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

8-22-07

Mailed to Parties:

AUG 3 0 2007

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

T.A.
Rose Anne Fiore
Clement F. Lisitski, Esquire

For Respondent:

C.A.

EXHIBITS

For Petitioner:

P-1 Initial Decision Settlement, L.A. o/b/o Minor Children, T.A. and P.A. v. Board of Education of the City of Port Republic, Atlantic County, OAL Docket No. EDU 34-05

P-2 Letter, Rose Anne Fiore to Mr. and Mrs. A., February 9, 2005

P-3 Letter, Duane T. Phillips, Esquire to Clement F. Lisitski, Esquire, February 11, 2004

P-4 Letter, Clement F. Lisitski, Esquire to Duane T. Philips, Esquire, February 10, 2004

P-5 Letter, Clement F. Lisitski, Esquire to Duane T. Phillips, Esquire, Februar 23, 2005

P-6 Letter, Rose Anne Fiore to Mr. and Mrs. A., March 10, 2005

P-7 Surveillance Log

For Respondent:

None

398-07

398-07E

OAL DKT. NO. EDU 9786-07
AGENCY DKT. NO. 268-9/07

E.T., ON BEHALF OF MINOR CHILDREN, N.S. AND J.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter – including the audiotape of proceedings – and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6. Petitioner's children are not being irreparably harmed by attending school in their assigned zone rather than the school preferred by petitioner because it is closer to home; further, the settled law, likelihood of success on the merits and balancing of equities in this matter all favor the Board of Education, which seeks to enforce the lawful attendance zone policies adopted to maintain class size balance among the district's several elementary schools.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons fully expressed by the ALJ in his oral decision rendered at hearing. This matter, should petitioner wish to pursue it, shall proceed to determination on the merits at the OAL.

IT IS SO ORDERED.*

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 10/12/07
Date of Mailing: 10/12/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 09786-07

AGENCY DKT. NO. 268-9/07

E.T. ON BEHALF OF MINOR CHILDREN N.S. AND J.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF OF BAYONNE, HUDSON COUNTY,

Respondent.

E.T., on behalf of her children, N.S. and J.S.

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

THIS MATTER having been opened to the Court upon application by E.T. on behalf of her children N.S. and J.S., and the Court having considered the papers in support of the motion and in opposition to the motion; and the Court having heard oral argument; and the Court having concluded that petitioner failed to demonstrate that her children will suffer irreparable harm if the relief is not granted, that petitioner has failed to demonstrate that she has a likelihood of prevailing on the merits of the case, that

petitioner has failed to demonstrate that her children will suffer greater harm than respondent if the relief is not granted; and for good cause having been shown;

It is on this 28th day of September, 2007,

ORDERED that petitioner's motion for emergent relief is **DENIED**.

This order on motion for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

BARRY E. MOSCOWITZ, ALJ

/bem

401-07

LEON VARJIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured math teacher employed by the Board since 1988 – contends that since his return from treatment for lymphoma in September 2000, he has been assigned a different combination of mathematics courses to teach than he had prior to his illness, and that his advisement role in student extra curricular activities has been diminished by the school administration. Petitioner argues that he has been a victim of discrimination and subject to a hostile work environment as the result of his illness. Respondent Board made a motion to dismiss the petition on the first day of hearing, at the conclusion of petitioner's case, arguing that petitioner has no entitlement to the relief he seeks.

The ALJ found, *inter alia*, that: petitioner was hired as a math teacher and is certified to teach any math class for grades 7 through 12, and has at all times been assigned to teach appropriate courses; petitioner has not been reduced in salary or benefits, nor have his tenure rights been violated; respondent has the discretion and managerial prerogative to assign teachers as it deems appropriate; there is absolutely no basis on which to conclude that petitioner has been discriminated against, and no evidence to sustain the relief sought by petitioner. Concluding that petitioner proved no violation of school law and failed to meet the burden of proof required to proceed with a discrimination claim, the ALJ granted respondent's motion to dismiss.

Upon a thorough and independent review of the record, the Commissioner concurs with the ALJ that the petitioner's appeal is without merit and adopts the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 15, 2007

OAL DKT. NO. EDU 9917-05
AGENCY DKT. NO. 168-6/05

LEON VARJIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply of the Midland Park Board of Education (Board), both duly filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

In his exceptions, petitioner urges rejection of the Initial Decision in its entirety, contending that the Administrative Law Judge (ALJ) erred in treating this matter as though it were not a civil rights case[1] and in mischaracterizing or drawing erroneous conclusions from petitioner's testimony and evidence. Petitioner reviews the Initial Decision in detail, proposing alternative findings of fact and conclusions of law (Petitioner's Exceptions at 1-33, *passim*); he stresses that he never claimed entitlement to relief under contract or school law, but rather sought to vindicate his right under the New Jersey Law Against Discrimination (LAD) to "work in a (*sic*) environment free of

[1] According to petitioner, because the Board's own policy states that district affirmative action determinations as to Law Against Discrimination claims may be appealed to the Commissioner of Education, the Board is estopped from arguing that petitioner's claim cannot be heard as a civil rights case. (Petitioner's Exceptions at 12-16, 21, 32)

discrimination and ***not to be assigned lower status job assignments because he was disabled or perceived as being disabled and likely to go out on cancer medical leave again." (*Id.* at 3, 6, 16-21, quotation at 6)

Petitioner asserts that – had the ALJ correctly construed his claim – it would have been clear that petitioner did, in fact, meet the requisite evidentiary burden for establishing a *prima facie* case of discrimination and hostile work environment under the LAD. In petitioner's view, he presented a factual scenario fully compatible with discriminatory intent, demonstrating that: 1) he was a member of a protected class, based on his medical disability and the perception of disability that remained even after he returned to work following treatment; 2) he was qualified for the position or rank sought, being an award-winning teacher with a long history of success in the courses and activities at issue; 3) he was denied promotion, reappointment or tenure based on the loss of status that resulted from having fewer honors and advanced courses assigned to him – notwithstanding that all assignments fell within his lawful job description – and from being deprived of his former autonomy as a student activity adviser; and 4) others with lesser qualifications achieved the rank or position denied to him, based on the Board's assignment of "his" classes to teachers less experienced and adept in handling advanced math, and less successful in preparing students for related exams. (Petitioner's Exceptions at 8-9, 12, 22-26) Moreover, petitioner contends, the Board's own Affirmative Action Officer's report concedes discrimination, openly admitting that the administration's thinking on how teachers should be assigned henceforth was colored by petitioner's need for medical leave, so that, "[in] other words, had [petitioner] never been disabled, he would not have suffered the loss in status of his job assignments." (*Id.* at 27)

Petitioner argues that he additionally demonstrated a hostile work environment under the LAD, having shown that: 1) the offending conduct would not have occurred but for his protected status, and 2) that such conduct occurred consistently over several years and was severe or pervasive enough for a reasonable person to conclude that conditions of employment had been altered and the working environment rendered hostile. It was not necessary in this context, petitioner opines, for him to show a deliberate intent to discriminate or harass; what matters is the discriminatory *effect* of the conduct at issue. (Petitioner's Exceptions at 29-30)

Petitioner further contends that the Board failed to produce any legitimate, nondiscriminatory reasons for the adverse actions it took against him, relying instead on justifications that are patently pretextual. (Petitioner's Exceptions at 9-10, 21-26, 28) According to petitioner, the bases offered by the Board are belied by the fact that the district's Advanced Placement Test scores "consistently plummeted" when the preparatory classes for them were assigned to teachers other than petitioner; therefore, since the Board's actions were clearly detrimental to students and the educational program, "no trier of fact could conclude anything other than that the removal of [petitioner] from these course *(sic)* was anything other than discrimination." (*Id.* at 22, 30-31; quotation at 22)

Consequently, petitioner urges, the Commissioner must direct that he be "returned to his pre-lymphoma employment positions with all the attendant status, i.e., three Honors classes and two CP classes *which he had before he had lymphoma,* and his former autonomy for his Student Senate advisory activities;" and "more importantly, that he be given assurances that the atmosphere in his workplace will be free of the discriminatory and hostile animus that prevent him from participating in supporting the

student body in their extra-curricular activities and in their charity projects, and to allow Petitioner to continue in the level of participation of student mentoring, mentoring in extra-curricular activities and in student charity projects that he participated in *prior to lymphoma*." (*Id.* at 22, emphasis *sic*)

In reply, the Board opines that the Initial Decision is legally and factually correct in all respects and well supported by the record, so that the Commissioner should adopt it as her own. According to the Board, the ALJ did not fail to recognize and properly address petitioner's claims of discrimination, as petitioner contends; to the contrary, despite her statement that the case was not a civil rights case, the ALJ did, in fact consider and apply the relevant law and concluded, based upon it, that petitioner had failed to make the requisite *prima facie* showing so as to be able to continue with a discrimination claim. (Reply Exceptions at 2-4, 9-10) The Board observes that petitioner was afforded full opportunity to testify as to the reasons underlying his claim, and that the ALJ based her findings upon this testimony and the evidence supporting it – appropriately exercising her judicial discretion to conclude that petitioner's perception of discrimination against him was without basis in fact. (Board's Reply at 4-5)

Additionally, the Board asserts that the ALJ was correct in viewing this matter (and petitioner's claims) in the context of well-established school law regarding the managerial rights and prerogatives of a board of education as to scheduling and teacher assignments. In the Board's view, the predicate of petitioner's argument is that he should be able to teach only those courses which he deems to have the appropriate level of "status," "prestige," and "cachet" (Board's Reply at 6), while ignoring both applicable law

and the fact that assignment of upper-level classes to staff members other than the most senior and experienced may be made for a variety of legitimate reasons. (*Id.* at 7)

Finally, the Board notes that petitioner – in excepting to its purported failure to demonstrate legitimate reasons for its actions – ignores or misunderstands that this matter was dismissed *before* the Board was called upon to make such demonstration, as a result of petitioner's own failure to meet his initial burden of presenting a *prima facie* case of discrimination. (Board's Reply at 8-9) The Board additionally observes that petitioner's demand for relief is at the very least premature, since he would not be entitled to prevail at this point in proceedings even if he *had* been found to have met his initial burden and the ALJ had not granted the Board's motion to dismiss. (*Id.* at 10)

Having carefully reviewed the record and considered the positions of the parties, the Commissioner concurs with the ALJ that petitioner's appeal is without merit.

In the Commissioner's view, the ALJ appropriately decided petitioner's LAD claim within the context of a school law dispute – which petitioner himself initiated by choosing to file his appeal with the Commissioner of Education rather than the Division on Civil Rights, as the Board policy on which petitioner relies in asserting Commissioner jurisdiction clearly gave him the option to do. Thus, the Commissioner finds, the ALJ correctly analyzed petitioner's claim primarily in terms of school law and secondarily in terms of the standard applicable to claims under the LAD, concluding from her review of the law, testimony and evidence that petitioner had no entitlement under the former and had not met his burden of proof under the latter.

Although petitioner repeatedly stresses that he is not claiming entitlement to relief under the school laws, but solely under the LAD, he cannot ignore that the demands

he is making would – as found by the ALJ – significantly limit the Board's lawful discretionary authority to operate and manage the schools within its district. While the Commissioner is well aware that boards of education are not permitted to exercise such authority in a discriminatory fashion, petitioner has presented no evidence that the Board in this instance has done so; thus, there is no basis on which to award even appropriately limited relief.

In essence, petitioner claims that his work environment has been rendered hostile by the cumulative effect of numerous adverse actions at the hands of the Board and its administration, for which there is no possible explanation other than discrimination toward him as a former cancer patient. Although he concedes (for example, in Exceptions at 2, 27-28) that the actions of which he complains would not have constituted harassment or discrimination under different circumstances, he repeatedly asserts that such actions began only after he took leave for treatment of cancer and have persisted ever since; thus, in his view, the nexus between his illness and the offending actions is self-evident.

The reality revealed by the record, however, is that petitioner's absence and return to work coincided with the emergence of a new building-level administration which progressively undertook to make systematic changes in the operation of the high school, a number of which affected petitioner's ability to maintain what he perceived as his accustomed (and rightful) position of status and autonomy. Following careful review of petitioner's extensive testimony and evidence, the Commissioner must concur with the ALJ that petitioner presented no proof whatsoever that any of the "adverse actions" he suffered were the result of either his absence for medical treatment or any perception upon his return that he had (or would again) become disabled. All petitioner has shown is that

during his illness and in the years after he returned to work, things changed at the high school in ways he did not like: that policies and practices were put into place for reasons he did not believe valid or fair (and protested to no avail), and the resulting changes had the effect, to his mind, of diminishing the prestige and unhindered scope of activity he previously enjoyed. From this fact alone, petitioner assumes – and asks the ALJ and Commissioner to conclude – that he was the victim of adverse employment actions which were the direct and discriminatory result of his illness; in other words, he equates imposition of general policies and procedures – all within the lawful scope of a board of education's authority – with action against him personally, and sequence of events with cause and effect – without a scintilla of evidence to support either equation.[2]

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Issue: 10/15/07
Date of Mailing: 10/15/07

[2] The Commissioner is not unmindful of petitioner's evidence to the effect that his absence caused the district to re-think its apparent past practice of regularly assigning all or most of the advanced courses within a department to a single teacher. However – although petitioner's situation may well have been the impetus for bringing the disadvantages of this practice to the attention of the administration – there was nothing discriminatory about the district's response, which was to make the entirely reasonable and appropriate decision to avoid henceforth, whenever possible, assigning teachers in a way that would cause expertise to reside in only one person when other staff members within a department were also certified in the same area.

[3] This decision, as the Commissioner's final determination in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

403-07

F.P., on behalf of minor child, K.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought relocation of his daughter's school bus stop, asserting that: the location selected by the respondent Board is unsafe and requires K.P. to walk between petitioner's house and the bus stop; and that the respondent's decision not to send buses into petitioner's cul-de-sac is arbitrary and capricious and should be set aside.

The ALJ found that: the current bus stop is safe; petitioner's proposed bus stop is less safe than the current stop; the walk from petitioner's house to the bus stop is safe; and no incidents involving this bus stop have occurred since it became a stop 15 years ago. The ALJ concluded that the petitioner has not met his burden of proving that the designated bus stop is not safe and that the Board's action to deny petitioner's request to change the bus stop was arbitrary and capricious.

Upon a full and independent review, the Commissioner concurred with the Administrative Law Judge – for the reasons clearly presented in her decision – that petitioner failed to sustain his burden of establishing that the Board's actions were arbitrary, capricious or unreasonable. Accordingly, the Commissioner dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 17, 2007

OAL DKT. NO. EDU 2818-06
AGENCY DKT. NO. 143-4/06

F.P., on behalf of minor child, K.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions to the Initial Decision – which was mailed to the parties on September 10, 2007 – were dated October 10, 2007 and filed October 15, 2007, and, therefore, untimely pursuant to *N.J.A.C.* 1:1-18.4,[1] and as such, were not considered herein.

Upon full review and consideration of the record, the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, concurs with the Administrative Law Judge – for the reasons clearly articulated in her decision – that petitioner has failed to sustain his burden of establishing that the Board's denial of his request to change the designated school bus stop location for his child, K.P., was arbitrary, capricious or unreasonable; therefore, the Board's determination in this regard must be sustained.

[1] *N.J.A.C.* 1:1-18.4 (a) specifies: "Within 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head."

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER

Date of Decision: 10/17/07

Date of Mailing: 10/17/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2818-06
AGENCY DKT. NO. 143-4/06

F.P. o/b/o MINOR CHILD
K.P.,
Petitioners,
v.
BOARD OF EDUCATION OF
THE HOPEWELL VALLEY
REGIONAL SCHOOL DISTRICT,
MERCER COUNTY,
Respondent.

F.P., Esq., for petitioner K.P. (Sterns & Weinroth, attorneys)

Victor J. Medina, Jr., Esq., for respondent (Medina, Martinez & Castroll, attorneys)

Record Closed: July 2, 2007 Decided: September 4, 2007

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks relocation of his daughter's school bus stop, asserting that the bus stop location selected by the respondent, that would require his daughter walk between his house and the bus stop, is not safe, and that the respondent's decision to not send buses into this cul-de-sac was arbitrary and capricious and should be set aside. The matter was transmitted to the Office of Administrative Law (OAL) on May 9, 2006, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. Thereafter, petitioner filed an amended petition with the Commissioner of Education that was transmitted on October 19, 2006. I conducted a site visit on August 4, 2006. The matter was heard over the course of several days with the final hearing date on May 14, 2007. Petitioner verbally stipulated to dismissing count three of the amended petition. After the submission of post-hearing briefs on July 2, 2007, the record closed.

FACTUAL DISCUSSION

K.P., the 12-year-old daughter of F.P., attends the Stuart Country Day Private School located in Princeton, New Jersey. The family resides in Pennington on a cul-de-sac consisting of ten houses. As required by state law under the circumstances of this case, the district provides busing or aid-in-lieu-of services, depending on the cost, to the private school student. The bus stop selected by the school district is located at the intersection of the cul-de-sac (Rosedale Way) and the main road, Federal City Road. K.P. has taken the school bus once this past school year; her father asserts that because the .3 (three-tenths) mile walk from his residence to Federal City Road and the bus stop location itself are unsafe, he and his wife will not permit K.P to take the school bus. Mrs. P. drives K.P. to school. He seeks a determination that the school bus stop location selected by the district is unsafe and that the decision to locate the bus stop was reached in an arbitrary and capricious manner.

After the passage of Senate Bill 1701, the district was required to include courtesy busing as part of its budget that was now capped at 2.5% or the Consumer Price Index (CPI), whichever is higher. As a result, in April 2005, the Board of Education undertook to evaluate courtesy busing in the district. Eleven individuals, including the school business administrator, the chief of police, a safety officer and two parents served on an ad hoc committee to address the issue. **Judith Karp,** a board member, also served on this committee. Testifying at this hearing on behalf of the respondent, she explained that while the main focus of the committee was the possibility of eliminating all courtesy busing; the committee evaluated all the busing in the district. The committee issued a report in September 2005. (R-3) The Committee considered the statutory requirement[1] that a district, in providing courtesy busing, adopt a policy regarding the transportation of students who walk along hazardous routes, she testified. As a result, the Board adopted Board Policy 3540 (R-2), hereinafter BP 3540, which set forth the criteria of determining hazardous routes. The criteria was adapted from the statutory criteria and included: population density; traffic volume; vehicle velocity; absence of adequate shoulder and/or off-road walking space; roads and highways that are winding or have blind curves; topographical conditions of drop off sites; bridges or overpasses that must be crossed to reach the school; train tracks or trestles that must be crossed to reach school; and busy roads or highways that must be crossed to reach the school. (R-2) The committee did not include in BP 3540 the statutory reference to "sidewalks" because of the rural nature of Hopewell; so the committee included in the criteria whether or not there existed adequate shoulder and/or off-road walking space. But, the absence of sidewalks does not mean there is a safety problem. Karp testified that the committee's conclusions were all consistent with safety considerations.

Based upon its investigation, which including riding school buses through the district, the committee determined that eliminating all courtesy busing was not feasible, Karp testified, because of areas considered hazardous for walking due to the absence of sidewalks. (R-5) Appendix I to the report lists hazardous streets. The public school that K.P. would attend, if she attended public school, is Stony Brook Elementary.

[1] N.J.S.A. 18A:39-1.5.

According to the committee report designation, students living on Rosedale Avenue would continue to be transported "for one of the following reasons:

- Hazardous roadway
- Secondary street but must travel a hazardous roadway to/from school."

Federal City Road is included on this list. Karp testified that Rosedale Way is included on this list as a secondary street, but because a student living on Rosedale would have to walk on Federal City Road, which is considered a hazardous roadway, the committee recommended continued courtesy busing for students living on Rosedale. Rosedale Way itself is not hazardous, she testified, and does not need a sidewalk because it is already safe. The committee members did not walk along Rosedale as part of its research, she testified, because Federal City Road was considered unsafe; therefore, it would not be necessary to walk along Rosedale.

In preparation for this hearing, Karp testified she drove along Rosedale Way. She testified that K.P could walk on many lawns but that at one point, she would need to walk on the cart way. She testified that there are no sidewalks and street lights along Rosedale but that, in her opinion, the road was safe for walking. She testified that BP 3540 assumes a "presumption of safety" in walking along cul-de-sacs. But the Traffic Safety Department can review any presumption of safety. Including Rosedale Way, the Board reviewed three cul-de-sacs and determined all three safe. Although Rosedale Way does not meet each criteria of BP 3540, Karp testified that overall, the topography is appropriate for walking and there is a grassy area at the intersection of Rosedale and Federal City for students to stand while waiting for the bus. (R-15) Additionally, Rosedale is considered low density population and low traffic volume. The vehicle velocity traveling on Rosedale is "relatively slow," she testified.

George Meyer, Chief of Hopewell Township Police Department testified. He has been a township police officer since 1975. He served on the Ad Hoc Committee on Courtesy Busing. He is familiar with Rosedale Way and Federal City Road. School Business Administrator John Nemeth asked him to review the designated school bus stop at that intersection. His education on safety issues includes attending courses on

traffic safety and accident investigations, respectively. He testified that in his 32 years experience as a police officer in the Township, he has no recollection of any accidents occurring on Rosedale Way. The speed limit on Rosedale and Federal City Road, in the area adjacent to the intersection with Rosedale, is 25-miles-per-hour. The cart way on Rosedale is 26 feet wide, curb-to-curb, and the right of way is 50 feet. Meyer testified the public has the right to use the right-of-way.

He evaluated the path from K.P.'s residence to the bus stop subsequent to the issuance of the committee report and wrote to John Nemeth. (R-9) He concluded that the bus stop did not pose any safety concern. He did not address whether the walk to the bus stop from K.P.'s residence was safe, because he was not asked, he testified.

Kenneth Newman, a traffic and transportation engineer, testified as a traffic safety expert on behalf of the respondent. He spent several hours visiting the site, outside of peak travel times, on July 6, 2006, and "drove up and down Rosedale Way several times." He did not address the walking path in his report. (P-10) However, he testified that the issue of whether a roadway is safe for a child to walk is subjective, because there are no set standards. There are curves on Rosedale Way and they tend to slow vehicles down to 20 mph. There is shrubbery in certain areas that encroach upon walking along the right of way and line of sight for the pedestrian becomes limited. But he testified, a motorist traveling along Rosedale Way has a greater sight distance and unless the pedestrian is walking four feet within the cart way, it should not be a problem for the pedestrian. He conceded; however, that a child would have little opportunity to walk anywhere but the cart way.

He evaluated the stop on Rosedale Way and the stop on Federal City Road and Rosedale Way. The focus of his inquiry was based on line of sight and sight distance. Due to vegetation on both sides of the Rosedale Way corners, he had to "inch up" in order to measure the sight distance. Stopped at Rosedale Way, there is an abrupt curvature southbound on Federal City Road and a downgrade on the northbound side. The evaluation of the safety of the bus stop centered on the stop itself and not on the path of travel from K.P.'s residence to the bus stop at the corner of Rosedale Way and

Federal City Road. Because the school bus stop is located on Federal City Road, the bus becomes a "priority vehicle," he testified, and once stopped with lights flashing, no vehicle can travel past it on either Federal City Road or Rosedale Way. If the school bus stop was moved inside the cul-de-sac, it would lose it "priority" status and cars on Federal City Road would not have to extend any courtesy to a school bus trying to enter the main roadway. Additionally, the bus is required to stop in a perpendicular manner and this would cause the bus to have to encroach onto Federal City Road in making the turn. A school bus driver would have to exercise more caution in exiting the cul-de-sac and entering Federal City Road. He testified that although both the current bus stop and the one suggested by the petitioner offered adequate sight distance, the current bus stop on Federal City Road is preferred from a safety aspect because the bus would retain its priority vehicle status.

John Nemeth has been the school business administrator since 1992. He has had significant training on transportation safety issues through the insurance pool, SAIF, of which, the school district is a member. He is the chairperson for the insurance company's transportation safety committee, in which 50% of the agenda comprises school bus routes and bus stops.

He testified that Rosedale Way/Federal City Road bus stop has been used for 15 years and that it has been safe.

As part of his responsibilities, he reviews complaints from parents regarding school bus stops if they are not resolved by the Transportation Department. The majority of the complaints are resolved by Transportation. In the past two years he has reviewed more complaints. The district eliminated courtesy busing for all students living less than two miles from the school district that did not involve a hazardous walking route or students eligible for special education and related services.

The district requests bids after it determines the number of non-public students to be serviced and the route. If a bid is received within the permitted allocation of $826.00 per student, the district must award the bid.

With regard to petitioner's alternate proposal that the district utilize a mini-bus so that it would be easier to traverse from Rosedale onto Federal City Road, Nemeth testified that the mini-buses only accommodate 20 students and that it would be unlikely that the district could obtain a bid for about $17,000[2] , when the going rate is closer to $20,000.00. Additionally, the current bus utilized on K.P.'s route is at or near capacity, so two mini-buses would be needed. The district does utilize mini-school buses for children eligible for special education and related services.

As school business administrator, he advised committee members that in determining hazardous routes, the nine factors in BP 3540 should be equally considered.

Of the 147 cul-de-sacs in the Township in January 2007 (R-17), the school district buses entered about one-third in the 2005-2006 school year and five in the 2006-2007 school year. Additional cul-de-sacs were entered as they related to students receiving special education and related services because typically their Individualized Education Plans (IEP) might require door-to-door transportation. (R-17) The Board instituted a change in policy relating to cul-de-sacs in 2006 and decided to enter five cul-de-sacs, not including Rosedale Way, due to the length of the cul-de-sacs and the total time required for the children to walk to the bus stop coupled with the time it then took for those children to reach school. Superintendent of schools Judith Ferguson and he decided that if the length of cul-de-sac was a minimum of .5 miles to the school bus stop, then the bus stop was changed so that the school bus would travel inside the cul-de-sac to a stop. This change only affected public school routes.

After petitioner filed this complaint, Nemeth visited Rosedale Way multiple times and rode a bike, drove and walked along the cart way from K.P.'s residence to the intersection with Federal City Road at least six times, both at 7:30 a.m. and after 5:00 p.m. Rosedale Way has a good line of sight even though it is a curved road. (R-13) As one walks through the cart way, one can see the roadway ahead as it curves. Nemeth opined that based on the number of homes on the cul-de-sac and the quantity

[2] $826.00/student x 20 students

of traffic, Rosedale Way is safe for walking; because Hopewell Township is a rural district, children walk along grass areas and cart ways. But students are not being asked to walk along Federal City Road.

Judith Ferguson is the superintendent of schools for the district. Her past experience includes 13 years as superintendent in three districts, cumulatively; eight years as a school business administrator in Princeton; and two years with the state Department of Education. During her tenure as business administrator in Princeton, she was responsible for the division on busing. Her current responsibilities include overseeing student busing. Out of 4,000 students living in district, 3,000 are transported by school buses.

Before instituting BP 3540, she surveyed nine neighboring districts and determined that only one had school buses entering cul-de-sacs. Three districts - Princeton, South Hunterdon and North Hunterdon - respectively, did not direct school buses to enter cul-de-sacs and these latter three districts had similar topography and demographics as Hopewell Township. She was the chairperson for the Ad Hoc Committee on Courtesy Busing and wrote the report. After the Board enacted the policy to not enter cul-de-sacs, it began receiving complaints from parents residing in large sub-divisions consisting of cul-de-sacs, that their children were walking one mile in order to get to the school bus stop on the main road. The transportation superintendent recommended that exceptions to the policy be made for these developments. She has the authority to change the location of bus stops and she authorized the change with regard to these cul-de-sacs. She visited the sites with Nemeth after receiving the complaints and reviewed all the bus stops.

She is familiar with the Rosedale Way cul-de-sac. The Board has changed its decision with regard to other appeals. It hired the same expert to evaluate the Bear Tavern Road appeal and the Fern Ridge appeal. In both instances, the location of the respective bus stop was changed in order to improve visibility and as to Fern Ridge, also to increase security. (R-16) Fern Ridge, she testified, is not comparable with Rosedale because it has a narrower cart way and a great volume of traffic. She

reviewed the safety determination with regard to the Rosedale Way stop and decided the current stop is the safest although the Board is not required to provide the "safest" stop but merely a "safe" stop. She made this decision incorporating a review of walking within the cul-de-sac to the stop. F.P.'s idea of utilizing mini-buses is not cost effective, she testified.

Cul-de-sacs were eliminated for three reasons: equity, economy and efficiency, she testified. Prior to drafting BP 4530, the committee toured the entire community and that is when the members first realized that they were traveling into some developments and not others for any apparent reason, and so equity was one of the reasons for elimination of most of the cul-de-sacs.

F.P., testified that he asked the Board to change the bus stop because the three-tenths mile walk from his residence to the end of the street is not safe. His twelve-year-old daughter, K.P., would be required to walk in the street and this is an unreasonable and inappropriate hazardous condition. Rosedale Way is a 26 feet wide curvi-linear cart way, with no sidewalks or street lights and with few exceptions, no graded areas. Although the Board contends there is minimal traffic on Rosedale Way, he testified that since there is no public garbage collection, the property owners contracted two private carriers and garbage trucks service Rosedale Way four days weekly between 6:30 and 7:30 a.m., or sometimes between 3:00-4:00 p.m. Additionally, some residents contract for a milk delivery service, MuMu Express, which delivers usually between 4:00 a.m. and 7:00 a.m. A dry cleaner that operates a pick-up and delivery service, also services residents on Rosedale Way. These conditions, he asserts, increases the traffic on the street and render it unsafe for his daughter to walk. There is no opportunity to walk anywhere but on the cart way when it snows or rains, or when there are leaves on the ground. And, the cart way narrows to 18 feet when it snows or there are leaves on the ground; so the only place to walk is in the street. Federal City Road is an 18 feet wide cart way with a large volume of traffic and has three to four feet ditches, on either side. Although, the respondents' witnesses have testified that there have not been any accidents on Rosedale Way, he does not want his daughter to be the first, F.P. testified.

When parents residing on Shara Lane complained about the school bus not entering the cul-de-sac, the bus stop was changed, he testified.[3]

Karl Pehnke, a traffic and road design expert employed by Schoor DePalma, testified on behalf of petitioner. This is the first bus stop issue he has reviewed. He issued reports (P-6, P-8) in which he concurred with respondent's expert with regard to the appropriate sight lines for traffic to enter either from Rosedale Way or Federal City Road. However, he testified that the walk from the petitioner's residence to the designated bus stop is hazardous because the road is curvilinear, not well lit, and the area is mostly not graded. (P-2) And, the bus stop itself is hazardous, Pehnke testified, because the only place for K.P. to stand is in the cart way on Rosedale Way and there is vehicular traffic in and out of Rosedale Way. There is no shoulder area for K.P. to stand which is not in an area of vehicular movement. While there is some grassy area that K.P. can stand, this is not engineered and in inclement weather, it is not conducive for K.P. to stand there. A mini-bus, and perhaps a full-size bus, can safely maneuver within the cul-de-sac to turn around.

As indicated previously, I conducted a site visit which included inspection of the designated bus stop, riding the school bus to the designated bus stop as well as the alternative bus stop suggested by the petitioner and walking from K.P.'s residence to the designated bus stop.

Based upon my observations, I found the current bus stop to be safe. There is a grassy area where students can wait for the school bus. Although the petitioner and his expert contend there are ditches on either side of Federal City Road, these ditches do not exist within approximately four to five feet from the grassy area. The designated bus stop is approximately at the middle of the intersection with Federal City Road. As such, the students would be stepping onto the bus from the level cart way. Once the school bus driver signaled that he was stopping at the designated bus stop, all traffic on Federal City Road stopped. There were no outgoing vehicles at the time on Rosedale

[3] For the 2006-2007 school year, the only bus stop on Shara Lane is for a special education student. (R-17)

Way but had there been such vehicles, those vehicles would have had to stop several feet back from the immediate intersection. The school bus driver also attempted the alternate bus stop suggested by the petitioner. Had there been any parked cars at the end of the cul-de-sac, turning the 54 passenger school bus would have taken an inordinate amount of maneuvering. Additionally, I did not find this to be a safe alternative because in order to turn onto Federal City Road, the bus encroached upon almost the entire width of the opposite lane of travel in order to effectuate the turn. Since the vehicle is no longer on the main thoroughfare, it loses its status as a priority vehicle and this would significantly increase the time for the school bus to arrive at its destination.

The walk from K.P.'s residence to the designated school bus stop is three-tenths mile long. The parties agree the roadway is 26 feet wide, asphalt-paved and curvi-linear. There are some graded areas immediately adjacent to the cart ways but it is not possible to walk along such areas completely from K.P.'s residence to the designated bus stop. However, considering there are only ten residences on the four-tenths mile cul-de-sac, I found the walk to be safe due to the low volume of traffic and the fact that the curvi-linear road does slow down vehicular traffic below 25-miles-per-hour. The cart way is also wide enough that a pedestrian walking close to the curb would not encounter a vehicle since this is the area where cars would be parked. But few cars were parked on the street on the day of the site visit and considering the overall length of the respective driveways, one would not expect too many parked cars on the cart way. Additionally, there exists a 50 feet right-of-way making it further possible to walk off the cart way, albeit not immediately adjacent to the cart way the entire portion of the walk to the designated bus stop.

Based on the foregoing, I further find that the Federal City Road/Rosedale Way bus stop has been utilized for the past 15 years without incident. There have been no accidents on Rosedale Way as a result of the bus stop location. The committee determined Federal City Road to be hazardous and that is why the Board determined to continue courtesy busing for students attending Stony Brook Elementary School. The committee never determined Rosedale Way to be hazardous.

LEGAL ANALYSIS

The action of the Board of Education in the designation of the school bus stop location may not be set aside unless such action was arbitrary and capricious. Bailey v Board of Ed of Maurice River Township, EDU 924-03 (November 10, 2003). As long as the Board of Education decision has a rational basis, the Commissioner will not substitute her judgment. Lemma v Branchburg Board of Education, EDU 8953-97 Initial Decision (July 22, 1998) adopted Comm'r (August 28, 1998)

Petitioner asserts that the superintendent's decision to allow buses into five cul-de-sacs, and not into Rosedale Way, despite BP 3540 was arbitrary and capricious. However, as petitioner himself noted, BP 3540 requires the superintendent "to oversee the development of bus routes to provide safe, economical and reasonably expeditious transportation." Dr. Ferguson's explanation that these five cul-de-sacs were re-examined due to the length of time that it took students to walk from their respective homes to the designated bus stop coupled thereafter with the length of time for the ride to school, falls within that mandate.

DECISION AND ORDER

The petitioner has not met the burden of proving the designated bus stop is not safe and that the Board's action in denying his request to change the bus stop was arbitrary and capricious. The appeal is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 4, 2007
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

9-4-07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 10 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/mmp

APPENDIX

WITNESSES

For the Petitioner:

F.P.

Karl Pehnke

For the Respondent:

John Nemeth

Judith Ferguson

Kenneth Newman

Judith Karp

George Meyer

LIST OF EXHIBITS

For the Petitioner:

P-1 Hazardous Routes. N.J.S.A. 18A:39-1.5

P-2 RSIS standards for "low density residential access roads"

P-3 Appendix I prepared in June/July 2005

P-4 BP 3540 (Transportation of Students) adopted January 17, 2006

P-5 Final Administrative Decision relating to hearing held on January 17, 2006 (including Exhibit B-1 and B-2)

P-6 Pehnke Expert Report dated December 16, 2005 and Resume

P-7 Letter from petitioner to respondent dated April 6, 2006

P-8 Pehnke Expert Report dated April 13, 2007

P-9 Tax Map

P-10 Aerial photograph of Rosedale Way, Shara Lane, etc.

P-11 Final Administrative Determination September 5, 2006/Giordano Appeal

For the Respondent:

R-1 Final Administrative Decision: In The Matter Of The Appeal Of F. P.: January 17, 2006

R-2 Board Policy 3540

R-3 Ad Hoc Committee on Courtesy Busing Report

R-4 Tax Map

R-5 HVR BOE Minutes: September 19, 2005

R-6 HVR BOE Minutes: January 17, 2006

R-7 HVR BOE Minutes: September 18, 2006

R-8 HVR BOE Closed Minutes: September 18, 2006

R-10 TRC Raymond Keyes Report: July 20, 2006

R-11 Street Map

R-12 Color Aerial Map # 1 (Rosedale Way, Pennington, NJ)

R-13 Color Aerial Map #2 (Rosedale Way)

R-14 Color Aerial Map #1 depicting intersection of Federal City road and Rosedale Way

R-15 Color Aerial Map #2 depicting intersection of Federal City Road and Rosedale Way (*courtesy reduced color copy unavailable*)

R-16 Street Map

R-17 2006-2007 List of cul-de-sac buses enter

404-07

404-07JO

AGENCY DKT. NO. 451-12/06

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
J.H.,	:	
RESPONDENT.	:	

On February 8, 2007, a final agency decision was rendered in this matter, wherein the Commissioner ordered that respondent, Jennifer Hampton, be assessed $4,617.60 in tuition to compensate the Buena Regional Board of Education for her child's period of ineligible attendance in the public schools of the district pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that respondent had failed to pay any of the judgment against her, and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reason why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Jennifer Hampton is now subject to entry of a judgment by the court in the amount of $4,617.60, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/07

Date of Mailing: 10/18/07

405-07

#405-07

OAL DKT. NO. EDU 1042-07
AGENCY DKT. NO. 383-10/06

THOMAS SETTEMBRE,	:	
		COMMISSIONER OF EDUCATION
PETITIONER,	:	
		DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	
	:	
RESPONDENT.		
	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/07
Date of Mailing: 10/18/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01042-07
AGENCY DKT. NO. 383-10/06

THOMAS SETTEMBRE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Joseph R. Morano, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: September 13, 2007 Decided: September 24, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 3, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for hearing to commence on December 14, 2007. Prior to that date the parties reached a settlement and forwarded the enclosed Stipulation of Settlement indicating the terms of settlement which was received by the undersigned on September 11, 2007.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9-24-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 9-26-07

Mailed to Parties:

SEP 26 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 11 A 7:5

BUCCERI & PINCUS, ESQS.
1200 US Highway 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

THOMAS SETTEMBRE,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
		AGENCY REF. NO. 383-10/06
v.	:	OAL DKT. NO. EDUOR 01042-2007N
HOBOKEN BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between Thomas Settembre (hereinafter "Mr. Settembre"), who resides at 171 Stover Avenue, North Arlington, New Jersey 07031-5625, and the Hoboken Board of Education (hereinafter "the Board") having its offices at 1115 Clinton Street, Hoboken, New Jersey 07030. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Settembre is a tenured employee of the Board; and

WHEREAS, Mr. Settembre's position of employment was the subject of a reduction in force and his employment was terminated; and,

WHEREAS, due to a vacancy in the school district, Mr. Settembre was recalled to employment with the Board for the 2006-2007 school year; and,

WHEREAS, Mr. Settembre was not allowed to work or be paid for certain days in September and October 2006 because of certain issues relating to the processing of a criminal history record check, pursuant to *N.J.S.A.* 18A:6-7.1; and,

WHEREAS, Mr. Settembre filed a petition with the Commissioner of Education alleging that the Board violated his tenure, seniority and recall rights; and,

WHEREAS, the Board filed an answer denying the allegations made by Mr. Settembre; and,

WHEREAS, the parties have agreed to an amicable resolution of this matter in lieu of further litigation; and,

IT IS on this _____ day of August, 2007, agreed as followed:

1. The Board will pay Mr. Settembre his full salary for all salary lost from September 1 to October 12, 2006. The purpose of this agreement is to compensate Mr. Settembre for all salary lost for days on which he was not permitted to return to work during the time period in question.

2. All back pay due and owing as the result of this salary adjustment shall have all appropriate payroll deductions and withholdings made.

3. The amount of back pay owed to Mr. Settembre as the result of this salary adjustment will be paid within thirty (30) days of the approval of this Stipulation of Settlement by the Commissioner of Education.

4. Mr. Settembre acknowledges that he has been advised that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Stipulation of Settlement, and has done so, and that he signs this document as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

5. The undersigned representatives of the Board hereby acknowledge that they are authorized to sign this Agreement pursuant to the terms of the attached resolution of the Board approving this Stipulation of Settlement.

6. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

7. Both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Stipulation of Settlement and all of these stipulations,

agreements, acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

WITNESS:

Edward T. Stevens — Thomas Settembre

~~Gregory T. Syrek~~
Edward T. Stevens
Dated: 9-9-2007

Thomas Settembre

HOBOKEN BOARD OF EDUCATION

Therese Minutillo

Dated:

BE IT RESOLVED, upon the recommendation of the Superintendent, that the following administrative disciplinary and personnel matters be amicably resolved, be and hereby is approved.

PERC Docket No. AR-2007-203 (O'Connor)
OAL Docket No. EDUOR-1123-2006N (Settembre)
OAL Docket No. EDUOR-01042-2007N (Settembre)
OAL Docket No. EDUOR-0116-2007N (Lisa)
OAL Docket No. EDUOA-11846-2006N (Acuna)

The above is a true copy of a resolution approved by the Hoboken Board of Education at the Stated Session held on August 14, 2007.

David Anthony
Board Secretary

406-07

#406-07

OAL DKT. NO. EDU 7382-05
AGENCY DKT. NO. 18-1/05

JUDITH SCHNEIDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the matter is appropriately dismissed in light of the jointly executed stipulation submitted by the parties.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/07
Date of Mailing: 10/19/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO.: EDU 07382-05
AGENCY DKT. NO. 18-1/05

JUDITH SCHNEIDER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Mitzy Galis-Menendez, Esq., for respondent (Chasan Leyner & Lamparello, attorneys)

Record Closed: September 11, 2007 Decided: September 11, 2007

BEFORE **JEFFREY A. GERSON**, ALJ:

On June 28, 2005, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for a hearing on January 23 & 24, 2006 but adjourned pending the disposition of a Worker's Compensation case.

On September 4, 20097 the parties notified the undersigned that the matter had been settled and filed a Stipulation of Dismissal with Prejudice. A copy of the Stipulation of Dismissal is attached hereto and made a part hereof.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 2007
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 9-17-07

Mailed to Parties:

SEP 17 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tbj

CHASAN LEYNER & LAMPARELLO, PC
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR RESPONDENT, EAST RUTHERFORD BOARD OF EDUCATION
FILE NO: 12324-4936

JUDITH SCHNEIDER, **Petitioner,** **vs.** **BOARD OF EUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY.** **Respondent.**	**STATE OF NEW JERSEY** **DEPARTMENT OF EDUCATION** **BUREAU OF CONTROVERSIES AND DISPUTES** **DOCKET NO. 18-1/05** **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been resolved in conjunction with Petitioner's pending worker's compensation matter, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice and without costs or fees against any party.

CHASAN LEYNER & LAMPARELLO, PC
Attorneys for Respondent

THOMAS R. KOBIN
For the Firm
Dated: 8/28/07

SPRINGSTEAD & MAURICE
Attorneys for Petitioner

ALFRED F. MAURICE
For the Firm
Dated: 8/17/07

F:\files\Miscellaneous LIT\Boards of Ed\East Rutherford\Schneider v. ERBE 12048-4936\Stip Dismissal 072607.doc

408-07

OAL DKT. NO. EDU 6816-07
AGENCY DKT. NO. 252-9/07

BOARD OF EDUCTION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SARAH DICKERSON,	:	DECISION
RESPONDENT.	:	
	:	

The record, settlement agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/07

Date of Mailing: 10/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6816-07
AGENCY DKT. NO. 252-9/07

BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,
Petitioner,
v.
SARAH DICKERSON,

Jane B. Capasso, Esq., for petitioner (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Sarah Dickerson, respondent, pro se

Record Closed: September 26, 2007 Decided: October 1, 2007

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 7, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on September 17, 2007.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10/11/07
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

OCT 9 2007
DATE

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/sd

RESOLUTION

WHEREAS, at a hearing to resolve the issues raised in a Petition for Emergent Relief before the Honorable Bruce M. Gorman, A.L.J. on September 17, 2007, Dr. David Moyer entered into an agreement with S.D. on behalf of the Pittsgrove Township Board of Education (the "Agreement"); and

WHEREAS, the Pittsgrove Township Board of Education desires to ratify the Agreement made by Dr. Moyer on its behalf so that it may be transmitted to the Commissioner of Education;

NOWTHEREFORE, the Pittsgrove Township Board of Education resolves to ratify the Agreement made by Dr. David Moyer on its behalf with S.D. concerning the issues raised in its Petition for Emergent Relief, OAL Docket No.: EDUOR 06816-2007S, Agency Ref. NO. 252-9/07.

Secretary, Board of Education

Date: 9-24-07

RECEIVED
2007 SEP 26 A 10:45
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Pittsgrove Board of Education v. Sarah Dickerson
OAL Docket No. EDU 6816-07
Agency Docket No. 252-9/07

Based on Judge Gorman's recommendation, Sarah Dickerson and the Pittsgrove Township Board of Education agree as follows:

1) Ms Dickerson will schedule an MRI and a neurological exam at a hospital of her choice.

2) The Board will not supply any background information to Ms. Dickerson's chosen health care providers prior to these examinations.

3) The tests will be taken within 2 weeks of September 17, 2007 and full test results to be provided by Ms Dickerson to the Board by October 15, 2007.

4) Ms. Dickerson, is insurance will pay for the MRI and the neurological exam. The Board will reimburse Ms Dickerson for costs not covered by her insurance.

5) Ms Dickerson will remain on paid administrative leave of absence until the test results are received by the District

Sarah Dickerson

Sarah Dickerson

Pittsgrove Township Board of Education

By: [redacted]

407-07

OAL DKT. NO. EDU 4668-07
AGENCY DKT. NO. 141-5/07

T.P. on behalf of minor child, T.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/07

Date of Mailing: 10/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4668-07

AGENCY DKT. NO. 141-5/07

T.P. O/B/O T.H.,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF HAMILTON,

Respondent.

T.P., petitioner, pro se

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & Staub, attorneys)

Record Closed: September 10, 2007 Decided: September 28, 2007

BEFORE **ANA C. VISCOMI**, ALJ:

This matter, involving the petitioner's challenge of the Board of Education's residency determination, was transmitted to the Office of Administrative Law on June 26, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On August 30, 2007, the hearing in this matter commenced but did not conclude due to the unavailability of respondent's witnesses. However, petitioner testified on his behalf. Prior to the rescheduling of this matter, the

parties agreed to a settlement and prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law, insofar as T.H. remains a non-resident of Hamilton Township. If T.H. returns to Hamilton Township and reestablishes a bona-fide residence, he obviously is entitled to enroll in its school district.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

A copy of this Initial Decision Settlement is contemporaneously being mailed to the Trenton Board of Education and the Department of Children and Families with a specific request that T.H.'s enrollment and attendance in the Trenton school district be confirmed. At the limited hearing conducted before me, T.P. testified that he had moved to the Trenton School District on or about March 2, 2007, but that T.H. had not attended school from that date through the end of school year 2006-2007. By letter dated September 6, 2007, a copy of which is included (C-1), T.P. was required to provide an indication to me, in writing, of the name of the school T.H. is enrolled in and attending. No communication, written or otherwise, has been received by my office as of this date. Of concern, an order dated August 30, 2007 forwarded to T.P. at the Trenton address he provided me during the hearing has been returned as "undeliverable."

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 28, 2007
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Date Received at Agency:

OCT 2 2007
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cs

Destribats, Campbell, DeSantis
Magee & Staub, Esquires
247 White Horse Avenue
Trenton, NJ 08610
Tel: (609) 585-2443
Attorneys for Respondent

2007 SEP 10 A 11: 22
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

T,P. on behalf of minor child. T.H.	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
PETITIONER,	**OAL DOCKET NO: EDUOS 04668-2007S**
v.	**AGENCY DKT. NO.: 141-5/07**
BOARD OF EDUCATION OF HAMILTON TOWNSHIP, MERCER COUNTY,	**STIPULATION OF SETTLEMENT**
RESPONDENT.	

This matter, being opened to the Court by Terrance Pierce, Petitioner in this matter, and the Respondent being represented by Dennis M. DeSantis, Esquire, of the law firm of Destribats, Campbell, DeSantis, Magee & Staub, Esqs., and the parties having reached an agreement;

IT IS on this 5th day of September, 2007 AGREED AS FOLLOWS:

(1) Terrence Pierce shall no longer enroll his son, TRAISON HENDERSON, in the Hamilton Township School District.

J-1

(2) The Hamilton Township School District will withdraw its application for tuition as set forth in the within matter and not seek any payment from Terrence Pierce regarding his son's prior attendance in the Hamilton Township School District.

Dated : 9/6/07

Terrence Pierce
TERRENCE PIERCE, Petitioner

Dated :

DENNIS M. DeSANTIS, ESQ.,
Attorney for Respondent

409-07

OAL DKT. NO. EDU 7155-06
AGENCY DKT. NO. 132-4/06

BOARD OF EDUCATION OF THE BOROUGH OF ROCKAWAY, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GENEVIEVE JEAN AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/07

Date of Mailing: 10/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 07155-06

Agency Ref. No. 132-4/06

BOARD OF EDUCATION OF THE BOROUGH OF ROCKAWAY, MORRIS COUNTY

Petitioner,

v.

GENEIEVE JEAN AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,

Respondent.

Joanne Butler, Esq., for petitioner
(Schenck, Price, Smith & King)

Nathanya Simon, Esq. for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP)

Record Closed: September 20, 2007 Decided: September 26, 2007

BEFORE **CARIDAD F. RIGO**, ALJ:

On November 16, 2006, this matter was transmitted to the Office of Administrative Law (OAL) for hearing on emergent relief as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. An in person prehearing was scheduled on November 16, 2006 at the OAL in Newark, New Jersey, at which time a hearing date was scheduled for January 11, 2007. On December 19, 2006 a Court Order was submitted indicating that all of respondent's records maintained by the Division of

Human Services shall be signed and returned back to the undersigned. The matter was then scheduled for March 13, 2007 at which time there were still discovery issues and the matter was rescheduled to May 3, 2007. During the May 3, 2007 hearing there were extensive settlement discussions. On May 29, 2007 petitioner's attorney advised that the matter was settled and awaiting Board approval.

August 31, 2007 the undersigned received the certified copy of the Extract from the Minutes of the Board meeting approving the settlement in this matter. On September 20, 2007 the Original Stipulation of Settlement and Release was received by the OAL which are incorporated herein by reference.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their authorized representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 26, 2007
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 10-3-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT - 3 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

Genevieve Jean
PO Box 205
LANDING NJ 07850

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for the Township of Rockaway
Board of Education.

2007 SEP 24 A 11: 29
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

BOROUGH OF ROCKAWAY BOARD OF EDUCATION, Petitioner, vs. GENEVIEVE JEAN AND THE TOWNSHIP OF ROCKAWAY BOARD OF EDUCATION, Respondents.	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL DOCKET NO. EDUCS 07155-2006N AGENCY REF. NO. 132-4/06 **STIPULATION OF SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between the Borough of Rockaway Board of Education with administrative offices located at 103 East Main Street, Rockaway, New Jersey 07866, and the Township of Rockaway Board of Education with administrative offices located at 16 School Road, Hibernia, New Jersey 07842, and Genevieve Jean residing at 14 Green Pond Road, Rockaway, New Jersey 07866.

WHEREAS, Genevieve Jean and her children resided in a home in Rockaway Borough;

WHEREAS, in 2001, Genevieve Jean was forced to leave her home in Rockaway Borough, moved in with her mother in Landing and/or Mount Arlington, and then moved into the Mountain Inn in Rockaway Borough;

WHEREAS, while living in the Mountain Inn, Genevieve Jean's children attended school in the Rockaway Borough School District;

WHEREAS, in or about December 2005, the Mountain Inn in Rockaway Borough closed;

WHEREAS, in or about December 2005, Genevieve Jean and her children moved into the Best Western Hotel in Rockaway Township and continue to live there;

WHEREAS, on or about February 14, 2006, the Borough of Rockaway Board of Education determined that Genevieve Jean was not homeless and no longer domiciled in Rockaway Borough;

WHEREAS, on or about March 4, 2006, Genevieve Jean appealed the Board's determination to the County Superintendent of Schools;

WHEREAS, on or about March 15, 2006, the County Superintendent determined that Genevieve Jean is homeless and her children are entitled to a free public education in the Rockaway Borough School District;

WHEREAS, on or about April 5, 2006, the Borough of Rockaway Board of Education filed the above-captioned Petition of Appeal with the Commissioner of Education challenging the County Superintendent's determination that Genevieve Jean is homeless and that her children are entitled to a free public education in the Rockaway Borough School District;

WHEREAS, both the Township of Rockaway Board of Education and Genevieve Jean have maintained the position that Genevieve Jean and her children continue to be homeless as a matter of fact and law; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Borough of Rockaway Board of Education agrees to permit the children of Genevieve Jean to continue in its schools through August 31, 2007.

2. Effective September 1, 2007, should Genevieve Jean and her children continue to reside in the Best Western Hotel in Rockaway Township, or any other address within Rockaway Township, Genevieve Jean's children shall be transferred into the Rockaway Township School District and the education of Genevieve Jean's children shall be the responsibility of the Township of Rockaway Board of Education for so long as Genevieve Jean continues to be domiciled at the Best Western Hotel in Rockaway Township or any other address within Rockaway Township.

3. Each of the parties named herein, that being the Borough of Rockaway Board of Education, Genevieve Jean, and the Township of Rockaway Board of Education, in consideration of this Agreement, hereby release each other, individually and collectively, the agents, servants and employees of each party, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, arising under or relating in any way to the responsibility for the education of Genevieve Jean's children prior to September 1, 2007, now and forever, except to enforce the terms of this Agreement.

4. The Borough of Rockaway Board of Education, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to a dismissal, with prejudice, of its Petition of Appeal in this matter.

5. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

6. This Agreement contains the entire agreement between the parties and no other representations, whether verbal or in writing, shall be binding upon them.

7. All terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

8. This Agreement is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE BOROUGH OF ROCKAWAY BOARD OF EDUCATION

By:_____ By:_____
, Witness

Date:_____ Date:_____

FOR THE TOWNSHIP OF ROCKAWAY BOARD OF EDUCATION

By:_____ By:_____
, Witness

Date:_____ Date:_____

GENEVIEVE JEAN, PRO SE

Genevieve Jean

Date: 8.14.07

Sworn and subscribed before me this
14th day of August, 2007

Notary Public

XIOMARA RUBIO-FERNANDEZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 04/11/2012

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for the Township of Rockaway
Board of Education.

RECEIVED
2007 SEP 20 A 11:29
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BOROUGH OF ROCKAWAY BOARD OF EDUCATION, Petitioner, vs. GENEVIEVE JEAN AND THE TOWNSHIP OF ROCKAWAY BOARD OF EDUCATION, Respondents.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL DOCKET NO. EDUOS 07155-2006N AGENCY REF. NO. 132-4/06 **STIPULATION OF SETTLEMENT AND RELEASE**

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WHEREAS, in or about 2001, Genevieve Jean moved in with her mother in Landing and/or Mount Arlington, and then moved into the Mountain Inn in Rockaway Borough;

WHEREAS, while living in the Mountain Inn, Genevieve Jean's children attended school in the Rockaway Borough School District;

WHEREAS, in or about December 2005, the Mountain Inn in Rockaway Borough closed;

WHEREAS, in or about December 2005, Genevieve Jean and her children moved into the Best Western Hotel in Rockaway Township and continue to live there;

WHEREAS, on or about February 14, 2006, the Borough of Rockaway Board of Education determined that Genevieve Jean was not homeless and no longer domiciled in Rockaway Borough;

WHEREAS, on or about March 4, 2006, Genevieve Jean appealed the Board's determination to the County Superintendent of Schools;

WHEREAS, on or about March 15, 2006, the County Superintendent determined that Genevieve Jean is homeless and her children are entitled to a free public education in the Rockaway Borough School District;

WHEREAS, on or about April 5, 2006, the Borough of Rockaway Board of Education filed the above-captioned Petition of Appeal with the Commissioner of Education challenging the County Superintendent's determination that Genevieve Jean is homeless and that her children are entitled to a free public education in the Rockaway Borough School District;

WHEREAS, both the Township of Rockaway Board of Education and Genevieve Jean have maintained the position that Genevieve Jean and her children continue to be homeless as a matter of fact and law; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Borough of Rockaway Board of Education agrees to permit the children of Genevieve Jean to continue in its schools through August 31, 2007.

2. Effective September 1, 2007, should Genevieve Jean and her children continue to reside in the Best Western Hotel in Rockaway Township, or any other address within Rockaway Township, Genevieve Jean's children shall be transferred into the Rockaway Township School District and the education of Genevieve Jean's children shall be the responsibility of the Township of Rockaway Board of Education for so long as Genevieve Jean continues to be domiciled at the Best Western Hotel in Rockaway Township or any other address within Rockaway Township.

3. Each of the parties named herein, that being the Borough of Rockaway Board of Education, Genevieve Jean, and the Township of Rockaway Board of Education, in consideration of this Agreement, hereby release each other, individually and collectively, the agents, servants and employees of each party, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, arising under or relating in any way to the responsibility for the education of Genevieve Jean's children prior to September 1, 2007, now and forever, except to enforce the terms of this Agreement.

4. The Borough of Rockaway Board of Education, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this

matter hereby agrees to a dismissal, with prejudice, of its Petition of Appeal in this matter.

5. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

6. This Agreement contains the entire agreement between the parties and no other representations, whether verbal or in writing, shall be binding upon them.

7. All terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

8. This Agreement is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE BOROUGH OF ROCKAWAY BOARD OF EDUCATION

By: Terrell Perry

Date: 8/20/07

By: Emil J Suarez
Witness

Date: 8/20/07

FOR THE TOWNSHIP OF ROCKAWAY BOARD OF EDUCATION

By: Joseph Verbost

Date: 9/4/07

By: Linda Antonucci
, Witness

Date: 9/5/07

LINDA ANTONUCCI
Notary Public of New Jersey
My Commission Expires Feb. 25, 2008

GENEVIEVE JEAN, PRO SE

_____
Genevieve Jean

Date: _____

Sworn and subscribed before me this
_____ day of _____, 2007

_____
Notary Public

Extract From The Minutes Of A Meeting of The Board Of Rockaway Borough, Morris County, N.J. As Recorded In The Official Minute Book

The Board Of Education Of The Rockaway Borough in the County of Morris, New Jersey, convened in Public Session on August 20, 2007 in the Thomas Jefferson School, in Rockaway N.J.

The following members of the Board of Education were present: Ruben Fuentes, Eileen Haynes, Vice-President, James Hurley, President, Russell Perry, Superintendent of Schools, Emil Suarez, Board Secretary/Business Administrator, Joseph P. Hurley Jr.

The following members of the Board of Education were not present: Tina Huelsenbeck

The following motion was offered by James Hurley and seconded by Eileen Haynes and carried unanimous roll call vote:

Be it resolved by the Rockaway Borough Board of Education to approve the settlement for the residency case with Rockaway Township and the GJ.

I, Joseph P. Hurley Jr., Secretary of the Board of Education of the Borough of Rockaway in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of The Board of Education of said district duly called and held on August 20, 2007 has been compared by me with the original minutes as officially recorded in my office in the minutes book of said Rockaway Borough Board of Education and is true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board Of Education.

Joseph P. Hurley Jr.
Board Secretary

2007 AUG 31 A 9:01

Extract From The Minutes Of A Meeting of The Board Of Rockaway Borough, Morris County, N.J. As Recorded In The Official Minute Book

The Board Of Education Of The Rockaway Borough in the County of Morris, New Jersey, convened in Public Session on August 20, 2007 in the Thomas Jefferson School, in Rockaway N.J.

The following members of the Board of Education were present: Ruben Fuentes, Eileen Haynes, Vice-President, James Hurley, President, Russell Perry, Superintendent of Schools, Emil Suarez, Board Secretary/Business Administrator, Joseph P. Hurley Jr.

The following members of the Board of Education were not present: Tina Huelsenbeck

The following motion was offered by James Hurley and seconded by Eileen Haynes and carried unanimous roll call vote:

Be it resolved by the Rockaway Borough Board of Education to approve the settlement for the residency case with Rockaway Township and the GJ.

I, Joseph P. Hurley Jr., Secretary of the Board of Education of the Borough of Rockaway in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of The Board of Education of said district duly called and held on August 20, 2007 has been compared by me with the original minutes as officially recorded in my office in the minutes book of said Rockaway Borough Board of Education and is true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board Of Education.

Joseph P. Hurley Jr.
Board Secretary

RECEIVED
2007 AUG 31 A 9:01

410-07

OAL DKT. NO. EDU 5008-07
AGENCY DKT. NO. 97-4/07

IN THE MATTER OF THE TENURE HEARING	:	
OF VINCENT NAPOLEONE, STATE-OPERATED	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PATERSON, PASSAIC COUNTY.	:	

The record of this matter, the parties' Settlement Agreement and Release of Claims, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

In so doing, however, the Commissioner observes that Terms 1 and 2 require effectuation prior to final agency approval, contrary to *N.J.A.C.* 1:1-19.1. The parties herein – and all litigants in controverted matters – are accordingly reminded that parties to proposed settlements act at their peril when including terms requiring effectuation prior to the Commissioner's approval, since the Commissioner may ultimately disapprove the term(s) in question. Additionally, the Commissioner notes with respect to Term 5 that: 1) pursuant to *N.J.A.C.* 1:1-14.1(a), records of all contested case hearings are open for public inspection unless, for good cause shown, the Administrative Law Judge orders sealing of the record, or any part thereof; and 2) the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law. A copy of this decision shall be forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/22/07

Date of Mailing: 10/22/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05008-07
AGENCY DKT. NO. 97-4/07

IN THE MATTER OF THE TENURE HEARING OF VICENT NAPOLEONE, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Joanne Butler, Esq., for petitioner State Operated School District of the City of Paterson, (Schenck, Price, Smith & King, attorneys)

Mary J. Hammer, Esq., for respondent Vincent Napoleone (Buceceri and Pincus, attorneys)

Record Closed: August 30, 2007 Decided: September 17, 2007

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

On April 24, 2007, the Department of education transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was held on May 11, 2007. A hearing was scheduled for August 30, 2007. Prior to the hearing the parties determined that resolution of the matter without resort to a hearing was in the public

interest. Therefore, on August 30, 2007, the parties agreed to settle the matter. The Stipulation of Settlement and Release executed by the parties is attached hereto.

Pursuant to N.J.A.C. 6A:3-5 .6(a), the Commissioner of Education must approve settlement and withdrawal of certified tenure charges. The standards established by the State Board of Education In re Cardonick,1990 S.L.D. 842, 846 must include the following: 1) the nature of the charges; 2) an explanation of the circumstances justifying the settlement or withdrawal; 3) consent of both the charged and the charging parties; 4) the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate .N.J.A.C. 6A:3-5 .6 .

I have reviewed the record and terms of the settlement and **FIND**:

(1) Sufficient documentation in the complaint and certification to support the Tenure Charges of Conduct Unbecoming a Teaching Staff Member filed before the Commissioner of Education as appended to the Initial Decision. (attached)

(2) The parties have provided an explanation to justify the settlement.

(3) The settlement agreement and release of claims executed by the parties demonstrates the consent of the parties to finally settle the matter and release all claims between the parties.

(4) The credible evidence reflects that petitioner State Operated School District of Paterson and respondent Vincent Napoleone entered into the settlement agreement with advice of counsel and were advised all rights under the agreement as set forth in the Settlement of Agreement and

Release of Claims shall be construed in accordance with and governed by the laws of the State of New Jersey.

(5) The parties have established by the credible evidence that the settlement agreement and release of claims is in the public interest.

(6) Respondent will submit to the District an irrevocable letter of resignation, effective August 30, 2007. Further, he has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Based upon the foregoing, I **CONCLUDE** that the Settlement Agreement and Release of Claims executed by petitioner State Operated School District of Paterson and respondent Vincent Napoleone satisfies the requirements of In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846): Therefore, the Settlement Agreement and Release of Claims executed the parties should be **APPROVED.**

It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 17, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 9-20-07

Mailed to Parties:

SEP 20 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for the State Operated School District of Paterson

In the Matter of Tenure Charges Against **VINCENT NAPOLEONE**	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO: EDU 05008-2007 **SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

This matter having come before the Court upon the filing of Tenure Charges by Petitioner State Operated School District of Paterson (hereinafter referred to as "Petitioner" or "District") against Vincent Napoleone (hereinafter referred to as "Respondent" or "Napoleone"), and the parties having determined that resolution of this matter without resort to the time and expense of a hearing is in the interests of the public and consistent with furthering the public good, and to fully and finally settle and/or release all claims between them arising out of Napoleone's employment and separation from employment with District;

The parties do hereby agree as follows:

1. Napoleone shall make payment to the District in the total amount of $3,000. Payment will be made by certified check, money order, or attorney trust account check, payable in two installments. The first payment, in the amount of $2,000, shall be made payable to the State Operated School District of Paterson c/o Schenck, Price, Smith & King,

LLP, Attorney Trust Account, and shall be received by Schenck, Price, Smith & King, LLP, by not later than August 30, 2007. The second and final payment, in the amount of $1,000, shall be made payable to the State Operated School District of Paterson c/o Schenck, Price, Smith & King, LLP, Attorney Trust Account, and shall be received by Schenck, Price, Smith & King, LLP, by not later than October 31, 2007.

2. By not later than August 30, 2007, Napoleone will submit to the District an irrevocable letter of resignation, effective August 30, 2007.

3. Napoleone hereby releases and forever discharges District and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Napoleone may have or may have had, or may claim to have or have had, in the past, currently, or in the future, against any of them, except as may be necessary to enforce this Agreement. Napoleone acknowledges that this general release also includes but is not limited to claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, including the tenure laws, claims arising under State, federal or common law for breach of contract, or claims growing out of any legal restrictions on the District's rights with regard to employment of individuals. Napoleone hereby expressly waives and releases any and all claims or rights arising under the State education laws, N.J.S.A. 18A:1-1, et seq., including but not limited to the "Tenure" laws set forth in N.J.S.A. 18A:28-1, et seq., and the "Tenure Employees Hearing Law," set forth in N.J.S.A. 18A:6-10, et seq., as well as any and all claims or rights

arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000e, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Federal Civil Rights Act of 1964, as amended 42 U.S.C. § 2000 (3), et seq., and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. Napoleone does not waive or release his right to seek indemnity pursuant to N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1 in the event of a claim or accusation by a third party. The District does not, at this time, commit to indemnifying Napoleone on any claim(s). Any decision regarding indemnification will be based upon an analysis under the statutes in light of the particular circumstances surrounding the claim(s).

4. This Agreement does not constitute an admission by either party of any wrongful action or violation of any federal or state statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

5. The terms of this Agreement shall be kept confidential. Napoleone agrees not to disclose the fact, terms or amount thereof to any person other than Napoleone's immediate family, accountant, attorney, income tax preparer or similar professional, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction. District agrees not to disclose the fact, terms or amount thereof to any person other than its Board of Education members, Central Office administrators and necessary clerical staff, accountants, auditors, attorneys, tax preparers, or other persons on a need-to-know basis, or unless otherwise ordered by a court of competent jurisdiction.

6. This Agreement shall be binding upon and inure to the benefit of Napoleone, the District, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

7. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Napoleone represents and acknowledges that he does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

8. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

9. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

10. Napoleone acknowledges that he has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he has had a reasonable period of time to consider the terms hereof, and that he enters into this Agreement voluntarily and with the advice of counsel.

11. The parties agree that this Agreement will be incorporated into an Initial Decision by the Honorable Mumtaz Bari-Brown, the administrative law judge assigned to preside over the pending tenure dismissal action bearing OAL DKT. No. EDU 05008-2007.

Mary J Hammer

WITNESS
MARY J. HAMMER

VINCENT NAPOLEONE
Date: 8-30-07

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

Joanne L Butler

~~WITNESS~~
not witnessed signing
but believe this to be
the signature of the
State District Supt
Michael E. Glascoe

By: Michael E. Glascoe

Date: 8/29/07

411-07

411-07

OAL DKT. NO. EDU 9198-07
(EDU 9039-05 AND EDU 12277-05 CONSOLIDATED – ON REMAND)
AGENCY DKT. NOS. 142-6/05 AND 248-9/05 CONSOLIDATED

RICHARD J. SMUTEK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Confidential Stipulation of Settlement and Initial Decision on Remand issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms* and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/22/07

Date of Mailing: 10/22/07

* The Commissioner is, however, compelled to comment on Term #16 of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9198-07

AGENCY DKT. NOS. 142-6/05 &

248-9/05

(Remand EDU 9039-05 & 12277-05)

RICHARD J. SMUTEK,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Andrew Babiak, Esq., for petitioner

Karen A. Murray, Esq. for respondent (The Murray Law Firm, LLC, attorneys)

Record Closed: September 25, 2007 Decided: September 26, 2007

BEFORE **BARRY N. FRANK**, ALJ:

This matter was remanded to the Office of Administrative Law ("OAL") from the Department of Education on August 27, 2007 for revision of the settlement or for further proceedings. The parties agreed to make revisions to the settlement.

The parties have submitted a revised Confidential Stipulation of Settlement as well as the Board's Resolution approving the revised settlement, as set forth in the attached documents.

I have reviewed the record and the revised settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 26, 2007
DATE

BARRY N. FRANK, ALJ

Date Received at Agency: 10-1-07

Mailed to Parties:

OCT - 1 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

THE MURRAY LAW FIRM, LLC
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Respondent

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2007 SEP 25 P 4:55

RICHARD J. SMUTEK, **Petitioner,** **v.** **BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,** **Respondent.**	**Agency Docket No. 248-9/05** **OAL Docket No. 090339-2005N** **Agency Docket No. 142-6/05** **OAL Docket No. 12277-2005N** **EDU Docket No. 09198-2007N** **CONFIDENTIAL** **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement (hereinafter "Agreement") is made this _____ day of September, 2007, by and between Petitioner, Richard J. Smutek (hereinafter "RJS"), who resides at 1 Enfield Circle, West Windsor, New Jersey 08550, and the Respondent, Elizabeth Board of Education (hereinafter the "Board"), with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207.

WITNESSETH:

WHEREAS, RJS is currently employed as a tenured teaching staff member for the Elizabeth Public School District; and,

WHEREAS, RJS has filed two (2) Petitions of Appeal with the Commissioner of Education which have been consolidated (Agency Docket No. 142-6/05; OAL Docket No.

EDUOA 09039-2005N; and Agency Docket No. 248-9/05; EDUOR 09198-2007N; and Agency Docket No. 248-9/05; OAL Docket No. EDUOA 12277-2005N (hereinafter the "Litigation"); and,

WHEREAS, the Litigation involves RJS's assertion to tenure in the position of Assistant Superintendent; and

WHEREAS, the Board has denied the material allegations of RJS's Petitions; and

WHEREAS, to avoid the time and significant expense involved with further litigation for an Abbott District, the parties mutually desire to settle and resolve this Litigation and all disputes and differences between them, on the terms and conditions set forth herein; and

WHEREAS, both the Board and RJS desire to enter into this Agreement stipulating the terms of the settlement of the Litigation including his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of mutual releases of any and all claims which the parties may have against the other arising from RJS's employment or otherwise;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. RJS agrees to sign an irrevocable letter of resignation from all employment with the Board, effective October 31, 2007. The resignation letter is attached as Exhibit A and shall be expressly conditioned upon the Commissioner of Education's approval of this Agreement. In the event that the Commissioner does not approve this Agreement prior to October 31, 2007 and instead approves it in November 2007, RJS's resignation shall be deemed to be effective on November 30, 2007. The signed letter of resignation shall be held in escrow by the Board's counsel until such time as the Commissioner acts on this Agreement. The letter of resignation shall be null and void if this Agreement is not approved by the Commissioner and shall be returned to RJS in such event. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of RJS's resignation.

2. The Board shall acknowledge, for all employment purposes, that its initial transfer of RJS to the position of Director was not performance related, but due to central office staff reorganization.

3. RJS shall remain employed by the Board in the title of Director until such time as his resignation becomes effective.

4. Upon the Commissioner's approval of the settlement, the Board shall provide RJS with the following retroactive salary adjustments based upon his service years and tenure in the District:

(1) for the 2005-2006 school year, from a gross salary of $117,830 to a gross

salary of $150,250 (gross $32,420), plus $1,500 (longevity);

(2) for the 2006-2007 school year, from a gross salary of $122,830 to a gross salary of $156,000 (gross $33,170), plus $2,000 (longevity); and

(3) for the 2007-2008 school year (until his resignation on October 31, 2007), from a gross salary of $129,900 to a gross salary of $156, 000 (gross $8,700), plus $2,000 (longevity).

Within ten (10) business days from receipt of the Commissioner's approval of the settlement, the Board shall pay RJS the foregoing retroactive salary adjustments (less applicable standard and ordinary withholdings) and shall also adjust RJS's payroll and personnel records in accordance with all applicable state and federal laws and regulations. It is understood and agreed that RJS shall NOT be receiving the equivalent of one year's salary for the 2007-2008 school year; the only payments RJS shall be entitled to will be the retroactive salary adjustments identified above, and the payments specified in paragraphs 5, 6 and 7.

5. In consideration for services RJS rendered in supervising the Adult Evening Program for 2005-2006, beyond the normal working day, since the date of the Board transfer, the Board shall pay RJS a stipend of $9,162 (less applicable taxes and deductions) based upon RJS working 229.05 extra hours at a rate of $40 per hour. Said stipend shall be paid within ten (10) business days from the receipt of the Commissioner's approval of the settlement. In consideration for the services RJS rendered in supervising the Adult Evening Program for 2006-

2007, beyond normal working day hours, the Board will pay RJS at a rate of $40 per hour, for a total of $896.65. Neither this agreement to pay for the time worked in '05-'06 or '06-'07 or the hourly rate shall be precedential for any other employees working with the Adult Evening Program.

6. Upon RJS's retirement, the Board agrees that it shall pay him for his unused sick leave days at the rate of $75 per unused sick leave day. Payment at this per diem rate shall not be precedential for any other Administrator in the District. The Board also agrees that upon RJS's separation from employment, it shall pay him for his unused, accumulated vacation days at his per diem rate, calculated as his final annual salary divided by 240 working days.

7. During the remainder of RJS's employment, the Board agrees to provide him with all the (non-salary) benefits, perquisites, and emoluments of the position of Director including membership dues; (family) medical; (family) dental; (family) vision; (family) prescription; etc. Within ten (10) business days from receipt of the Commissioner's approval of the settlement, the Board shall reimburse RJS $1,270 for his payment of NJASA membership dues for 2005-2006, $1,350 for his payment of NJASA membership dues for 2006-2007, $1,410 for his payment of NJASA membership dues for 2007-2008 (prorated for four (4) months: $448), and shall pay him $600 for additional travel allowances between July 2005 and June 2007.

8. The parties' entry into this Agreement shall not constitute an admission of guilt, wrongdoing or labeling on the part of the Petitioner or Respondent.

9. RJS waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that RJS shall not, as of the effective date of his resignation, receive from the Board any other compensation or benefits or emoluments of employment except as otherwise provided in this Agreement.

10. Except as otherwise provided herein, in consideration of the above, RJS agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past and present; and agents of the Board ("Releasees"), past and present, of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims seeking employment or re-employment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had. Except as otherwise provided herein, this release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1966, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or

marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board. Specifically excepted from this release are: (1) any claims arising from a breach of this Agreement or any provision hereof; (2) any claim relating to RJS's right upon cessation of employment with the Board to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA) (as amended); (3) any rights he may have arising under the Teacher's Pension and Annuity Fund (TPAF) and related statutes and regulations; and (4) any claim for indemnification under N.J.S.A. 18A: 16-6 or N.J.S.A. 18A: 16-6.1.

11. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge RJS from any and all claims which it may have against RJS. It specifically releases RJS from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency, or any other federal or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

12. The parties expressly agree that they shall act in good faith to ensure implementation of the terms of this Agreement.

13. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Agreement and that each signs this Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations, and are satisfied with the advice received.

14. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, successors, and assigns.

15. This Agreement incorporates and settles all claims and disputes which may exist between RJS and the Board arising from his employment or otherwise. Except as otherwise provided herein, it is understood and agreed that any and all previous discussions and agreements, whether oral or written, are hereby merged into this Agreement, and that this Agreement is intended to be final and complete resolution of the Litigation.

16. The parties agree that the term of this agreement shall be kept in a separate confidential litigation file and shall not be released to anyone other than the parties or their legal representatives, except pursuant to Court order or valid subpoena.

17. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signatures of all the parties hereto are required for this Agreement to be binding on any party. An original signature transmitted by facsimile shall be deemed an original for purposes of this Agreement. This Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of New Jersey. Pursuant to N.J.A.C. 1: 1-19.1, this Agreement will be submitted to the Honorable Barry N. Frank, A.L.J. for his consideration and approval.

18. This agreement is subject to approval of the Board of Education.

Karen A. Murray, Esq.
Counsel for Respondent,
Elizabeth Board of Education

Dated: 9/21/07

Andrew Babiak, Esq.
Counsel for Petitioner,
Richard J. Smutek

Dated: 9/14/07

Richard J. Smutek

Dated: 9/14/07

EXHIBIT "A"

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2007 SEP 25 P 4:56

1 Enfield Circle
West Windsor, NJ 08550

September ___, 2007

Mr. Pablo Munoz, Superintendent of Schools
Elizabeth Board of Education
500 N. Broad Street
Elizabeth, NJ 07207

Dear Mr. Munoz:

Subject to the terms of the Stipulation of Settlement, I hereby tender my resignation, for retirement purposes, from all my positions with the Elizabeth Board of Education effective October 31, 2007. In the event the Commissioner of Education approves the Stipulation of Settlement subsequent to October 31, 2007, I hereby tender my resignation for retirement purposes, according to the terms thereof, effective November 30, 2007.

Sincerely,

Richard J. Smutek

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, by Resolution #06-308, the Elizabeth Board of Education approved a settlement of ending in lieu of a hearing, specifically, OAL Dkt. #090339-2005N; and OAL Dkt. #A227-2005N; and

WHEREAS, the Commissioner of Education requested clarification of certain items in the settlement agreement, and;

WHEREAS, counsel for the Board of Education and Richard Smutek have revised certain language items; and,

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

BE IT FURTHER RESOLVED, that the Board approves paid administrative leave for Richard Smutek from October 18 - 31, 2007.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-64

424-07

#424-07SEC

IN THE MATTER OF DR. JOSEPH ATALLO :

PATERSON BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

PASSAIC COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission found probable cause to credit allegations that respondent – a member of the Paterson Board of Education – violated the School Ethics Act, *N.J.S.A.* 18A:12-24.1(e), by threatening the then Interim Superintendent while using profanity at an April 2005 public forum, and threatening a member of the public while using profanity at an April 2005 meeting of the Board of Education. The matter was transferred to the Office of Administrative Law for hearing.

The ALJ found that there is insufficient credible evidence to support the allegations against respondent, and concluded that the Commission has failed to satisfy its burden of proving, by a preponderance of credible evidence, that respondent violated *N.J.S.A.* 18A:12-24.1(e) in either of the two alleged incidents in April 2005. Accordingly, the ALJ issued an Initial Decision ordering that the findings of probable cause against respondent be dismissed.

The School Ethics Commission's Final Decision rejected the ALJ's findings, concluded that respondent had violated *N.J.S.A.* 18A:12-24.1(e) of the School Ethics Act with respect to the charges involving a member of the public, and recommended that the appropriate penalty for respondent's violation is a one-year suspension from the Board.

The Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – found that the Commission's recommended penalty in this case was inconsistent with penalties issued in prior cases and insufficiently supported. Accordingly, the Commissioner found that the appropriate sanction for respondent in this matter is a three-month suspension from the Board. However, in view of respondent's allegations of fundamental error in the Commission's rejection of the ALJ's decision, the Commissioner stayed implementation of the penalty pending timely appeal by respondent to the State Board of Education.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 25, 2007

AGENCY DKT. NO. 201-7/07

IN THE MATTER OF DR. JOSEPH ATALLO	:	
PATERSON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed, as have respondent's exceptions and the Commission's reply pursuant to *N.J.A.C.* 1:6C-18.3. In its decision, the Commission found – following a hearing at the Office of Administrative Law (OAL) and contrary to the conclusion of the Administrative Law Judge (ALJ) – that respondent, Paterson Board of Education member Dr. Joseph Atallo, violated *N.J.S.A.* 18A:12-24.1(e) of the School Ethics Act (Act) so as to warrant a one-year suspension from the Board.

On exception, Dr. Atallo contends that the Commission had "no jurisdiction" to overturn the decision of the ALJ, having "failed to timely adopt, reject or modify [such] decision" and having "improperly based [its own decision] on the [ALJ's] credibility determinations," contrary to *N.J.S.A.* 52:14B-10(c). (Exceptions at 1-9, quotation at 2) Dr. Atallo further contends that – even if he had violated the Act as found by the Commission – the recommended penalty is "without precedence, excessive, prejudicial, arbitrary, capricious, and inappropriate." Citing two prior matters involving board members who confronted a member of the public or a school employee and received either a two-month suspension or a reprimand, Dr. Atallo argues that the penalty imposed against him is out of all proportion to his own (alleged) conduct – in addition to having been reached without rational basis and without the requisite weighing of aggravating and mitigating factors or

consideration of his history of service to the Board and community. (Id. at 9-11, quotation at 9; citing *In the Matter of John Talty and Sharon Kight, Brick Township Board of Education, Ocean County*, decided by the Commission January 24, 2006 and by the Commissioner March 1, 2006, affirmed State Board November 1, 2006, and *In the Matter of Charles Fischer, Eatontown Board of Education, Monmouth County*, decided by the Commission February 24, 2004 and by the Commissioner April 12, 2004)

In reply, the Commission states that Dr. Atallo's comments to the Commissioner must by law be confined to the Commission's recommended sanction, so that his arguments with respect to the Commission's finding of violation must be reserved for appeal pursuant to *N.J.S.A.* 18A:12-29(d). (Reply at 1-2) The Commission further urges adoption of its recommended sanction, asserting that it is necessary to ensure that members of the public are respected at Board meetings and that Dr. Atallo's conduct toward a community member – making threats, using profanity and indicating that he would see the person "outside" – was far more egregious than the conduct of the board member in *Talty and Kight, supra*, was witnessed by the public at a Board meeting (in contrast to *Fischer, supra*) and had the potential to compromise the Board by causing members of the public to avoid participating at Board meetings for fear that Board members would disrespect or retaliate against them. (*Id.* at 2-3)

Having considered the positions of Dr. Atallo and the Commission, the Commissioner initially emphasizes that the Commission's fact-finding and determination as to Dr. Atallo's violation of the School Ethics Act are not reviewable herein, since, by law, only the School Ethics Commission may determine whether a violation of the Act has occurred, and appellate review of this determination is expressly in the State Board of Education rather than the Commissioner, whose jurisdiction is expressly limited to reviewing

the Commission's recommended sanction once a violation has been found. *N.J.S.A.* 18A:12-29(c), *N.J.A.C.* 6A:3-9.1, and *N.J.A.C.* 1:6C-2.1. This remains so notwithstanding Dr. Atallo's contention that the Commission's decision is a nullity because the Commission lacked legal authority to reject the Initial Decision of the ALJ at the time and in the manner it did: Given the limits of her authority in school ethics matters, the Commissioner cannot reach alleged deficiencies in the Commission's decision, but must rather accept it as valid and review the Commission's recommended penalty in that light.

Turning to such penalty, however, the Commissioner concurs with Dr. Atallo that the Commission's recommendation is both excessive and insufficiently supported.[1] The Commissioner certainly does not disagree with the Commission that conduct of the type in which it found Dr. Atallo to have engaged is reprehensible and cannot be countenanced in public school district board of education members under any circumstances. However, the Commission has offered no explanation as to why Dr. Atallo's conduct was so much more egregious, or the circumstances of his offense so much more compelling, that he should warrant a penalty so much more severe than the two-month suspension imposed in *Talty and Kight*, *supra* – the case precedent most closely resembling the present matter – which involved a board member taking private action to confront and threaten a member of the public at a board meeting in response to comments made during the public comment session.[2]

This is particularly so in view of the fact that the vast majority of School Ethics decisions finding violation of the Act – even very serious violation – have resulted in

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[1] The Commission's recommendation reads in its entirety: "***the Legislature found that 'board members ...must avoid conduct which is in violation of the public trust...' Dr. Atallo's threat to Mr. Mutooni is one of the most egregious violations of the public trust that a board member can commit. Therefore, the Commission recommends to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year." (School Ethics Commission Decision at 4)

[2] The situation at issue in *Fischer, supra*, is somewhat different, involving a board member who contacted a board employee at home and made demands of her in an angry and insistent manner.

penalties substantially less than a one-year suspension. Indeed, the Commission's decisions since its inception[3] have included relatively few instances – other than for delay in obtaining required board member training or filing required disclosure statements – where penalties of suspension have been imposed, and such suspensions as have been issued – including those in training and disclosure cases – have almost invariably been short-term, usually for one or two months.[4] The sole instance of any suspension exceeding three months was a one-year suspension imposed under circumstances, and for reasons, entirely unlike those herein: There, the Commission recommended the unpaid suspension of the tenured school business administrator of a Type I school district for a period of time intended to ensure – in addition to conveying the extreme seriousness of his violation and the fact that he had persisted in holding dual office despite two instances of prior Commission advice – that he would not return to work for the same board members he had appointed in his capacity as mayor, and from whom he had received significant special treatment. *Irvington Municipal Council v. Michael Steele and Board of Education of the Township of Irvington, Essex County*, 95 *N.J.A.R.*2d (EDU) 123, penalty adopted by Commissioner March 9, 1995; affirmed by State Board September 9, 1995.

In consideration, then, of prior precedent, the Commission's articulated reasons for its recommended penalty, and its findings as to Dr. Atallo's violation of the Act – which, it is again stressed, must be accepted by the Commissioner – the Commissioner finds that the appropriate sanction to be imposed in this instance is a suspension of three months,

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[3] See http://www.state.nj.us/education/legal/ethics/index.html for decisions from January 1, 1997 and beyond; decisions from 1992-1996 resulting in the imposition of a penalty can be found in the *New Jersey Administrative Reports* (*N.J.A.R.*2d).

[4] The Commission has generally reserved removal for a handful of instances where board members were found to have engaged in persistent, extensive or especially flagrant violation of the Act. A few additional instances of removal would exist, but for the Commission's inability to impose a penalty greater than censure on a board member who had already resigned by the time of the Commission's ruling.

thus providing for consistency with *Talty and Kight, supra*, while also taking into account Dr. Atallo's use of profanity and threat of direct physical violence, as well as the fact that – through its ruling in *Talty and Kight* – the Commission had previously served notice that it deemed conduct of the type at issue herein to be a violation of the Act.

Accordingly, Dr. Joseph Atallo, as a school official found to have violated the School Ethics Act, is hereby suspended for a period of three months from his membership on the Paterson Board of Education. However, in light of Dr. Atallo's vigorous denial of the Commission's fact-finding and his allegations of fundamental error in the Commission's rejection of the decision of the Administrative Law Judge, the Commissioner determines *to stay implementation of the penalty ordered herein*, pending timely appeal by Dr. Atallo to the State Board of Education. If no such appeal is filed, the suspension shall be effectuated as ordered immediately upon expiration of the time for filing an appeal pursuant to *N.J.S.A.* 18A:6-28 and *N.J.A.C.* 6A:4-1.3.

IT IS SO ORDERED.[5]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/25/07

Date of Mailing: 10/25/07
& Faxing

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties. *N.J.A.C.* 6A:3-1.14(c).

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**SEC Docket No.: C32-05 & C24-05**
	:	**OAL Docket No. EEC01110-06**
JOSEPH ATALLO,	:	
PATERSON BOARD OF EDUCATION,	:	**FINAL DECISION**
PASSAIC COUNTY	:	
	:	

On December 2, 2005, the School Ethics Commission found probable cause to credit the allegation that Joseph Atallo, a member of the Paterson Board of Education (Board), violated N.J.S.A. 18A:12-24.1(e) by threatening then interim superintendent, Dr. Dennis Clancy, and Fredrick Mutooni, a member of the public, using profanity on two separate occasions. The Commission transmitted the finding to the Office of Administrative Law (OAL) for a hearing in accordance with N.J.S.A. 18A:12-29(b). On March 26, 2007, the Administrative Law Judge (ALJ) concluded in her Initial Decision that the Commission failed to establish, by a preponderance of credible evidence, that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) and dismissed the Commission's finding of probable cause.

The record of this matter and the Initial Decision of the ALJ have been reviewed by the Commission. The Deputy Attorney General (DAG) representing the Commission submitted exceptions and the attorney for the respondent, Joel M. Miklacki, Esquire, submitted reply exceptions in accordance with N.J.A.C. 1:1-18.4. The exceptions and reply exceptions were also reviewed by the Commission. At its meeting of July 24, 2007, the Commission did not adopt the ALJ's Initial Decision and recommendation to dismiss the Commission's finding of probable cause. Rather, the Commission voted to reject the ALJ's finding that no violation occurred. The Commission also voted to find that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e), and recommended to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year.

In her exceptions, the DAG argues that the ALJ improperly found that the security officer's incident report was hearsay. The DAG maintains that the report falls within the "Records of Regularly Conducted Activity" exception to the hearsay rule. The Commission concludes that, although the report fell under the hearsay exception, the statement therein is offered for the truth of the matter asserted. Therefore, it is hearsay. Furthermore, there was no direct testimony that would have corroborated the report to support the hearsay statement in the report. Upon review of the record, the Commission hereby concludes that the ALJ's determination that the report was hearsay was correct and cannot be overturned.

The DAG also argues that the ALJ erred in concluding that the Commission failed to prove by a preponderance of the credible evidence that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened the interim superintendent, Dr. Clancy, with profanity. The Commission must give deference to the ALJ's credibility determinations. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility." In the Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), certif. denied, 121 N.J. 615 (1989)." The ALJ found that Dr. Clancy's testimony was significantly impaired by his failure to report or take any action regarding the alleged incident. Upon review of the record, the Commission hereby concludes that the ALJ's credibility determinations regarding the April 5, 2005 public forum must be given deference and her findings based on those determinations cannot be overturned.

In her first exception, the DAG argues that the ALJ erred in concluding that the Commission failed to prove by a preponderance of the credible evidence that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened Fredrick Mutooni, a member of the public, with profanity at the April 27, 2005, board meeting. See, DAG exceptions page 2. The DAG maintains that the testimony and evidence establishes that Dr. Atallo threatened Mr. Mutooni. In the respondent's reply exceptions, he argues that the ALJ, "summarily discounted Mr. Mutooni's testimony as being false, disingenuous and not credible." See, Reply Exceptions, page 1. The Commission notes that at no place in the Initial Decision does the ALJ indicate that Mr. Mutooni's testimony was false or disingenuous. The Commission recognizes that these are matters that turn on the credibility of witnesses. In this regard, the Commission must give deference to the credibility determinations of the ALJ.

While the Commission gives deference to the credibility determinations of the ALJ, it agrees with the DAG that the testimony and evidence establishes that Dr. Atallo threatened Mr. Mutooni. Upon a review of the record before it, the Commission concludes that the ALJ erred when she placed limited weight upon Mr. Mutooni's account of what happened on April 27, 2005, due to inconsistencies in the testimony of the various witnesses when such inconsistencies were not regarding a material fact. For example, the ALJ placed significant weight upon the fact that Mr. Mutooni, Dr. Atallo and Anthony Vancheri offered contradictory versions as to when Dr. Atallo left the stage. See, Initial Decision page 19. While Mr. Mutooni estimated that Dr. Atallo left the stage approximately one hour after Mr. Mutooni's comments, Dr. Clancy estimated that it was approximately one and one half to two hours later and Mr. Vancheri estimated that it was a couple of minutes after Mr. Mutooni spoke. The Commission finds that it is immaterial as to when Dr. Atallo left the stage. What is material is the fact that Dr. Atallo left the stage and headed to the back of the auditorium towards Mr. Mutooni who was in the back of the auditorium. Therefore, it was incorrect for the ALJ to place significant weight upon the inconsistent testimony regarding the time that Dr. Atallo left the stage in weighing Mr. Mutooni's testimony.

The Commission also finds that the ALJ erred when she gave greater weight to the testimony of the respondent's witnesses who were community members because they have no vested interest in the outcome of the proceeding. The Commission is aware that in many communities there are community members that regularly attend board meetings. In the respondent's reply exceptions, he indicates that the witnesses were "concerned citizens who regularly attend board meetings." See, Respondent's Reply exceptions, page 2. The Commission recognizes that there are many concerned citizens who faithfully attend board meetings. However, the Commission also recognizes that many of those who regularly attend board meetings do so because of personal interests. It may be that they are concerned with rising property taxes or they have an interest in the special education program. They may also attend board meetings to support certain board members or to influence the board in certain matters. The Commission can find no evidence to establish that the community members who testified had no vested interest in the outcome of the proceeding. The ALJ also erred when she gave greater weight to respondent's witness, James Smith, because he has no vested interest in the outcome of the proceedings. Mr. Smith has served as the Executive Director of School Security for the Paterson School District for five years. The Commission finds it hard to believe that Mr. Smith has no vested interest when Dr. Atallo is a member of the board overseeing the district where Mr. Smith is employed.

In concluding that the totality of the evidence failed to establish by a preponderance of credible and competent evidence that Dr. Atallo threatened Mr. Mutooni after he left the stage, the ALJ indicated that, "[a]t best, the proofs regarding Dr. Atallo's conduct after leaving the stage are in equipoise..." See, Initial Decision, page 23. The Commission finds that the ALJ's error in placing limited weight on Mr. Mutooni's testimony based on immaterial inconsistencies, and the error in placing greater weight on the respondent's witnesses because of a presumption that they had no vested interest in the outcome of the proceedings, slightly tip the balance of the evidence so that it no longer provides equal support to two inconsistent inferences. These errors coupled with the fact that there was testimony that Dr. Atallo made threatening statements to Mr. Mutooni also shift that balance of evidence even more. Both Dr. Clancy and Mr. Vancheri testified that Dr. Atallo made threatening statements to Mr. Mutooni. The Commission acknowledges that Mr. Vancheri did not directly link Dr. Atallo's comments to Mr. Mutooni. However, given the testimony of Dr. Clancy that Dr. Atallo made a comment to Mr. Mutooni that he, Dr. Atallo, would see Mr. Mutooni outside, the Commission is led to conclude that when Mr. Vancheri heard Dr. Atallo say, "kick your ass" it was directed to Mr. Mutooni.

The Commission finds and concludes that the preponderance of the evidence establishes that Dr. Atallo threatened Mr. Mutooni by words on April 27, 2005. The Commission further finds that this conduct was a private action that could have compromised the Board. The Commission notes that any time a board member reacts in a threatening manner towards members of the public attending the board meeting it has the potential to compromise the board. Based on the foregoing, the Commission finds that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) when he threatened Mr. Mutooni at the April 27, 2005 Board meeting.

In determining what sanction to recommend to the Commissioner of Education, the Commission notes that in N.J.S.A. 18A:12-22 the Legislature found that "board members ...must avoid conduct which is in violation of the public trust...." Dr. Atallo's threat to Mr. Mutooni is one of the most egregious violations of the public trust that a board member can commit. Therefore, the Commission recommends to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Miklacki may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C32-05 & C24-05

Whereas, the Commission found probable cause to credit the allegation that Joseph Atallo violated N.J.S.A. 18A:12-24.1(e) in connection with conduct that he engaged in as a member of the Paterson Board of Education; and

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a hearing; and

Whereas, the Administrative Law Judge concluded that the charge had not been sustained and therefore dismissed the finding of probable cause; and

Whereas, the complaining party filed exceptions to the ALJ's decision and respondent filed reply exceptions; and

Whereas, the Commission fully considered all of the documentation filed in response to the ALJ's decision and voted to not adopt the ALJ's Initial Decision and recommendation to dismiss the Commission's finding of probable cause; and

Whereas, the Commission voted to uphold its finding of probable cause, found that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) and recommended to the Commissioner of Education that Dr. Atallo be suspended from the Board for one year; and

Whereas, the Commission agrees with the draft decision finding that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) and recommending to the Commissioner of Education that Dr. Atallo be removed from the Board;

Now Therefore Be It Resolved that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School Ethics Commission adopted this decision at its public meeting on July 24, 2007.

Mary E. Torres
Acting Executive Director

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EEC 01110-06

AGENCY DKT. NO. C32-05 & C24-05

IN THE MATTER OF JOSEPH ATALLO,

PATERSON BOARD OF EDUCATION,

Cynthia Ann Raymond, Deputy Attorney General, for petitioner School Ethics Commission (Stuart Rabner, Attorney General of New Jersey, attorney)

Joel Miklacki, Esq., for respondent

Record Closed: February 9, 2007 Decided: March 26, 2007

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE

This matter arises out of probable cause findings issued by the School Ethics Commission pursuant to the School Ethics Act, N.J.S.A. 18A:12-21 to -34. More particularly, the Commission found probable cause to credit allegations that respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members by threatening the then Interim District Superintendent and a member of the public using profanity. Respondent denies the allegations and seeks dismissal of the charges.

PROCEDURAL HISTORY

The within matter emanates from two complaints filed against respondent, who serves as a member of the Paterson Board of Education (the Board). On May 12, 2005, Fredrick Mutooni filed a complaint with the School Ethics Commission (the Commission) (C24-05) alleging that respondent threatened him using profanity at a meeting of the Board on April 27, 2005.[1] On June 22, 2005, as later amended on September 7, 2005, the Director of the Department of Education Office of Compliance Investigation, Ray Montgomery, filed a complaint against respondent (C32-05) alleging, among other assertions, that respondent violated N.J.S.A. 18A:12-24.1 by threatening the Interim District Superintendent using profanity at a public forum on April 5, 2005. The Commission consolidated the complaints for a hearing. By letter dated December 2, 2005, the Commission notified respondent of its determination finding probable cause to credit the allegations that respondent violated N.J.S.A. 18A:12-24.1(e) by threatening then Interim Superintendent Dr. Clancy using profanity at an April 5, 2005 public forum and threatening Mr. Mutooni using profanity at an April 27, 2005 meeting of the Board. The Commission dismissed the remaining allegations asserting violations of N.J.S.A. 18A:12-24.1(a), (c), (f) and (j). The Commission further found the material facts to be disputed regarding the conduct on which it found probable cause and, therefore, informed respondent that the matter would be transmitted to the Office of Administrative Law (OAL) for a hearing. The Commission transmitted the matter to the OAL where, on January 5, 2006, it was filed for determination as a contested case. A hearing was held on October 16 and 18, 2006. Following the conclusion of the testimony, the record remained opened for the receipt of post-hearing submissions. The record closed upon receipt of the last submission.

[1] Although the complaint and the Commission's later decision refers to a Board meeting on April 26, 2005, the parties agree that the meeting in issue occurred on April 27, 2005.

FACTUAL DISCUSSION

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe and assess the credibility of the witnesses, I **FIND** the following preliminary **FACTS**, which are essentially not in dispute.

Respondent Dr. Joseph Atallo has served as an elected member of the Paterson Board of Education (the Board) since 2000. Dr. Dennis Clancy served as the Interim District Superintendent for Paterson from July 2004 to August 2005.

The April 5, 2005 Public Forum

On April 5, 2005, a public forum was held at JFK High School. The purpose of the forum was to provide the public an opportunity to meet and hear from the three prospective candidates for appointment to the district superintendent position. The public forum was scheduled to commence at 6:00 p.m. A large number of members from the community, approximating 300 individuals, were in attendance. Shortly before the meeting was scheduled to begin, two of the candidates withdrew from the process. The one remaining candidate was not scheduled to make a presentation until in or around 8:00 p.m. As described by the various witnesses, members of the public were "agitated," "unruly," "upset" and "contentious," with some "questioning" the process.

Dr. Clancy, the then Interim Superintendent, initially spoke to the audience concerning the reason for the delay and the revised schedule for the candidates. The Board President, Dr. Hodges, then went on the stage and addressed the audience. Dr. Atallo also went on the stage and called up two Board members. When Dr. Atallo attempted to speak, Dr. Clancy had the microphone which Dr. Atallo was using shut off. Dr. Clancy testified that he took this action after Dr. Atallo attempted to criticize the process since this was not the purpose of the forum. As later addressed, varying accounts were presented with regard to the events that subsequently transpired.

The April 27, 2005 Meeting

On April 27, 2005, the Board held a reorganization meeting in the auditorium of JFK High School. The Board members, along with Dr. Clancy, sat on the stage during the meeting. The public portion of the meeting was videotaped. After the public portion of the meeting, the Board holds executive session down the hall behind the principal's office. The auditorium was set up with sections of rows, with aisles located on the sides of each section and in or around the middle of the auditorium. From the viewpoint facing the stage, there is a door on the right near the stage that leads to the principal's office, which has a restroom. Conflicting evidence was presented as to whether the door to the principal's restroom is unlocked during the meeting. Restrooms are also located in the hallway outside the rear of the auditorium.

At the hearing, the parties offered testimony by various individuals who attended the April 27, 2005 meeting. Present at the meeting were James Smith, the Executive Director of School Security, and Officer Lillian Sanchez, who worked security at the meeting. Mr. Spagnola, who was sworn in as a commissioner at the meeting, sat on the stage with the other Board members along with Dr. Clancy. Members of the community who attended the meeting included Fredrick Mutooni, Anthony Vancheri, Theodore Kyles and Anna Taliaferro.

During the public portion of the meeting, a member of the community, Fredrick Mutooni, called for Dr. Atallo's resignation from the Board. This period is reflected on the videotape introduced as R-1. Although the videotape does not show Dr. Atallo during this entire timeframe, the portions when he can be seen reflect Dr. Atallo sitting on the stage and not reacting verbally or by gestures to Mr. Mutooni's comments. That Dr. Atallo did not respond verbally or by gestures to the comments while on the stage was further articulated by various witnesses, which testimony the undersigned accepts as **FACT**.

It is undisputed that Dr. Atallo left his seat on the stage at one point during the meeting. At the hearing, differing accounts were presented vis-à-vis the timing of this

action, the path taken by Dr. Atallo and his conduct after he left the stage. The videotape introduced as P-1 does not capture Dr. Atallo leaving the stage or the alleged events that then transpired. The videotape reveals that, after a motion was made to close the public session and while a Board member was speaking, the Board members reflected on the tape turned toward their left and voices can be heard stating "something is going on over there" and asking security to take care of the problem. Other comments can also be heard including, among others, "he's going after the guy who asked him to resign."

After leaving the April 27, 2005 meeting, Mr. Mutooni contacted the Paterson Police Department and provided a report (P-1c). Mr. Mutooni did not file criminal charges against Dr. Atallo arising from the incident. Subsequently, Mr. Mutooni filed a complaint, dated May 3, 2005, with the School Ethics Commission. (P-4).

On April 27, 2005, Dr. Clancy requested James Smith, the Executive Director of School Security for the district, to conduct an investigation of the incident. Mr. Smith commenced the investigation the next day. Mr. Smith contacted Mrs. Vancheri, who provided her account along with advice that her husband may be able to provide more information. Mr. Smith contacted Mr. Vancheri for a report, which Mr. Vancheri ultimately provided directly to Dr. Clancy's office. (P-1d). Mr. Smith submitted a written report to Dr. Clancy dated May 3, 2005 detailing his involvement, including his discussions with Mrs. Vancheri and another individual, neither of whom testified at the hearing. (P-1a). Mr. Smith's report attached an incident report by Security Officer Harris (P-1b), who also did not testify at the hearing.

Subsequently, Dr. Clancy wrote a letter to the then Commissioner of Education (the Commissioner), dated May 6, 2005, setting forth various allegations concerning Dr. Atallo. The allegations included, among others, that Dr. Atallo threatened Dr. Clancy with physical harm when he was stopped from disrupting a community forum to meet the final candidate for superintendent and Dr. Atallo threatened a community member who called for his resignation from the Board on April 27, 2005. (P-1). With the letter, Dr. Clancy enclosed copies of Mr. Smith's report, the police report filed by Mr. Mutooni and Mr. Vancheri's

written statement. The matter was referred to the Department of Education, Office of Compliance Investigation. Karl Feltes with that office conducted an investigation. Following the investigation, the Director of the Office of Compliance Investigation, Ray Montgomery, filed a complaint against Dr. Atallo on June 22, 2005, as later amended by complaint dated September 6, 2005.

After considering the testimony and the documents submitted, the Commission found probable cause to credit the allegations that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) by threatening then Interim Superintendent Dr. Clancy using profanity at the April 5, 2005 public forum and threatening Mr. Mutooni using profanity at the April 27, 2005 meeting.

THE TESTIMONY

At the hearing, the Commission presented four witnesses; former Interim State District Superintendent Dr. Dennis Clancy; Fredrick Mutooni; Anthony Vancheri, who attended the April 5 and 27, 2005 meetings; and Karl Feltes with the Office of Compliance Investigation in the Department of Education. Respondent testified on his own behalf and offered testimony by three individuals who attended the April 2005 meetings (Lawrence Spagnola, Theodore Kyles and Anna Taliaferro); a police officer who worked security at the April 27, 2005 meeting (Lillian Sanchez); and the Executive Director of School Security for the district (James Smith). A review of pertinent testimony follows.

The April 5, 2005 Public Forum

Dr. Clancy testified that, after he shut off Dr. Atallo's microphone, there was an exchange of words between them as to why the Board President, and not Dr. Atallo, was allowed to speak. At that point, Dr. Atallo and the two Board members left the stage. According to Dr. Clancy, after Dr. Atallo left the stage, he approached Dr. Clancy, who was standing along the wall by the door on the right side of the stage, and said words to the effect of "if you keep it up, I am going to knock the f----ing s--t out of you." Dr. Clancy

indicated that he called for security by the door to come over, and two security guards employed by the district approached Dr. Atallo and told him to calm down. Dr. Clancy testified that, although he was upset by Dr. Atallo's comment which Dr. Clancy believed was inappropriate, Dr. Clancy was not in fear of imminent harm and did not believe Dr. Atallo would physically hurt him. Dr. Clancy acknowledged that he did not report the incident to the police, he did not contact the head of school security to conduct an investigation and he did not prepare or secure any reports. Dr. Clancy incorporated this incident as one of the various concerns set forth in his May 6, 2005 letter to the then Commissioner.

Anthony Vancheri testified that he attended the April 5, 2005 public forum with his wife. They were sitting in the center of the auditorium in approximately the fifteenth or sixteenth row in the back. Although Mr. Vancheri observed a "discussion", "confrontation" or "debate" going on between Dr. Clancy and Dr. Atallo, who were on the left side of the assembly, Mr. Vancheri did not hear anything that was said between them.

Dr. Atallo testified that he went on the stage to present a different view than Dr. Hodges and Dr. Clancy turned the microphones off on him. Dr. Atallo acknowledged that he was upset by Dr. Clancy's action, which he believed was rude, inappropriate and violated his first amendment right to speak and express his perspective as an elected official. Dr. Atallo testified that he expressed his displeasure to Dr. Clancy from the stage. At that point, Dr. Atallo was on the stage facing the audience and Dr. Clancy was off the stage near the sound room. Dr. Atallo denied threatening Dr. Clancy in any way or using profanity. According to Dr. Atallo, after he left the stage, Dr. Atallo had no further contact with Dr. Clancy that evening. Dr. Atallo denied making the comment alleged by Dr. Clancy and that any security officers approached him.

James Smith has served as the Executive Director of School Security for five years and previously was employed by the Paterson Police Department for twenty-six years. Mr. Smith's duties as Executive Director include conducting all internal investigations in the district. Mr. Smith did not attend the April 5, 2005 public forum. Mr.

Smith testified that Dr. Clancy did not report to him that Dr. Atallo had approached Dr. Clancy using profanity and did not request Mr. Smith to conduct an investigation. In addition, no security officer reported to Mr. Smith that they had been called over by Dr. Clancy on April 5, 2005.

Three individuals who attended the April 5, 2005 public forum testified on respondent's behalf. The witnesses consistently testified that they observed Dr. Atallo leave the stage and did not observe any later exchange between Dr. Clancy and Dr. Atallo or any security guard approach Dr. Atallo.

Theodore Kyles testified that he was standing by the wall near the door close to the stage on the left side of the auditorium when Dr. Atallo went on the stage. Dr. Clancy was standing not far from Mr. Kyles with his back against the same wall. Mr. Kyles had a full view of the stage and observed Dr. Atallo leave the stage. Mr. Kyles testified that, after Dr. Atallo left the stage, the witness did not observe Dr. Atallo approach Dr. Clancy or have any conversation or argument with him. He further did not observe any security guards approach Dr. Atallo. Mr. Kyles stated that he was present during this particular time period, he did not observe an incident between Dr. Atallo and Dr. Clancy and an incident did not happen.

Lawrence Spagnola testified that he was situated in front of the stage near the middle of the auditorium (as depicted on R-4) and observed Dr. Atallo leave the stage. Dr. Atallo, who did not appear to be upset, then came over by Mr. Spagnola. Mr. Spagnola testified that, from the time Dr. Atallo left the stage until he arrived at Mr. Spagnola, the witness did not observe any discussion, argument or confrontation between Dr. Clancy and Dr. Atallo. He also did not observe any security guards go to the location of Dr. Clancy.

Anna Taliaferro, who has regularly attended Board meetings for thirty-seven years, attended the April 5, 2005 public forum. Ms. Taliaferro was sitting in the front row to the far right, which is where she regularly sits at every meeting. Ms. Taliaferro

testified that she observed Dr. Atallo when he left the stage and did not observe an argument between Dr. Clancy and Dr. Atallo after he left the stage. Ms. Taliaferro, who was situated approximately twenty-one feet from Dr. Atallo, testified that she was absolutely sure that she did not observe an exchange between them. She also did not observe any security guards being called by Dr. Clancy to Dr. Atallo.

The April 27, 2005 Meeting

Mr. Mutooni testified that an incident occurred with Dr. Atallo when Mr. Mutooni was leaving the April 27, 2005 meeting after the public portion, approximately forty minutes to an hour after his comments to Dr. Atallo. Mr. Mutooni described that, as he was walking slowly out of the auditorium from his seat (depicted as X1 on P-5a), Dr. Atallo rushed down the steps of the stage, crossed over the front of the auditorium, went down the middle aisle and caught up with Mr. Mutooni near the back of the auditorium (depicted as X-2 on P-5a). According to Mr. Mutooni, Dr. Atallo was directly face to face with Mr. Mutooni, pointed his finger at Mr. Mutooni's face and said "if you ever mention my name again I will f--k you up." Mr. Mutooni indicated that he felt threatened and denied yelling at Dr. Atallo when he left the stage. Mr. Mutooni stated that Dr. Fulmore, along with Mr. Vancheri and Mr. Smith, came between them, after which Mr. Smith and Dr. Fulmore walked Mr. Mutooni out the door and Dr. Atallo was escorted back to the podium. Mr. Mutooni acknowledged providing prior testimony before the School Ethics Commission that Officer Sanchez, not Captain Smith, approached Dr. Atallo and Officer Sanchez pushed Dr. Atallo away.

Dr. Clancy testified that Dr. Atallo left the stage when the meeting was adjourning, approximately one and one half to two hours after Mr. Mutooni spoke at the microphone. Dr. Clancy, who was on the stage talking to another Board member, observed Dr. Atallo after he had left the stage. A member of the public, Mr. Vancheri, alerted Dr. Clancy's attention to the situation and requested Dr. Clancy to do something to stop it. Mr. Vancheri had jumped up and was heading over to the side of the auditorium. From Dr. Clancy's viewpoint on the stage, Dr. Atallo was going down the left side aisle, Mr. Mutooni was in the center aisle toward the back and a row of approximately ten to twenty chairs were

between them. Dr. Clancy testified that Dr. Atallo yelled out to Mr. Mutooni and said words to the effect that he was going to get Mr. Mutooni. Mr. Mutooni turned around, stopped in his exit and said words to the effect that he was not afraid and would see Dr. Atallo outside. Dr. Clancy signaled for security in the back of the auditorium. Security went down the aisle, security stopped Dr. Atallo from going any further and Mr. Mutooni was asked to leave out the back of the auditorium. Dr. Atallo then returned to the stage with the Board.

Mr. Vancheri testified that Dr. Atallo appeared aggravated by Mr. Mutooni's comments and Dr. Atallo left the stage, proceeding toward the back of the auditorium, a couple of minutes after Mr. Mutooni spoke at the microphone. Mr. Vancheri described that Dr. Atallo had that "look" and it was Mr. Vancheri's opinion that Dr. Atallo was going toward Mr. Mutooni. Mr. Vancheri was seated in the middle aisle with his wife. Mr. Vancheri went over to Dr. Atallo and stood in front of him. Mr. Vancheri did not hear Dr. Atallo say anything from the time when he left the stage to when Mr. Vancheri confronted him. At that point, Dr. Atallo and Mr. Vancheri were against the right wall (from the view facing the stage) around the middle area that separates the two sets of seats at approximately the thirteenth row. Mr. Mutooni was in the same right aisle but approximately twelve to fifteen rows back near the second set of seats. Mr. Vancheri asked Dr. Atallo where he was going and Dr. Atallo told Mr. Vancheri to get out of his way. Mr. Vancheri testified that he heard Dr. Atallo say "kick your ass," but stated that he did not pinpoint the person to whom the comment was directed. Mr. Vancheri also testified that he turned around after the comment and observed Mr. Mutooni. Dr. Atallo further told Mr. Vancheri that he was going to the restroom and Mr. Vancheri responded that he would go with him. Two security guards, and later Mr. Smith, approached them. Dr. Atallo left with Mr. Smith and later returned to the stage. Mr. Vancheri testified that Dr. Atallo was never in close proximity to Mr. Mutooni. Mr. Vancheri did not observe Dr. Atallo pointing his finger at Mr. Mutooni and threatening him.

Dr. Atallo testified that he was not offended by Mr. Mutooni's comments asking for his resignation and he did not respond or react to the comments while on the stage.

Dr. Atallo indicated that, approximately an hour and a half after Mr. Mutooni spoke, he left the stage to go to the restroom at the back of the auditorium. According to Dr. Atallo, he did not know the location of Mr. Mutooni when he left the stage. Dr. Atallo described that he was walking very slowly and did not get far when Mr. Vancheri ran over to him, asking where he was going. Dr. Atallo responded that he was going to the restroom and to get out of his way. Security then came over to Dr. Atallo and told him to wait at the location. Dr. Atallo testified that he heard a commotion in the back of the auditorium and observed Mr. Mutooni in the back waving his arms, speaking loudly and being escorted out. A police officer followed Dr. Atallo to the restroom, after which Dr. Atallo returned to the stage for the rest of the meeting. Dr. Atallo denied that he was ever face to face with Mr. Mutooni, pointed his finger and threatened him.

Lillian Sanchez has been employed by the Paterson Police Department for four years and worked security at the April 27, 2005 meeting. Officer Sanchez testified that she was situated around the middle of the auditorium, at approximately the twelve or thirteen row from the stage. Officer Sanchez indicated that, as individuals were leaving the auditorium, Mr. Mutooni started shouting abusive comments at Dr. Atallo, who was coming off the stage, and coercing Dr. Atallo to fight. Officer Sanchez testified that, from the viewpoint facing the stage, Dr. Atallo left the stage toward the right, walked across the front of the auditorium and went down the aisle toward the left. Officer Sanchez described that Dr. Atallo was walking with his head down, appeared embarrassed and at no time made any comments back to Mr. Mutooni. Officer Sanchez went over to Dr. Atallo because she was concerned about his well being. Dr. Atallo informed Officer Sanchez that he was fine and was going to the restroom. Officer Sanchez escorted Dr. Atallo to the restroom at the rear of the auditorium and then escorted Dr. Atallo back to the stage. By this point, Sergeant Garcia had escorted Mr. Mutooni out another door. Officer Sanchez stated that Mr. Mutooni and Dr. Atallo were never in close proximity to each other and approximately fifteen rows of chairs were between them. She disputed that they were face to face and that Dr. Atallo pointed his finger and made a threatening comment to Mr. Mutooni.

Mr. Spagnola was seated on the stage with the other Board members during the April 27, 2005 meeting. He did not recall Dr. Atallo make any comments from the stage to Mr. Mutooni. Mr. Spagnola testified that, approximately an hour to an hour and fifteen minutes after Mr. Mutooni spoke and in or around after the public session of the meeting, he observed Dr. Atallo leave the stage walking toward the back of the auditorium. From his viewpoint on the stage, Dr. Atallo walked down the left aisle against the wall. Mr. Spagnola observed Dr. Atallo toward the front of the auditorium past the side door (as depicted on R-4), at which point Mr. Vancheri ran over by Dr. Atallo. Mr. Mutooni was at the rear door of the auditorium (as depicted on R-4) "jumping up and down," pointing his finger at Dr. Atallo and "shadow boxing." Security went over by Mr. Mutooni. Dr. Atallo stayed in the same location by Mr. Vancheri until Mr. Mutooni was escorted out. Mr. Spagnola testified that he did not observe Dr. Atallo make any aggressive gestures, and did not hear Dr. Atallo make any comments, to Mr. Mutooni. Mr. Spagnola described that Dr. Atallo and Mr. Mutooni were never in close proximity to each other and disputed that Dr. Atallo was next to Mr. Mutooni, pointing his finger and threatening him.

Mr. Kyles testified that he did not observe Dr. Atallo, when he was on the stage, make any comments or gestures to Mr. Mutooni during or immediately following Mr. Mutooni's remarks at the microphone. Mr. Kyles was seated in the first row of the second bank of seats on the left or southwest side of the auditorium (as depicted on Ju-1). At one point, Mr. Kyles noticed a commotion around Mr. Mutooni, who was to the right of Mr. Kyles in the area depicted on Ju-1. Mr. Kyles described that Mr. Mutooni was making comments, had security/police near him and, seconds after Mr. Kyles heard the commotion, Mr. Mutooni was escorted out of the auditorium. Mr. Kyles testified that Dr. Atallo was not near the area of the commotion. After leaving the stage, Dr. Atallo walked in the direction of the right side door near the stage (as depicted on Ju-1) and was approached by one or two individuals including security. Mr. Kyles did not hear Dr. Atallo use profanity to Mr. Mutooni.

Ms. Taliaferro testified that she was seated in her regular seat at the April 27, 2005 meeting located in the front row to the far right and directly in front of Dr. Atallo. Ms. Taliaferro indicated that members of the public had an exchange of words with Mr. Mutooni by the podium, believing that his comments to Dr. Atallo were unwarranted. Ms. Taliaferro observed Dr. Atallo on the stage during Mr. Mutooni's comments and described that Dr. Atallo maintained his decorum at all times, acted like a gentleman and did not appear to be upset or aggravated by Mr. Mutooni's comments. Ms. Taliaferro stated that Mr. Mutooni was "very upset," but she was not sure whether it was with Dr. Atallo or the comments by the members of the public. Ms. Taliaferro testified that she observed Dr. Atallo leave the stage. Dr. Atallo greeted Ms. Taliaferro as he passed by her and said he was going to the men's room. Ms. Taliaferro kept Dr. Atallo in full view as he proceeded toward the men's room because she was concerned about his safety. Security also went to Dr. Atallo. Ms. Taliaferro observed Mr. Mutooni in the area around the back of the auditorium with security behind him. Ms. Taliaferro testified that she did not observe Dr. Atallo make any gestures, and did not hear him make any comments, after he left the stage.

Mr. Smith, the Executive Director of School Security, attended the April 27, 2005 meeting and appeared at the hearing pursuant to a subpoena. Mr. Smith observed Dr. Atallo on the stage during Mr. Mutooni's comments and described that Dr. Atallo did not respond verbally or by gestures to the comments. The meeting concluded a couple hours after the public portion. Shortly before the meeting ended, Mr. Smith was stationed at the rear of the auditorium discussing with security their assignments. Mrs. Vancheri (the wife of Mr. Vancheri), who was seated in the front of the auditorium, motioned and called to Mr. Smith that she needed assistance. Mr. Smith, who was approximately thirty yards from Dr. Atallo, observed that Dr. Atallo had left the stage, he appeared angry and he was walking down the right side aisle toward Mr. Mutooni. Mr. Smith described that Dr. Atallo was then at the ninth or tenth row of the first section in the right aisle walking toward the back. Mr. Mutooni was in the same aisle at the second group of rows toward the rear of the auditorium at approximately the thirty to thirty-fifth row and was walking toward the front. Mr. Smith walked over to Dr. Atallo

approximately ten to fifteen seconds after being alerted to the situation by Mrs. Vancheri. Dr. Fulmore walked over to Mr. Mutooni. At this point, Dr. Atallo was at approximately the twelve row, Mr. Mutooni was approximately ten to fifteen feet from Dr. Atallo and individuals were in between them. Mr. Smith relayed that, when he arrived in front of Dr. Atallo, Dr. Atallo stated that he was threatened by Mr. Mutooni. Mr. Smith instructed Security Guard Harris to stay with Dr. Atallo and went to speak to Mr. Mutooni, who appeared angry, stated he wanted to file a police report and left through the rear exit. Mr. Smith testified that Mr. Mutooni and Dr. Atallo were never face to face, Dr. Atallo did not point his finger at Mr. Mutooni and nothing physically occurred between them. Mr. Smith did not hear Dr. Atallo curse at Mr. Mutooni or threaten him.

LEGAL DISCUSSION

This proceeding arises under the School Ethics Act, N.J.S.A. 18A: 12-21 to -34. In adopting this enactment, the Legislature declared that "[i]n our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people," and that these individuals "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(a). The Legislature further found that, "[t]o ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them." N.J.S.A. 18A:12-22(b). In furtherance of these objectives, the Legislature enacted a statutory Code of Ethics for School Board Members to guide their conduct as well as ensure and preserve public confidence. N.J.S.A. 18A:12-24.1.

N.J.S.A. 18A:12-27 establishes a School Ethics Commission in the Department of Education consisting of gubernatorial appointees selected as representatives of local school boards, school administrators and the general public. An individual may file a complaint with the Commission alleging a violation of the School Ethics Act or the Code

of Ethics for School Board Members. N.J.S.A. 18A:12-29(a). After providing the charged school official an opportunity to respond, the Commission must decide by a majority vote whether probable cause exists to credit the allegations in the complaint. N.J.S.A. 18A:12-29(b). Should the Commission determine that probable cause exists, the matter is referred to the OAL for a hearing. Ibid. After the OAL has issued its initial decision, the Commission then determines whether the Act has been violated and, if so, recommends an appropriate sanction to the Commissioner of Education, which may include a reprimand, censure, suspension or removal of the school official. N.J.S.A. 18A:12-29(c).

Pertinent to the within matter, the Code of Ethics for School Board Members states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
>
> [N.J.S.A. 18A:12-24.1(e)]

The Commission has recognized that "board members do not surrender the rights that they have as citizens such as freedom of speech" due to their board membership but, in exercising those rights, a board member must comply with the standards set forth in the School Ethics Act. SEC Advisory Opinion, A02-06 (March 10, 2006). In the case of In the Matter of John Talty and Sharon Knight, Brick Township, Agency Dkt. Nos. C18-05 and C19-05, (January 24, 2006), Comm'r (March 1, 2006), aff'd, State Board (November 1, 2006), the Commission held that a board member violated N.J.S.A. 18A:12-24.1(e) when she took private action in confronting a community member in a verbal and physical matter regarding his comments during the public comment session at a board meeting. Specifically, the Commission found that "[t]he weight of the evidence shows that [the board member] approached [the community member] in an aggressive manner, screamed at him and threatened him," "made some type of physical contact with [the community member]" and the board member's actions "had an impact" on the community member who did "not feel comfortable speaking at Board meetings." The Commission reasoned "that such

aggressive actions had the potential to compromise the Board because the actions hurt the integrity of the Board and intimidated the public from coming forward and addressing the Board." See also In the Matter of Charles Fisher, Eatontown Bd. of Educ., Agency Docket No. C30-03 (February 24, 2004), Comm'r. (April 12, 2004) (finding board member who contacted a board employee at home, raised his voice and requested the employee to return to the office to obtain certain information violated N.J.S.A. 18A:12-24.1(e)). The Commission cites these cases in support of the conclusion that, if respondent threatened Dr. Clancy and/or Mr. Mutooni using profanity, such conduct constitutes a violation of N.J.S.A. 18A:12-24.1(e).

The Commission bears the burden of proving, by a preponderance of the credible evidence, that respondent engaged in conduct in violation of the Code of Ethics for School Board Members. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Delaware, Lackawanna and Western Railroad, 111 N.J.L. 487, 490 (E & A 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). "The evidence must demonstrate that the offered hypothesis is a rational inference, that it permits the triers of fact to arrive at a conclusion grounded in a preponderance of probabilities according to common experience." In the Matter of the Estate of Reininger, 388 N.J. Super. 289, 298 (Ch. Div. 2006). Stated differently, under the preponderance of the evidence standard, the party who shoulders the burden of proof must establish that the desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met. See Cvelich v. Erie Railroad Co., 120 N.J.L. 414 (Sup. Ct. 1938), aff'd. 122 N.J.L. 26 (E. & A. 1939), cert. den. 307 U.S. 633 (1939). Proofs that give equal support to two inconsistent inferences are insufficient. Id. at 416. And, the burden is not satisfied by mere guess or conjecture. Joseph v. Passaic Hospital Assoc., 26 N.J. 557, 575 (1958).

Since in this case no "personal promises" are involved, and the Commission does not contend that Dr. Atallo failed to "recognize that authority rests with the board," in order to prove a violation of N.J.S.A. 18A:12-24.1(e) the Commission must show that respondent took private action that had the potential to compromise the Board. The Commission contends that the evidence presented at the hearing establishes that respondent violated N.J.S.A. 18A:12-24.1(e) by threatening Dr. Clancy and Mr. Mutooni at the two meetings. Respondent maintains that the Commission has failed to sustain its burden of proof as to both charges warranting dismissal. Respondent further argues that, inasmuch as the April 5, 2005 public forum was not a Board meeting, it falls outside the realm of the statute which requires private action that may compromise the Board.

ANALYSIS AND CONCLUSIONS

The initial inquiry to be addressed is whether the proofs establish, by a preponderance of credible evidence, the conduct which forms the foundation for the alleged violations; namely, that Dr. Atallo threatened Dr. Clancy and/or Mr. Mutooni using profanity. Obviously, if the answer is in the negative, the charges against Dr. Atallo should be dismissed. Should the alleged conduct be established, the determination must then be made as to whether Dr. Atallo's conduct had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e). In view of the divergent accounts surrounding the events that transpired on April 5 and April 27, 2005, it is necessary for the undersigned to assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts.

Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t must be such as the common experience and observation of mankind can approve

as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-522. See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp. 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), certif. denied., 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Community Affairs Department, 182 N.J. Super. 415, 421 (App. Div. 1981).

In evaluating the evidence regarding the April 5, 2005 public forum, the only direct evidence to support the allegation consists of Dr. Clancy's testimony. No eyewitness was presented to corroborate the alleged threat by Dr. Atallo. Although Mr. Vancheri testified that he observed a discussion, debate or confrontation between Dr. Clancy and Dr. Atallo, this evidence falls significantly short of proof that Dr. Atallo threatened Dr. Clancy using profanity. Indeed, Dr. Atallo fully acknowledged being upset with Dr. Clancy for shutting off the microphone and expressing his displeasure to Dr. Clancy from the stage. In addition, the Commission offered no witness or documentary evidence, such as security personnel or logs, to corroborate Dr. Clancy's assertion that he summoned security after the alleged threat. And, none of the other witnesses who attended the meeting observed any such security in the vicinity of Dr. Atallo. Mr. Smith also credibly testified that, as the head of security, he was never advised by his staff of an incident involving Dr. Clancy. Beyond this, the strength of Dr. Clancy's testimony was, in the undersigned's view, significantly impaired by his failure to

report or take any action regarding the alleged incident prior to his letter to the Commissioner more than a month later.

Succinctly stated, the undersigned found Dr. Clancy's testimony to be overborne by the testimony of the members of the community who attended the meeting. These witnesses, who have no direct sake in the outcome of this proceeding, presented consistent testimony, which the undersigned found to be credible, that they observed Dr. Atallo leave the stage, he had no interaction with Dr. Clancy after he left the stage and no security guards approached Dr. Atallo. This evidence corroborates Dr. Atallo's rendition of the events after he left the stage, which the undersigned found believable and persuasive.

Based upon a consideration of the totality of the evidence, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **CONCLUDE** that there is insufficient credible evidence to support the allegation that Dr. Atallo threatened Dr. Clancy using profanity on April 5, 2005. Based upon the foregoing, I **CONCLUDE** that the Commission has failed to satisfy its burden of proving, by a preponderance of credible evidence, that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) by threatening Dr. Clancy using profanity. Accordingly, I **CONCLUDE** that this allegation should, therefore, be dismissed.

Turning to the meeting on April 27, 2005, the testimony of the various witnesses differed in a number of significant respects. Overall, the undersigned found that the various witnesses espoused irreconcilable accounts with regard to exactly what happened, including such facts as where Dr. Atallo and Mr. Mutooni were situated, their proximity to each other, the statements (if any) that were made and the timeframe and sequence of events. Indeed, the Commission's own witnesses offered contradictory versions as to when Dr. Atallo left the stage, the path taken by him and the words allegedly said. For example, although Mr. Mutooni estimated that Dr. Atallo left the stage approximately an hour after his comments, Dr. Clancy stated that it occurred approximately one and one half to two hours later, whereas Mr. Vancheri testified that

Dr. Atallo left the stage a couple of minutes after Mr. Mutooni spoke. Similarly, the witnesses did not agree on the route taken by Dr. Atallo when he left the stage and his location vis-à-vis Mr. Mutooni. Although Dr. Clancy and Mr. Vancheri consistently described that Dr. Atallo walked down the right aisle of the auditorium (from the viewpoint facing the stage), Dr. Clancy situated Mr. Mutooni in a different aisle than Dr. Atallo whereas Mr. Vancheri testified that they were in the same aisle with approximately twelve to fifteen rows between them. In contrast, Mr. Mutooni articulated an entirely different route taken by Dr. Atallo (i.e. Dr. Atallo crossed over in front of the stage and walked down the middle aisle) and that Dr. Atallo threatened him when they were both in the middle aisle toward the back of the auditorium. The Commission's witnesses also presented conflicting testimony as to the statements made during the encounter.

In short, the undersigned found the testimony presented by the Commission's witnesses regarding the specific events that transpired on April 27, 2005 to be inherently inconsistent and at variance with the renditions offered by respondent's witnesses. A canvas of the testimony as a whole casts doubt on the accuracy and reliability of certain witnesses' recollection and version of the alleged incident. The undersigned places limited weight on Mr. Mutooni's account, which was discredited in significant respects by all of the other witnesses. Mr. Mutooni's testimony that Dr. Atallo threatened him when they were directly face to face and pointed his finger at Mr. Mutooni is contrary to, and overborne by, the testimony of all of the other witnesses. Except for Mr. Mutooni, all witnesses agreed that Mr. Mutooni and Dr. Atallo were never in close proximity to each other and that Dr. Atallo did not point his finger in Mr. Mutooni's face. Additionally, apart from Mr. Mutooni, no other witness situated Dr. Atallo near the back of the auditorium. Similarly, the path taken by Dr. Atallo after he left the stage, as described by Mr. Mutooni, cannot be reconciled with that presented by the other witnesses, who generally consistently testified that Dr. Atallo walked down the right side aisle where he was stopped by Mr. Vancheri and security prior to reaching near the back of the auditorium.

The testimony of Dr. Clancy on behalf of the Commission, as well as respondent's witnesses, further undermines the strength of Mr. Mutooni's testimony that he made no gestures or comments to Dr. Atallo. Dr. Clancy testified that he heard Mr. Mutooni make a comment to Dr. Atallo about seeing him outside. Mr. Spagnola indicated that he observed Mr. Mutooni in the back of the auditorium jumping around in a fighting stance. Officer Sanchez stated that she went over to Dr. Atallo, not to stop him from being the aggressor, but because she was concerned about his well being. Ms. Taliaferro similarly articulated her concerns for Dr. Atallo's safety. And, Mr. Kyles attention that night was directed to a commotion involving Mr. Mutooni.

Apart from this, the Commission's witnesses did not corroborate the alleged threat set forth in Mr. Mutooni's complaint and detailed by him at the hearing. Although Dr. Clancy, who was on the stage at the time, testified that Dr. Atallo yelled out a different comment to Mr. Mutooni, Mr. Spagnola, who was also on the stage, along with Ms. Taliaferro who was directly in front of the stage, consistently testified that they heard no comments on the part of Dr. Atallo to Mr. Mutooni. Likewise, Mr. Vancheri, who it appears was in closer proximity to Dr. Atallo than Dr. Clancy, testified that he heard Dr. Atallo make no comments from the time he left the stage to when Mr. Vancheri approached him. Although Mr. Vancheri relayed an entirely different comment later made by Dr. Atallo, his testimony did not directly link the comment to Mr. Mutooni, who Mr. Vancheri acknowledged was not in close proximity to Dr. Atallo.

In support of the allegations, the Commission's post-hearing submission relies on the report prepared by Security Guard Harris and Mr. Smith's report reciting Mrs. Vancheri's account of the incident. No formal report authored by Mrs. Vancheri was introduced and Mrs. Vancheri was not called as a witness. The security guard also did not testify at the hearing. Mr. Smith further credibly described the security guard's report as a "preliminary" report and that Mr. Smith would have taken additional measures regarding the report, such as interviewing the security guard, had Mr. Smith continued with the investigation after Dr. Clancy became actively involved in the investigation.

Plainly, the statements attributed to Mrs. Vancheri and the security guard are hearsay. Hearsay evidence is admissible in administrative proceedings and "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and generally, its reliability." N.J.A.C. 1:1-15.5(a). Notwithstanding its admissibility, the residuum rule requires that "some legally competent evidence must exist to support each ultimate findings of fact to an extent sufficient to provide assurance of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). In other words, "a fact finding or legal determination cannot be based on hearsay alone" and, "in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." Weston v. State, 60 N.J. 36, 51 (1972). The undersigned is further permitted to draw an adverse inference from the fact that neither Mrs. Vancheri nor the security guard testified at the hearing to support the statements attributed to them.

In sum, the undersigned places limited weight on this hearsay evidence. For the reasons hereinbefore detailed, the undersigned finds that this hearsay evidence does not add probative force to Mr. Mutooni's testimony. Further, due to the failure to produce the individuals as witnesses, the undersigned is unable to assess the credibility and the reliability of their alleged reported observations. Similarly, the undersigned places limited weight on the comment captured on the videotape. Since the individual who made the comment did not testify at the hearing, the undersigned cannot evaluate the observations that formed the basis for the board member's belief that Dr. Atallo was going after Mr. Mutooni.

For their part, the witnesses who testified on behalf of respondent did not support the allegations against Dr. Atallo. The undersigned does not embrace the Commission's stance that respondent's witnesses were not in close proximity when the incident occurred and their testimony was unreliable. Unlike Dr. Atallo and Mr. Mutooni, who are principle actors in the scenario, the various community members, along with Officer

Sanchez and Mr. Smith, have no vested interest in the outcome of this proceeding. These witnesses presented consistent and sincere testimony that they observed no threatening gestures and/or heard no remarks by Dr. Atallo to Mr. Mutooni. Indeed, Officer Sanchez testified that she escorted Dr. Atallo to the restroom, which Dr. Atallo testified, and stated on April 27, 2005, was his intended purpose for leaving the stage. While the undersigned found Mr. Vancheri to be a credible witness, and does not doubt the sincerity of his belief that Dr. Atallo appeared to be going toward Mr. Mutooni, the totality of the evidence fails to establish, by a preponderance of credible and competent evidence, that Dr. Atallo threatened Mr. Mutooni by words or actions after he left the stage. At best, the proofs regarding Dr. Atallo's conduct after leaving the stage are in equipoise and, thus, are insufficient to satisfy the Commission's burden. Cvelich, supra.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I make the following additional **FINDINGS OF FACT:**

On April 27, 2005, Dr. Atallo left the stage after a motion had been made to close the public session and during a board member's closing comments. Dr. Atallo left the stage a significant time period after Mr. Mutooni's comments. Dr. Atallo walked down the right aisle closest to his seat and toward the back of the auditorium. This route was in the direction of Mr. Mutooni who, it appears, was toward the back of the auditorium. Mr. Vancheri, and apparently others at the meeting, perceived that Dr. Atallo was going toward Mr. Mutooni. Mr. Vancheri stopped Dr. Atallo to avert any encounter and before Dr. Atallo was in close proximity to Mr. Mutooni. At no time were Dr. Atallo and Mr. Mutooni in close proximity to each other. Dr. Atallo did not point his finger at Mr. Mutooni and there was no physical contact between them. A preponderance of the credible evidence falls short of establishing any specific statements that may have been made by either Dr. Atallo or Mr. Mutooni. There is also insufficient evidence establishing, by a preponderance of credible evidence, that Dr. Atallo threatened Mr. Mutooni by words or actions on April 27, 2005.

The Commission must show, by a preponderance of the credible evidence, that respondent breached his ethical duties by taking private action that had the potential to compromise the Board. Based upon the aforesaid findings of fact, this has not been done in this case. Accordingly, I **CONCLUDE** that the Commission has failed to establish, by a preponderance of credible evidence, that Dr. Atallo violated N.J.S.A. 18A:12-24.1(e) by threatening Mr. Mutooni using profanity and the allegation against respondent should, therefore, be dismissed.

ORDER

It is **ORDERED** that the findings of probable cause to credit the allegations that respondent violated N.J.S.A. 18A:12-24.1(e) based upon his conduct on April 5 and 27, 2005 are hereby **DISMISSED.**

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education

may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, PO Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 2007
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ
Receipt Acknowledged:

3-29-07
DATE

UPS
SCHOOL ETHICS COMMISSION
Mailed to Parties:

APR 2 2007
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMININSTRATIVE LAW

db

APPENDIX

List of Witnesses

For Petitioner:

Dennis Clancy
Fredrick Mutooni
Anthony Vancheri
Karl Feltes

For Respondent:

James Smith
Lillian Sanchez
Lawrence Spagnola
Theodore Kyles
Anna Taliaferro
Joseph Atallo

List of Exhibits in Evidence

Judge's Exhibits

Ju-1 Diagram

Joint Exhibits:

J-1 Complaint by Ray Montgomery, dated September 6, 2005 (4 pp)

For Petitioner:

P-1 Letter from Dennis J. Clancy, Ed.D. to Dr. William L. Librera, dated May 6, 2005 (2 pp)

P-1(a) Memorandum from James Smith to Dr. Dennis Clancy, dated May 3, 2005 (2 pp)

P-1(b) Supplemental Incident Report of Security Officer R. Harris

P-1(c) Paterson Police Department Offense Report, dated April 29, 2005 (3 pp)

P-1(d) Report from Anthony Vancheri to Dr. Dennis J. Clancy, dated May 3, 2005

P-2 Minutes of the Paterson Board of Education Organization Meeting, April 27, 2005 (2 pp)

P-3 Videotape

P-4 Complaint by Fredrick Mutooni, dated May 3, 2005 (3 pp)

P-5(a) Sketch map of JFK auditorium

P-6 Letter from Linda G. Smith to Dr. William Librera, dated May 2, 2005 (2 pp)

P-7 Not in Evidence

P-8 Not in Evidence

P-9 Not in Evidence

For Respondent:

R-1 Videotape

R-2 Memorandum from William L. Librera to Ray Montgomery, dated May 18, 2005

R-3 Not in Evidence

R-4 Diagram

425-07

IN THE MATTER OF THE TENURE HEARING OF GREGORY HOWARD, TRENTON SCHOOL DISTRICT, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board filed tenure charges of excessive absenteeism, excessive tardiness and abandonment of position against respondent, a tenured mathematics teacher, and sought his removal from employment in the Trenton School District. Respondent failed to file an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant removal of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the Board, ordered respondent dismissed from his tenured position, and transmitted the matter to the State Board of Examiners for action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 26, 2007

AGENCY DKT. NO. 284-10/07

IN THE MATTER OF THE TENURE HEARING OF GREGORY HOWARD, TRENTON SCHOOL DISTRICT, MERCER COUNTY.	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Thomas W. Sumners, Jr., Esq. (Sumners George, attorneys)

No appearance by or on behalf of Respondent, Gregory Howard

This matter was opened before the Commissioner of Education on October 1, 2007 by way of a verified petition against respondent, a teacher in petitioner's district. Petitioner seeks respondent's removal for excessive absenteeism, excessive tardiness and abandonment of position.

By notice dated October 1, 2007, the Bureau of Controversies and Disputes (the Bureau) directed respondent to file an answer to the petition. The notice was sent to 1728 Mulford Street, Camden, NJ – purportedly the last known address for respondent – via certified and regular mail. The notice that was sent by regular mail was returned, marked "ATTEMPTED – NOT KNOWN – UNABLE TO FORWARD."

The communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are filed shall have 15 days from receipt of the petition to file an answer. The Bureau has received neither an answer to the petition from the respondent nor from any attorney purporting to represent respondent.

The Commissioner concludes that the allegations – which respondent has chosen not to deny – may be deemed admitted, pursuant to *N.J.A.C.* 6A:3-5.4(h), and are sufficient to warrant removal of respondent from his tenured position as teacher of mathematics.

IT IS THEREFORE ORDERED that summary decision shall be granted to the petitioner, and that respondent is dismissed from his tenured position in the district's employ as of the date of the within decision.[1] This matter shall be transmitted to the State Board of Examiners for action – as that body deems appropriate – against respondent's certificate, in accordance with *N.J.A.C.* 6A:9-17.6(a)1.

COMMISSIONER OF EDUCATION

Date of Decision: 10/26/07

Date of Mailing: 10/29/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

426-07

OAL DKT. NO. EDU 1123-06
AGENCY DKT. NO. 331-11/05

TOM SETTEMBRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/29/07

Date of Mailing: 10/29/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01123-06

AGENCY DKT. NO. 331-11/05

TOM SETTEMBRE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Mark S. Tabenkin, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: September 11, 2007 Decided: September 12, 2007

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 6, 2006, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled on February 7, 2008. Prior to the date of hearing the parties settled the matter. The attached Settlement Agreement and Release were submitted on September 11, 2007, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Sept. 12, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 9-17-07

Mailed to Parties:

SEP 17 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 14 P 2:

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter the "Agreement") is entered into this _____ day of August, 2007, by and between the **BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY** (the "Board of Education"), with its principal place of business located at 1115 Clinton Street, Hoboken, New Jersey, and **THOMAS SETTEMBRE** ("Settembre"), residing at 171 Stover Avenue, North Arlington, New Jersey 07031.

WHEREAS on or about June 30, 1998, the Board of Education conducted a reduction in force among tenured teachers of art employed by the Board of Education; and

WHEREAS as a result of said reduction in force, Settembre's employment by the Board of Education was terminated; and

WHEREAS in November 2005, Settembre filed a Petition of Appeal with the Commissioner of Education of the State of New Jersey (OAL Docket No. EDUOR 1123-2006N), alleging, among other things, that his tenure and seniority rights had been violated because certain other teachers with less seniority than he had been offered positions as a Teacher of Art instead of him for the 2005-2006 school year; and

WHEREAS the Board of Education has denied that Settembre'e tenure or seniority rights have been violated; and

WHEREAS the Board of Education subsequently recalled Settembre to a position as a Teacher of Art for the 2006-2007 school year; and

WHEREAS the Board of Education and Settembre now wish to resolve any outstanding issues between them with respect to this matter amicably and without the need for further litigation.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein, the Board of Education and Settembre agree as follows:

1. TERMS

a. The Board of Education shall credit Settembre with fifteen (15) days of sick leave for the 2005-2006 school year.

b. Settembre agrees to withdraw, with prejudice, his Petition of Appeal filed with the Commissioner of Education of New Jersey identified as Agency Reference Number 331-11/05 and the matter before the Office of Administrative Law identified as OAL Docket Number EDUOR 01123-2006N. In the event that any other claim, charge, complaint, grievance or any other action of any nature has been filed by Settembre against the Board of Education, its officers, trustees, agents, employees, successors, or assigns, on account of or arising out of the Board of Education's failure to recall Settembre to a position as a Teacher of Art for the 2005-2006 school year, Settembre agrees to cause its immediate dismissal with prejudice.

2. COMPLETE RELEASE

Settembre and his heirs, assigns and agents, in consideration of the action described in paragraph 1 of this Agreement, hereby releases the Board of Education, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees"), from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character or description, known or unknown, that Settembre had, now has, or may

in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement, including, but not limited to, the Board of Education's failure to recall Settembre to a position as a Teacher of Art for the 2005-2006 school year. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts including, but not limited to:

i. claims arising out of or under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., which, among other things, prohibits retaliatory action against an employee under certain specified conditions;

ii. claims arising out of or under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("LAD"), which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States;

iii. claims arising out of or under the Education Law, Title 18A, N.J.S.A.;

iv. claims arising out of or under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.;

v. claims arising out of or under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin;

vi. claims arising out of or under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. ("ADEA"), which, among other things, prohibits discrimination in employment on account of a person's age;

vii. claims arising out of or under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq. ("ADA"), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap;

viii. claims arising out of or under the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. § 2601 et seq. ("FMLA"), which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

ix. claims arising out of or under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 et seq., which, among other things, prohibits discrimination in employment by federal contractors against individuals with disabilities;

x. claims arising out of or under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute; and

xi. claims arising out of or under the Older Workers Benefit Protection Act, 29 U.S.C. 621 et seq. ("OWBPA"), which, among other things, amends

provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

The Board of Education, and its heirs, assigns and agents, in consideration of the benefits described in paragraph 1 of this Agreement, hereby releases Settembre from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character or description, that the Board of Education had, now has, or may in the future have against Settembre on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement, including, but not limited to, the Board of Education's failure to recall Settembre to a position as a Teacher of Art for the 2005-2006 school year.

Settembre has not filed and shall not hereafter file any claim, charge or complaint of any nature with the New Jersey Division on Civil Rights, the United States Equal Employment Opportunity Commission ("EEOC") or with any federal, state or local court or agency against the Board of Education or the Releasees concerning the Board of Education's failure to recall Settembre to a position as a Teacher of Art for the 2005-2006 school year. If Settembre violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, then the terms set forth in paragraph 1 of this Agreement, above, shall immediately be rendered null and void, and of no effect. Additionally, if Settembre violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, Settembre agrees to the immediate sick leave days credited pursuant to paragraph 1 above and to pay all costs and expenses of defending against the suit incurred by the Board of Education and/or the Releasees, including reasonable attorneys' fees.

3. NO DISPARAGING STATEMENTS

Settembre agrees that he will not make any statement(s) that has, have, or can be expected to have the effect of disparaging the Board of Education, and/or its employees or agents. The Board of Education agrees that it will not make any statement(s) that has, have, or can be expected to have the effect of disparaging Settembre.

4. NON-ADMISSION OF LIABILITY

This Agreement is executed and all consideration is given in final settlement of disputed claims. This Agreement shall not be construed as an admission of any allegation or of liability by the Board of Education or the Releasees, by whom any such obligation or liability is expressly denied.

5. CONFIDENTIALITY

It is the intention of the parties that the terms and conditions of this Agreement shall be kept confidential to the extent permitted by law. Neither Settembre nor the Board of Education shall take any action to publicize the fact of settlement or the terms and conditions of this Agreement. Notwithstanding any of the foregoing, the parties recognize that the Board of Education may be required to reveal the terms and conditions of this Agreement pursuant to a request by a third party under the Right to Know Law.

6. CONSULTATION WITH ATTORNEY

Settembre has had an opportunity to consult with his attorney with respect to this Agreement, and to review with his attorney all the terms and conditions of this Agreement before signing this Agreement.

7. REASONABLE PERIOD OF TIME

Settembre agrees that he has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement before signing this Agreement, but he may waive this 21-day period by signing in the space provided at the end of this Agreement.

8. COMPLETE AGREEMENT

This Agreement contains the entire agreement between Settembre and the Board of Education with respect to the subject matter, and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Board of Education to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of New Jersey.

9. MODIFICATION

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. SEVERABILITY

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

11. SETTEMBRE ATTESTS

Settembre represents and warrants that he has carefully read each and every provision of this Agreement, and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Settembre represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to, the Board of Education and the Releasees.

12. REVOCATION

Settembre may revoke this Agreement within seven (7) days after the date this Agreement is signed by Settembre. This revocation must take the form of written notice by Settembre that he intends to revoke this Agreement. This revocation must be provided directly to the Board of Education, c/o Mark S. Tabenkin, Esq., Scarinci & Hollenbeck, LLC, 1100 Valley Brook Avenue, P.O. Box 790, Lyndhurst, NJ 07071-0790. This seven (7) day revocation period may not be waived by Settembre.

13. APPROVALS

This Agreement must be signed/executed by all parties and their representative as indicated below and further must be approved by the Administrative Law Judge and the Commissioner of Education before it shall go into effect. In the event that the Agreement is not fully executed and/or it is disapproved, the Agreement shall be null and void.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Thomas Settembre, executed the foregoing Agreement this 4 day of ~~August~~ September, 2007.

THOMAS SETTEMBRE

Sworn and Subscribed to before me
this 4 day of ~~August~~ September, 2007.

Notary Public
State of New Jersey

GILBERTO A. GARCIA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 17, 2012

ON BEHALF OF THOMAS SETTEMBRE

By _____
NANCY I. OXFELD, ESQ.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN

By _____

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 day period referred to in the 7th recital on page 7 of this Agreement.

THOMAS SETTEMBRE

DATED: ~~August~~ September 4, 2007

429-07

429-07R

OAL DKT. NO. EDU 1362-07
(EDU 13138-05 ON REMAND)
AGENCY DKT. NO. 254-9/05

LYDIA BECKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ELYSIAN CHARTER SCHOOL, HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the "Settlement Agreement on Remand" (Settlement), respondent's board resolution authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the terms of the settlement, as revised on remand, and adopts same as the final decision in this matter, with the following modifications:

First, turning to Item #4 of the settlement wherein the parties agree that "[t]he OAL shall be empowered to enforce the terms of this Agreement," the Commissioner clarifies that the OAL is not a "Court" within the judicial branch, but rather an executive branch agency charged with the responsibility, *inter alia*, of conducting administrative hearings of controverted matters for the state agencies. Litigants do not apply directly to the OAL for a hearing; rather, state agencies transmit contested cases to the OAL, which then conducts hearings, prepares initial decisions and transmits the matters back to the agencies for review. Upon the filing of an initial decision with the transmitting agency, such as has occurred herein, pursuant to *N.J.A.C.* 1:1-18.1(g), the OAL relinquishes jurisdiction over the case. Moreover, as a general

rule, applications for enforcement of Commissioner's decisions, including approved settlement agreements, are taken to Superior Court.[1] In that the OAL cannot be bound by the provision agreed to by the parties in Item #4 of the within Settlement Agreement, Item #4 is, therefore, a nullity.

Second, Item #1 of the settlement required that $50,000 be paid to petitioner "within 35 days of June 26, 2006," a date that was 14 months before the Settlement was signed (and ratified) by all parties, and 15 months before consideration by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same. The Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already effectuated the settlement terms, or have agreed upon a mutually satisfactory alternative date for payment to petitioner of the $50,000.

Accordingly, the Settlement, modified as described above, is adopted as the final decision and the matter is dismissed – with prejudice – subject to compliance with the terms of the Settlement.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/07

Date of Mailing: 10/30/07

[1] An exception would be in matters where there is a school law issue which requires the Commissioner's education expertise in the examination of factual circumstances.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1362-07

AGENCY DKT. NO. 254-9/05

(Remand EDU 13138-05)

LYDIA BECKER,

Petitioner,

v.

ELYSIAN CHARTER SCHOOL,

HUDSON COUNTY,

Respondent.

Ty Hyderally, Esq., for petitioner

Rita F. Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: September 18, 2007 Decided: September 19, 2007

BEFORE **BARRY N. FRANK**, ALJ:

This matter was remanded to the Office of Administrative Law ("OAL") from the Department of Education on January 12, 2007, for revision of the settlement agreement bearing OAL Dkt. No. EDU 13138-05 or for further proceedings. The parties agreed to make revisions to the settlement.

The parties have submitted a revised Settlement Agreement as well as the Board's Resolution approving the settlement, as set forth in the attached documents.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 19, 2007
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

Date Received at Agency:

SEP 24 2007
DATE

9-24-07
Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PURCELL, RIES, SHANNON, MULCAHY & O'NEILL
One Pluckemin Way
Crossroads Business Center
P.O. Box 754
Bedminster, NJ 07921
(908) 658-3800
Attorneys for Defendant, Elysian Charter School
Our File No. (303) 17204-H/RFB

LYDIA BECKER, Petitioner(s), v. ELYSIAN CHARTER SCHOOL, HUDSON COUNTY, Respondent(s).	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY OAL Docket No. EDUOR 13138-2005N OAL Docket No. on Remand EDUOR 1362-2007N **SETTLEMENT AGREEMENT ON REMAND**

The parties agree to the following terms as a resolution of this matter.

1. ECS shall pay Lydia Becker $50,000 within 35 days of June 26, 2006.

2. ECS agrees that if it receives a job inquiry for Becker from a potential employer, it will confine its response to confirming the dates of her employment and job title. ECS shall state that it is their policy to not give out any additional information and no negative inference shall be drawn from the limitations imposed by school policy.

3. This Agreement reflects the fact that Becker shall withdraw her tenure claims with prejudice presently pending before the OAL at No. EDUOR 13138-2005N and EDUOR 1362-2007N. Therefore, no further claim shall be made by Becker, to a job entitlement based on an argument that Becker had tenure or based upon the tenure statute.

4. The OAL shall be empowered to enforce the terms of his Agreement.

5. This Agreement shall be subject to board resolution.

The parties voluntarily enter into this Agreement after having ample opportunity to consult with attorneys of their choosing.

LYDIA BECKER
Petitioner

Dated: 2/16/07

ELYSIAN CHARTER SCHOOL
Respondent
By: Steven Feinstern, Its Board Chair
Dated: 3.12.07

Elysian
Charter School of Hoboken

301 Garden Street -- Hoboken, NJ -- 07030
phone: (201) 876-0102 fax: (201) 876-9675 website: ecsnj.org

BOARD RESOLUTION

BE IT HEREBY RESOLVED:

that the Board of Trustees of the Elysian Charter School of Hoboken hereby APPROVE the Settlement Agreement on Remand, dated March 12, 2007, between Lydia Becker and the Elysian Charter School under OAL Docket Number On Remand EDUOR 1362-2007N

Record of Vote:

Ayes: 8
Nays: 0
Abstentions: 0

I, Robert Sinnott, Business Administrator/Board Secretary of the Board of Trustees of the Elysian Charter School hereby certify that the above abstract from the minutes of the September 17, 2007, Regular Meeting for the Elysian Charter School to be a true and accurate copy of the official minutes of the meeting:

Robert Sinnott, Board Secretary
Elysian Charter School Board of Trustees

Dated: 9-18-07

428-07

OAL DKT. NO. EDU 10466-06
AGENCY DKT. NO. 299-9/06

SALVADORE DIBELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Agreement and Stipulation of Settlement (Agreement), Stipulation of Dismissal, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that neither the file nor the Agreement contains exhibits A through C to the Agreement, and the Agreement is neither signed by the board's attorney, who is the Board's duly authorized representative in litigation, nor authorized by a board resolution. Further, respondent has not executed the Stipulation of Dismissal. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement to include its exhibits and either the Board attorney's signature or a Board resolution approving the settlement and designating who may sign it on behalf of respondent. The Commissioner also directs the parties to ensure that the Stipulation of Dismissal

is fully executed. If the parties are unwilling or unable to effectuate the requested revisions, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/07

Date of Mailing: 10/30/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10466-06

AGENCY DOCKET NO. 299-9/06

SALVATORE DIBELLA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq. appearing on behalf of petitioner
(Springstead & Maurice)

Heather Marcalus, Esq., appearing on behalf of respondent
(Fogarty & Hara)

Record Closed: September 14, 2007 Decided: September 14, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 12, 2006 for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone conference was conducted on December 13, 2006 at which time the parties agreed to a hearing date of January 23, 2007. The January 23, 2007 hearing was adjourned and rescheduled to February 14, 2007 however, prior to the date of the hearing the parties advised that they reached a tentative

settlement and requested an adjournment. The matter was then scheduled for a telephone status conference on June 19, 2007 at which time they advised the undersigned that the Board approved the settlement but there were still some language issues that needed to be resolved. On September 14, 2007 the undersigned received the fully executed settlement and a Stipulation of Dismissal, and the record closed that day.

Having reviewed the contents of the attached Stipulation of Settlement, and Board of Education Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 14, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 9-19-07

Mailed to Parties:

SEP 19 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Respondent,
Bergenfield Board of Education
Our File No. 114

SALVATORE DiBELLA,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	
v.	:	OAL Dkt. No. EDU 10466-2006N
	:	Agency Ref. No. 299-9/06
BERGENFIELD BOARD OF EDUCATION	:	
	:	AGREEMENT AND
Respondent.	:	STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Bergenfield Board of Education (hereinafter referred to as the "Board"), and Salvatore DiBella (hereinafter referred to as "DiBella"), (hereinafter collectively referred to as the "Parties").

WHEREAS, DiBella has been employed by the Board as a teaching staff member since on or about September 1, 1996 and has obtained tenure in that position; and

WHEREAS, certain employment issues have arisen giving rise to DiBella filing a Petition of Appeal under the above docket number with the Commissioner of Education; and

WHEREAS, the Parties find it to be in their best interests to reach an amicable resolution so as to avoid the time and expense associated with litigation.

NOW, THEREFORE, in consideration of the promises and mutual covenants, understandings and mutual agreements contained in this Stipulation of Settlement, it is hereby agreed by and between the Board and DiBella as follows:

1. DiBella shall immediately resign from all employment with the Board, together with all tenure and seniority rights, effective June 30, 2009, subject only to the approval of this Stipulation of Settlement by the Board.

2. DiBella submits his resignation knowingly, voluntarily and irrevocably, free of concern or duress, after consulting with a representative of his choosing and receiving advice as to its ramifications. DiBella shall sign an irrevocable letter of resignation from all employment with the Board in the form attached hereto as Exhibit A.

3. The Board, by Resolution, shall publicly accept the resignation of DiBella. The form of the Board Resolution is attached hereto as Exhibit B.

4. Until the effective date of his resignation, or June 30, 2009, DiBella shall continue to serve as a teaching staff member for the Board, and receive the salary and benefits associated with such employment, except as modified by the terms of this Agreement, and except to the extent that DiBella is lawfully precluded from performing the duties associated with said position by any judgment, order or direction of any court of competent jurisdiction or the Commissioner of Education, in which case his employment, as well as his receipt of salary and benefits, shall immediately cease. Nothing contained in this paragraph, however, shall in any way prohibit the Board from taking appropriate action with respect to DiBella in accordance with N.J.S.A. 18A:6-8.3 and/or N.J.S.A. 18A:6-10 et seq..

5. Nothing contained herein shall be construed to restrict the Board's right to assign and/or transfer DiBella to any teaching staff position within the Bergenfield School District for which he is appropriately certificated. It is expressly agreed that any such assignment and/or transfer

shall not be considered disciplinary under N.J.S.A. 34:13A-25 or N.J.S.A. 34:13A-27.

6. DiBella specifically releases all claims which were or could have been asserted by, or on behalf of, him in the instant action, and, upon full execution of this Agreement by the Parties, shall immediately withdraw, with prejudice, all claims asserted in his Verified Petition of Appeal bearing OAL Docket No. EDU 10466-2006N.

7. Subject to the terms of this Stipulation of Settlement, DiBella's employment and adjustment increments shall be withheld for the 2006-2007 and 2007-2008 school years, without further action required on the part of the Board. DiBella specifically releases all claims which could be asserted by, or on behalf of, him with respect to these withholdings. Said increments may, however, be restored in accordance with the provisions of paragraph 10 herein.

8. DiBella hereby waives any and all claims he has, or could have, against the Board, its agents, employees, and representatives, including, but not limited to claims for discrimination, contract, tort, constitutional violations and/or attorneys' fees.

DiBella shall execute a General Release in favor of the Board, its agents, employees, and

representatives, releasing them from any and all claims, liabilities or expenses to which they may be subject arising from any claims or rights of DiBella, except to the extent that such waiver is expressly prohibited by law. The form of this General Release is attached hereto as Exhibit C.

9. Nothing in this Stipulation of Settlement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Stipulation of Settlement should there be a default in performance.

10. In consideration for DiBella's immediate resignation effective June 30, 2009, as provided in paragraph 1, 2 and 3 herein, the withdrawal with prejudice of the Verified Petition of Appeal bearing OAL Docket No. EDU 10466-2006N, as provided in paragraph 6 herein, as well furnishing of the release referenced in paragraph 8 herein, on or about May 15, 2009, the Board shall restore DiBella's employment and adjustment increments for the 2006-2007 and 2007-2008 school years. It is expressly agreed that any such restoration shall be wholly contingent upon DiBella's satisfactory completion of his employment obligations, which shall include, but not be limited to, upholding the professional standards and responsibilities of a public school teacher within the

Bergenfield School District, as well as satisfactorily and consistently fulfilling at least the minimum requirements and standards set forth in his job description and any Professional Improvement Plan developed relative to his employment.

11. Nothing contained herein shall be interpreted to restrict the Board's right for reasonable cause to withhold DiBella's salary increments for the 2008-2009 school year.

12. The Parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Stipulation of Settlement and that each signs this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

13. The Parties acknowledge that this Stipulation of Settlement shall be submitted to the Board for its review and approval, and that the terms of this Stipulation of Settlement are expressly made subject to and contingent upon such review and approval.

In the event that the Board disapproves and/or rejects any of the terms contained herein, this Stipulation of Settlement shall be null and void and the Parties shall return

to the same positions which they held prior to this Stipulation of Settlement.

14. This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

15. This Stipulation of Settlement and compliance with this Stipulation of Settlement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

16. This Stipulation of Settlement sets forth the entire agreement between the Board and DiBella, and fully supersedes any and all prior agreements or understandings, written or oral, between the Parties pertaining to the subject matter hereof.

17. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

18. All terms of this Stipulation of Settlement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the Parties.

19. The terms of this Agreement and the underlying facts upon which it is based shall remain confidential among the parties except to the extent that disclosure is required by law. The parties are free to discuss the terms of this Agreement among their attorneys and professional advisors who shall be bound to this provision in the same manner as their principals.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

THOMAS P. EGAN
Board Secretary/Business Administrator

Dated: 8/28/07

BERGENFIELD BOARD OF EDUCATION

BY: Eileen L. Ryder
EILEEN RYDER
Board President

Dated: 8/28/07

WITNESS:

Diane Edwards

Dated: 8/28/07

BY: Salvatore DiBella
SALVATORE DIBELLA

Dated: 7/19/07

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
201-343-0003
Attorneys for Petitioner

SALVATORE DiBELLA,

Petitioner,

Vs.

BERGENFIELD BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 10466-2006N
Agency Ref. No. 299-9/06

STIPULATION OF DISMISSAL

The matter in difference being amicably resolved by the parties, the Petitioner hereby voluntarily withdraws the subject Petition of Appeal, with prejudice and without costs.

SPRINGSTEAD & MAURICE, ESQS.
Attorneys for Petitioner

By: _____
ALFRED F. MAURICE

Dated: September 14, 2007

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By: _____
HEATHER MARCALUS

Dated: September ___, 2007

427-07

OAL DKT. NO. EDU 3794-07
AGENCY DKT. NO. 56-2/07

DWAYNE STAGGERS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

In so approving, the Commissioner notes that: 1) records of all contested case hearings are open for public inspection pursuant to *N.J.A.C.* 1:1-14.1(a), unless – for good cause shown – the Administrative Law Judge orders sealing of the record, or any part thereof; and 2) the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, with respect to information concerning this matter, notwithstanding any understanding the parties may have between themselves to keep the settlement confidential. Consequently, because the ALJ did not address the presence within the record of documents for which confidentiality is required under the provisions of *N.J.A.C.* 1:10A-14, the Commissioner

October 29, 2007

hereby orders the sealing of Exhibits A and B of the petition of appeal, the latter of which is additionally referenced within the Settlement Agreement as Exhibit 1.*

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/29/07

Date of Mailing: 10/29/07

* Neither party objected to such sealing, although afforded an opportunity to do so.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03794-07

AGENCY DKT. NO. 56-2/07

DWAYNE STAGGERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Jennifer Borja, Esq., for petitioner (Timothy R. Smith & Associates, LLC, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, LLC, attorneys)

Record Closed: September 25, 2007 Decided: September 27, 2007

BEFORE **MARGARET M. MONACO,** ALJ:

On February 26, 2007, the petitioner, Dwayne Staggers, filed a Petition with the Commissioner of Education regarding a letter contained in his personnel file The respondent, the Board of Education of the City of Elizabeth (the Board), filed an Answer to the Petition on March 26, 2007. The Department of Education transmitted the matter to the Office of Administrative Law where, on April 12, 2007, it was filed for determination as a contested case. The undersigned held telephone conferences with counsel on June 6 and

August 3, 2007 and scheduled the hearing for December 7, 2007. Prior to the hearing, the parties reached an amicable agreement and counsel for the Board forwarded the attached Settlement Agreement and Resolution of the Board reflecting the Board's acceptance of the Settlement Agreement under letter dated September 24, 2007.

Having reviewed the record and the terms of the settlement I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 27, 2007 — Margaret M. Monaco
DATE — **MARGARET M. MONACO**, ALJ

Date Received at Agency: 10-3-07

Mailed to Parties:

OCT - 3 2007 — DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
DATE — OFFICE OF ADMINISTRATIVE LAW

db/tbj

THE MURRAY LAW FIRM, LLC
3 Revmont Drive, Suite 318
Shrewsbury, New Jersey 07702
(732)-389-1010
Attorneys for the Elizabeth Board of Education

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 25 P 4:41

DWAYNE STAGGERS, Petitioner, vs. ELIZABETH BOARD OF EDUCATION, Respondent.	OAL DOCKET NO. EDUOR 03794-2007N AGENCY DOCKET NO. 56-2/07 SETTLEMENT AGREEMENT

AGREEMENT between the Petitioner, Dwayne Staggers ("D.S.") and Respondent, Elizabeth Board of Education ("Board"):

WHEREAS, D.S. is currently employed as a Personal Assistant by the Board;

WHEREAS, D.S. filed a Petition of Appeal against the Board in the matter captioned as Dwayne Staggers v. Elizabeth Board of Education, OAL Dkt. No. EDUOR 03794-2007N; Agency Dkt. No. 56-2/07;

WHEREAS, the above-captioned matter is scheduled for hearing on December 7, 2007;

WHEREAS, the parties negotiated and agreed to resolve the above-captioned matter by way of settlement;

NOW, THEREFORE, the parties hereto agree as follows:

1. Correspondence from James J. Feehan, House Director - Edison House to D.S. that is dated January 29, 2007, (Exhibit 1), shall be removed from D.S.'s personnel file permanently;

2. Any and all references to an IAIU investigation under IAIU No. 06-7101 shall be removed from D.S.'s personnel file;

3. Petitioner shall be personally counseled by a Human Resources Supervisor regarding his alleged actions in connection with IAIU # 06-7101. Such counseling shall not be recorded in his personnel file.

4. Petitioner, D.S., agrees that he has been fully and fairly represented by legal counsel throughout this proceeding;

5. All parties in the above-captioned matters agree and acknowledge that the Settlement Agreement herein embodies the parties' full understanding of the terms of the parties' Settlement;

6. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey without regard to the principals of conflicts of law;

7. This Agreement shall not be precedential with respect to any similar claims raised against the Elizabeth Board of Education by the Elizabeth Education Association and/or any of their members.

8. This Agreement may only be modified in writing signed by all the parties.

9. All parties hereby agree that the terms of this Settlement are binding upon all parties, their heirs and their assigns.

TIMOTHY R. SMITH AND ASSOCIATES

Jennifer Borja, Esquire
Attorney for Petitioner
Date: 09/19/07

THE MURRAY LAW FIRM, LLC

Karen A. Murray, Esquire
Attorney for Respondent
Date: 9/21/07

DWAYNE STAGGERS

Petitioner
Date: 9/19/07

10hh

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P
Y

BOARD OF EDUCATION

RESOLUTION

WHEREAS, counsel for the Elizabeth Board of Education and Dwayne Staggers have negotiated a resolution of a case captioned, Dwayne Staggers v. Elizabeth Board of Education, Agency Dkt. No. 56-2/07; OAL Dkt. No. EDUOR 03794-2007N; and,

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, the parties have agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-63

430-07

#430-07

OAL DKT. NO. EDU 1116-07
AGENCY DKT. NO. 379-10/06

ANNETTE LISA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed stipulation of settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/07

Date of Mailing: 10/30/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01116-07
AGENCY DKT. NO. 379-10/06

ANNETTE LISA ,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Joseph R. Morano, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: September 13, 2007 Decided: September 24, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 4, 2007 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for hearing to commence on March 12, 2008. Prior to that date the parties reached a settlement and forwarded the enclosed Stipulation of Settlement indicating the terms of settlement which was received by the undersigned on September 11, 2007.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9/24/07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 9-26-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 26 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

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STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 11 A 7:5

BUCCERI & PINCUS, ESQS.
1200 US Highway 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

ANNETTE LISA,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
		AGENCY REF. NO. 379-10/06
v.	:	OAL DKT. NO. EDUOR 01116-2007N
HOBOKEN BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between Annette Lisa (hereinafter "Ms. Lisa"), who resides at 561 Lakeside Avenue, Pompton Lakes, New Jersey 07442-1240, and the Hoboken Board of Education (hereinafter "the Board") having its offices at 1115 Clinton Street, Hoboken, New Jersey 07030. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Lisa is a tenured employee of the Board; and

WHEREAS, Ms. Lisa's position of employment was the subject of a reduction in force and her employment was terminated; and,

WHEREAS, due to a vacancy in the school district, Ms. Lisa was recalled to employment with the Board for the 2006-2007 school year; and,

WHEREAS, Ms. Lisa was not allowed to work or be paid for certain days in September and October, 2006 because of certain issues relating to the processing of a criminal history record check, pursuant to *N.J.S.A.* 18A:6-7.1; and,

WHEREAS, Ms. Lisa filed a petition with the Commissioner of Education alleging that the Board violated her tenure, seniority and recall rights; and,

WHEREAS, the Board filed an answer denying the allegations made by Ms. Lisa; and,

WHEREAS, the parties have agreed to an amicable resolution of this matter in lieu of further litigation; and,

IT IS on this _____ day of August, 2007, agreed as followed:

1. The Board will pay Ms. Lisa her full salary for all salary lost from September 1 to October 12, 2006. The purpose of this agreement is to compensate Ms. Lisa for all salary lost for days on which she was not permitted to return to work during the time period in question.

2. All back pay due and owing as the result of this salary adjustment shall have all appropriate payroll deductions and withholdings made.

3. The amount of back pay owed to Ms. Lisa as the result of this salary adjustment will be paid within thirty (30) days of the approval of this Stipulation of Settlement by the Commissioner of Education.

4. Ms. Lisa acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Stipulation of Settlement, and has done so, and that she signs this document as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

5. The undersigned representatives of the Board hereby acknowledge that they are authorized to sign this Agreement pursuant to the terms of the attached resolution of the Board approving this Stipulation of Settlement.

6. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

7. Both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Stipulation of Settlement and all of these stipulations,

agreements, acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

WITNESS:

~~Gregory T. Syrek~~
Edward T. Stevens
Dated: 9-4-2007

Annette Lisa

HOBOKEN BOARD OF EDUCATION

Therese Minutillo

Dated:

BE IT RESOLVED, upon the recommendation of the Superintendent, that the following administrative disciplinary and personnel matters be amicably resolved, be and hereby is approved.

PERC Docket No. AR-2007-203 (O'Connor)
OAL Docket No. EDUOR-1123-2006N (Settembre)
OAL Docket No. EDUOR-01042-2007N (Settembre)
OAL Docket No. EDUOR-0116-2007N (Lisa)
OAL Docket No. EDUOA-11846-2006N (Acuna)

The above is a true copy of a resolution approved by the Hoboken Board of Education at the Stated Session held on August 14, 2007.

David Anthony
Board Secretary

431-07

OAL DKT. NO EDU 3757-07
AGENCY DKT. NO. 84-3/07

IN THE MATTER OF THE TENURE HEARING OF ADAM AQUILINA, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner cannot be satisfied – as she must be in order to meet her obligation to the schools and children of New Jersey – that the proposed agreement meets the established standard for settlement of tenure matters, as set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and *N.J.A.C.* 6A:3-5.6.

As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County*, decided September 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that the terms of a proposed settlement in a tenure hearing matter call for the teaching staff member's resignation or retirement does not in and of itself assure that the *Cardonick* standards have been met, since the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.

October 31, 2007

In the present instance, the tenure charges filed against respondent include allegations of engaging and persisting in an intimate relationship with a student, as well as other similar behaviors, and the settlement's only stated benefit to the Board and public is avoidance of the uncertainty, expense, disruption and threat of ancillary litigation that nearly always accompanies tenure proceedings centered on charges of unbecoming conduct toward students. Under these circumstances, the Commissioner cannot find the settlement consistent with the *Cardonick* standards, notwithstanding its acknowledgement that the Commissioner may refer the matter to the State Board of Examiners for possible suspension or revocation of respondent's certificate.[1] Rather, in the Commissioner's view, if this matter is to be settled without adjudication – and indeed, with the respondent essentially made whole in terms of salary, pension and benefits – there must be a better explication on the record as to why such serious charges cannot be pursued once raised, or alternatively, a voluntary relinquishment by respondent – pursuant to *N.J.A.C.* 6A:9-17.11 – of all certificates issued to him by the Board of Examiners so that he can no longer teach in the public schools or hold himself out as a teacher duly licensed by the State of New Jersey. [2]

Accordingly, while not precluding the possibility of settlement, the Commissioner rejects the Initial Decision of the OAL approving the proposed settlement, and directs instead that this matter be remanded for such further proceedings as are

---

[1] In this regard, it is noted that the Board would be obliged to cooperate fully with the Board of Examiners in any hearing held to suspend or revoke respondent's certificate, thus obviating in significant part the benefits of settlement claimed by the Board.

[2] It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986.

necessary to address the concerns expressed herein. If the parties are unwilling or unable to agree on an appropriately modified agreement, the matter shall proceed to plenary hearing.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/07

Date of Mailing: 10/31/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03757-07
AGENCY DKT. NO. 84-3/07

IN THE MATTER OF THE TENURE HEARING OF ADAM AQUILINA, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

Karen A. Murray, Esq., for petitioner
(Murray & Murray)

Sanford R. Oxfeld, Esq., for respondent
(Oxfeld Cohen, P.C.)

Record Closed: October 2, 2007 Decided: October 2, 2007

BEFORE **IMRE KARASZEGI,** ALJ:

On April 10, 2007, this matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 2, 2007

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 10-11-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT 11 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102

SETTLEMENT AGREEMENT

OCT 02 2007

This Agreement is made this _____ day of _____, 2007, by and between Adam Aquilina (hereinafter "Aquilina"), who resides at 13 Georgetown Drive, Manalapan, New Jersey 07726, and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Aquilina is currently employed as a tenured teaching staff member; and,

WHEREAS, Aquilina and the Board are parties to a proceeding with caption and docket No. as follows: In the Matter of the Tenure Hearing of Adam Aquilina, School District of the City of Elizabeth, Agency Docket No. 84-3/07, OAL Docket No. EDUTH 03757-2007N; and;

WHEREAS, after the completion of discovery and in view of the extensive anticipated costs of litigating this case for an Abbott District, the Board is agreeable to the dismissal of the tenure charges, subject to the conditions set forth in this Agreement;

WHEREAS, both the Board and Aquilina desire to enter into a Settlement Agreement stipulating the terms of his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of General Releases of any and all claims which the parties may have against the other arising from Aquilina's employment or otherwise;

WHEREAS, the terms of settlement take into account the public interest, as well as the fact that the litigation of this action, and anticipated appeals thereafter, have caused and will continue to cause disruption to the educational programs in the Elizabeth School District due to

the absence of administrators, teachers and students who have or will hereafter have to testify at hearings, and that the Board and Aquilina have incurred and will continue to incur substantial financial costs to continue this litigation;

NOW THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 84-3/07, OAL Dkt. No. EDUTH 03757-2007N shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

2. The Board shall pay to Aquilina the amount of salary that it withheld from Aquilina pursuant to N.J.S.A. 18a: 6-14, which sum is stipulated to be the gross amount of Eighteen Thousand Five Hundred Thirty-Two and Forty cents ($18,532.40). The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contributions. Additionally, the net monies shall be paid to Aquilina within thirty (30) days of the approval of this Agreement by the New Jersey Commissioner of Education.

3. Aquilina agrees to sign an irrevocable letter of resignation from all employment with the Board, effective at the close of business on November 30, 2007. The resignation letter shall be in the form annexed hereto as Exhibit A. The letter of resignation shall be null and void if the terms of the Separation of Employment Agreement are not met. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Aquilina's resignation.

4. The Board shall publicly approve and accept the resignation of Aquilina at its next regularly scheduled meeting, which resignation shall be effective the close of business on

November 30, 2007.

5. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Aquilina for the 2006-2007 school year, which gross sum is stipulated to be Two Thousand Seven Hundred Twenty-Five Dollars ($2,725.00). The gross sum of $2,725.00 shall be paid to Aquilina for the increment amount that was to have been paid to him in the 2006-2007 school year. The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contributions. Additionally, the sum of $2,725.00 shall be paid to Aquilina within ten (10) days of the approval of this Agreement by the New Jersey Commissioner of Education. The Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Aquilina's salary for the 2006-2007 school year is Forty-Nine Thousand Fifty-Six Dollars ($49,056.00).

6. The Board shall restore the prorated salary, adjustment and longevity increment(s) that it withheld from Aquilina for the 2007-2008 school year, which gross sum is stipulated to be Three Thousand Four Hundred Seventy-Five Dollars ($3,475.00). Subject to the terms of Paragraph 5 the Board shall amend its payroll records and pension reports to the N.J. Division of Pensions so that Aquilina's salary for the 2007-2008 school year is established to be a gross amount of Fifty-Two Thousand Five Hundred Thirty-One Dollars ($52,531). Aquilina shall receive a prorated amount of his salary for Sept. - Nov. 30, 2007.

7. Through and until November 30, 2007, the Board shall continue to provide Aquilina all the insurance coverage(s) that it is presently providing to Aquilina under the plan(s) applicable to teaching staff members employed by the Board.

8. Upon the termination of Aquilina's employment on November 30, 2007 and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Aquilina shall be able to purchase, at his own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

9. Aquilina waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that Aquilina shall not, as of the effective date of his resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

10. In consideration of the above, Aquilina agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board ("Releasees"), past, present and future; of and from any debts, obligations, claim, demands, judgements, claims for attorneys' fees, claims seeking employment or reemployment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age of Discrimination in Employment Act of 1967, The Americans with Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, the New Jersey Workers' Compensation Act, and all Federal, State and Local law claims,

whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board.

11. The Board, its members, agents, servants and employees ("Releasees") agree to release irrevocably and unconditionally, and discharge Aquilina from any and all claims which it may have against Aquilina. It specifically releases Aquilina from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency (including the filing and/or certification of tenure charges under the N.J. Tenure Employees' Hearing Law.

12. The Board and Aquilina agree that Aquilina shall be provided a mutually convenient opportunity to obtain whatever personal belongings of his remain within the school district, as well as to return any district materials that Aquilina has in his possession.

13. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commission of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement

Agreement. In addition, each of the parties shall return to the same position(s) which they help prior to this Settlement Agreement, and all rights are reserved in that event.

14. Aquilina acknowledges that, notwithstanding the parties entry into this Settlement Agreement, he has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding his teaching certificate as it deems appropriate.

15. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

16. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement.

17. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

18. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

19. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

20. All terms of this Settlement Agreement are deemed material. This document may

not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

21. This Separation of Employment Agreement incorporates and settles all claims and disputes which may exist between Aquilina and the Board arising from his employement or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Aquilina and Aquilina's separation from employment.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Witness
Dated: 9-25-07

Adam Aquilina
Dated: 9-25-07

Harold R. Kennedy, Jr.
Board Secretary/School Business Admin.
Dated: 9/27/07

Armando Da Silva, Board President
Dated: 9/27/07

Exhibit A

ADAM AQUILINA

13 Georgetown Drive
Manalapan, New Jersey 07726

9-19, 2007

Armando Da Silva, Board President
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Re: Letter of Resignation

Dear Mr. Da Silva:

Pursuant to the terms of the Settlement Agreement between the Elizabeth Board of Education and myself, I hereby submit my irrevocable resignation from the position of Teacher, effective the close of business on November 30, 2007, or on the date the Commissioner approves the settlement, whichever is later.

Sincerely,

Adam Aquilina

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P
Y

BOARD OF EDUCATION

RESOLUTION

WHEREAS, counsel for the Elizabeth Board of Education and Adam Aquilina have negotiated a resolution of the following case: In the Matter of the Tenure Hearing of Adam Aquilina, School District of the City of Elizabeth, Agency Dkt. No. 04-3/07, OAL Dkt. No. EDUTH 03757-2007N; and,

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, the parties have agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary; and,

BE IT FURTHER RESOLVED, the Board hereby accepts the resignation of Adam Aquilina, to be effective November 30, 2007, or the date the Commissioner of Education approves the Settlement, whichever is later.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

#434-07S

434-07

RECORD SEALED

OAL DKT. NO. HSV 916-06
AGENCY DKT. NO. AHU 06-013

OAL DKT. NO. EDU 6753-06
(EDU 8619-05 ON REMAND)
AGENCY DKT. NO. 276-10/05
(CONSOLIDATED)

DEPARTMENT OF CHILDREN AND FAMILIES, :
LEGAL AFFAIRS UNIT – INSTITUTIONAL :
ABUSE INVESTIGATION UNIT, :
PETITIONER, :
V. :
K.C., :
RESPONDENT, :
AND :
IN THE MATTER OF THE TENURE :
HEARING OF K.C., ATLANTIC COUNTY :
SPECIAL SERVICES SCHOOL DISTRICT, :
ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

Procedural History

This matter was initiated before the Commissioner on October 11, 2005 through the certification of tenure charges of unbecoming conduct against K.C., a special education teacher, by the Atlantic County Special Services School District (District). Such charges alleged

that on or about November 16, 2004, K.C. engaged in two instances of hitting a 15-year-old, severely and multiply disabled special education student (student) at the same time as the student was being hit in the head repeatedly with a shoe by a classroom aide; that K.C. allowed the aide to repeatedly hit the student without intervening; and that K.C. failed to report her aide's actions to the Division of Youth and Family Services (DYFS)[1]. With the receipt of an answer to the tenure charges from K.C. on October 26, 2005, the matter was transmitted to the Office of Administrative Law (OAL) on October 28, 2005 for hearing.

Subsequent to four days of hearing, the Administrative Law Judge (ALJ) issued his recommended Initial Decision on July 12, 2006, exonerating K.C. and directing her reinstatement. This decision was forwarded to the Commissioner for her final determination. In the course of reviewing the record for the Commissioner's decision, it was revealed that there was an outstanding DYFS case currently at the OAL (Dkt. No. HSV 916-06) with respect to the actions which formed the basis of the Board's tenure charges in this matter,[2] and that K.C.'s name had been placed on the Division's Central Registry as a perpetrator of child abuse. At this point, it was readily apparent that the pending DCF, IAIU case and the tenure matter both involved the incident which occurred on November 16, 2004, and presented the same facts for adjudication. More importantly, it was recognized that adjudication of the tenure charges absent a conclusion of the DCF, IAIU matter could conceivably result in the return to the classroom of an educator who appears on the Division's Central Registry – a wholly unacceptable outcome. For these reasons, on September 12, 2006, the Commissioner rejected the ALJ's Initial Decision in the tenure matter and remanded it to the OAL to be consolidated with the DCF, IAIU case in

[1] Now known as the Division of Central Operations, Department of Children and Families, Institutional Abuse Investigation Unit (DCF, IAIU).

[2] On November 18, 2004, the IAIU initiated an investigation of the allegations of physical abuse of the student which purportedly occurred in K.C.'s classroom on November 16, 2004. On July 14, 2005 the DCF, IAIU issued a finding that physical abuse was substantiated with regard to the actions of K.C., and her name was placed on the Division's Central Registry at that time. This pending matter is K.C.'s appeal of the DCF, IAIU's finding.

order that it could proceed in accordance with predominant interest regulations, *N.J.A.C.* 1:1-17.1.

Pursuant to the Commissioner's remand, on January 17, 2007, the ALJ issued an Order to Seal, Consolidation, and Predominant Interest determination in these matters. Therein he determined that the Department of Education had the predominant interest, basing such conclusion primarily on the scope of the Commissioner's special education expertise. A Joint Order of Predominant Interest, executed by the Commissioner and the Director of the Division of Central Operations on February 13, 2007 and February 22, 2007, respectively, agreed with the ALJ's Order of consolidation but disagreed with his predominant interest determination, finding, rather, that – while both agencies have the jurisdiction and expertise to determine whether K.C. engaged in the alleged conduct – the issue of whether child abuse occurred is within the particular expertise of the DCF. Furthermore, the fact that final decisions in special education cases are issued by ALJs pursuant to *N.J.A.C.* 1:1-6A-18 and *N.J.A.C.* 6A:14-2.7 militates against finding the Commissioner to have indispensable expertise for purposes of reviewing matters inextricably linked to disputes under the Individuals with Disabilities Education Act. The parties' Joint Order, therefore, determined that the two matters should be consolidated; that the DCF had the predominant interest; and that the Initial Decision and the record would be sealed. As such, the ALJ's Initial Decision in this consolidated matter would first be filed with the DCF for a determination by that entity as to whether the factual allegations against K.C. have been established by a preponderance of the competent and credible evidence, and for issuance of a final decision encompassing all the issues within its predominant interest. Thereafter this decision would be transmitted to the Commissioner to provide – dependent upon the DCF's findings, which are binding upon her – the relief or appropriate sanction/remedy to which K.C. would then be entitled.

The Initial Decision of the ALJ was issued on May 2, 2007, and transmitted to DCF on that date. Therein the ALJ – based in large measure on his credibility assessments of the testifying witnesses – found:

> Based on the testimony, exhibits and post-hearing briefs, I CONCLUDE that K.C. did not commit abuse of a student or fail to prevent any aides from inflicting abuse. K.C. did not witness any abuse and, therefore, had no obligation to report anything. The OCS and Atlantic County Special Services School District failed to meet their burden of proof. I therefore ORDER the tenure and abuse actions DISMISSED. I further ORDER that K.C. be reinstated with back pay, pension or service credit and all other emoluments, subject to mitigation, if any, and that K.C.'s name shall be removed from the abuse registry. (Initial Decision at 41)

By decision dated September 28, 2007 – transmitted to the Commissioner October 3, 2007[3] – the Director of Central Operations, DCF adopted the conclusion of the ALJ stating:

> Based upon the record before me, it is impossible to determine exactly what happened on the date in question. Clearly, Pantazes did the right thing in making a referral if she believed what she witnessed may have been abuse. That being said, the fact that she made the referral to the IAIU does not mean that the behavior she observed was in fact abuse. B.A. admitted that she scolded [the student] on November 16, 2004 by waving a shoe within six to ten inches of his face, but she maintained that she never hit the child with the shoe. In addition, B.A. and K.C. maintain that K.C. was not in the room when the shoe-throwing incidents occurred. As noted above, the ALJ found the testimony of B.A. and K.C. to be more trustworthy and reliable than that of Pantazes.
>
> While I do not agree with all of the ALJ's reasoning and findings, I am constrained by the limitations of the evidence, as well as the ALJ's observations and credibility determinations concerning witnesses. Therefore, based upon my review of the record, except as noted above, I ADOPT, the ALJ's findings and conclusion that the DCF failed to meet its burden of proof that K.C. abused the student in this matter. Accordingly, I ORDER that K.C.'s name be removed from the abuse registry. (DCF September 28, 2007 Decision at 15-16)

[3] Upon the signing of its decision, DCF sought and received an extension of time for issuance of a final decision in this consolidated matter in order to accord the Commissioner an adequate opportunity to review those issues before her. *N.J.A.C.* 1:1-17.8(c).

By letter dated October 3, 2007, the DCF notified counsel for K.C. that the finding of abuse in this matter was modified from "substantiated abuse" to "not substantiated abuse" and, therefore, the findings relative to this incident were being removed from the Central Registry.

Commissioner's Decision

The record of this matter, the Initial Decision of the OAL and the decision of the DCF have been reviewed. On October 17, 2007, the District filed exceptions to the Director of Central Operations, DCF's decision charging that while rejecting the basis for a number of the ALJ's critical credibility findings essential to his ultimate determination that Ms. Pantazes was less believable than Ms. Curchin and Ms. Adkins, the Director nonetheless adopted the ALJ's findings and conclusion that the DCF did not meet its burden of proving abuse. The District argues that this inconsistency will result in a finding that the Director's decision was arbitrary and capricious. The Commissioner finds the District's exceptions without merit. As is fully evidenced in the Director's decision, although she found grounds to disagree with some of the ALJ's reasoning and findings, she concomitantly recognized that the evidence in this matter was limited and her standard of review of the ALJ's observations and resultant credibility determinations with respect to witnesses was severely circumscribed. Indeed, an agency head "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c).

Upon careful and independent review, and recognizing that the findings of fact adopted by DCF in its final decision in this matter are binding upon her, the Commissioner's sole

focus here is to determine whether, based on those facts, respondent engaged in unbecoming conduct as charged by the District and, if so, the appropriate penalty to be imposed. Based on this record, the Commissioner finds and concludes that the instant tenure charges must be dismissed and K.C. returned to her tenured position. Testimony of the Board's witness, Barbara Morvay, Superintendent of the Atlantic County Special Services School District, established that the tenure charges against K.C. were solely based upon the IAIU report which substantiated child abuse; the District did not conduct any investigation of its own. (Initial Decision at 20); also see Hearing Transcripts, February 22, 2006 at 241-242. With the DCF's finding that allegations that K.C. was involved in abuse occurring in her classroom on November 16, 2004 are not substantiated, the District's tenure charges against K.C. are rendered a nullity and must be dismissed.

Accordingly, the Initial Decision of the OAL dismissing the instant tenure charges is adopted. It is hereby ordered that K.C. be reinstated to her tenured position and reimbursed for back pay and emoluments withheld, less mitigation, as a consequence of these charges.

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/05/07

Date of Mailing: 11/08/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
DEPARTMENT OF CHILDREN AND FAMILIES
PO Box 729
TRENTON, NJ 08625

JON S. CORZINE
Governor

KEVIN M. RYAN
Commissioner

FINAL AGENCY DECISION
OAL DKT. No. HSV 916-06
AGENCY DKT No. AHU 06-013

DEPARTMENT OF CHILDREN AND FAMILIES, INSTITUTIONAL ABUSE INVESTIGATION UNIT,
Petitioner,

v.

K.C.,
Respondent,

AND

IN THE MATTER OF THE TENURE HEARING OF K.C., ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT, ATLANTIC COUNTY

OAL DKT No. EDU 6752-06
(On Remand from EDU 8619-05)
AGENCY DKT No. 276-10/05
(Consolidated)

A. INTRODUCTION

K.C., a special education teacher, sought to appeal a finding of abuse rendered by the Institutional Abuse Investigation Unit (hereinafter "IAIU") pursuant to *N.J.S.A.* 9:6-8.21, as well as tenure charges brought by the Atlantic County Special Services School District (hereinafter "the District"). The IAIU and the District allege that K.C. repeatedly hit or condoned the hitting of a severely and multiply disabled special education student, L.P.M., on November 16, 2004. On October 11, 2005, certified tenure charges were filed by the District with the Commissioner of Education. On November 7, 2005, the matter was transmitted to the Office of Administrative Law (hereinafter "OAL") as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Administrative Law Judge W. Todd Miller (hereinafter "ALJ Miller") heard the matter on February 7, 22, and 27, March 17, and May 15, 2006. ALJ Miller issued an Initial Decision in the tenure matter on July 3, 2006, which was reversed by the Commissioner of Education on September 12, 2006. The Commissioner remanded the matter so it could

be consolidated with the Department of Children and Families (hereinafter "DCF") matter involving K.C.

In an Order dated January 17, 2007, the ALJ determined that the Commissioner of Education had the predominant interest since the alleged abuse occurred in a special needs school and involved a seriously disabled child. In a joint order, the Commissioner of Education and the Director of Central Operations for the DCF reversed the ALJ on the predominant interest issue and ordered that the DCF had the predominant interest in the matter. The ALJ also determined that a related case involving K.C.'s aide, B.A. (OAL Docket No. HSV 915-06), which arose out of the same facts and circumstances, should not be consolidated with these matters because of the complicated procedural history.

The parties agreed that the testimony and evidentiary record from the K.C. tenure hearing was sufficient and that no new evidence was required in the abuse case. The parties further agreed that they would argue the tenure and abuse cases upon the record as it existed. Counsel for K.C. and Counsel for the District rested upon their post-hearing briefs submitted during the tenure hearing. Counsel for the DCF submitted a closing brief to address the abuse matter. The record closed on April 26, 2007. The ALJ's Initial Decision, which is attached hereto, was issued on May 2, 2007. By Order of extension, the Final Agency Decision is due September 28, 2007.

B. INITIAL DECISION

In the Initial Decision, the ALJ summarized the relevant testimony. Among the witnesses was Edra Pantazes ("Pantazes"), the teacher's aide employed by the District in September 2004 who allegedly witnessed the abuse. At the beginning of her testimony, Pantazes drew two schematics of the classroom in which the alleged abuse took place. Pantazes then testified that on November 16, 2004, she observed the alleged victim, L.P.M., take off one of his shoes and throw it at a fellow student. The shoe, which Pantazes described as a boot-type with a hard sole, struck a container of milk on the table causing it to spill onto the floor and onto another student, T.N. According to Pantazes, teacher's aide, B.A., was sitting immediately to T.N.'s right.

In describing K.C.'s initial reaction to the shoe-throwing incident, Pantazes indicated that K.C. swatted L.P.M. on the back left side of his head with an open hand and told him not to throw his shoes. On a scale of one to ten, with one being the lowest and ten being the highest, Pantazes described the velocity of the swat as a three. According to Pantazes, K.C. drew her hand back only a few inches and lightly swatted L.P.M. on the head. Pantazes further indicated that K.C. used a stern voice directing the child not to throw his shoes.

Pantazes then indicated that B.A. began to clean up the spilled milk. Shortly thereafter, L.P.M. threw his other shoe and hit student, T.N., on the arm. Pantazes indicated that she then observed B.A. pick up the shoe, walk over to L.P.M., and hit the child with the shoe on the right side of the head two or three times near his ear as she stood to his right. As

to the velocity of B.A.'s swing, with one being the lowest and ten being the highest, Pantazes estimated the velocity to be between five and six when the sole of the shoe contacted L.P.M.'s head. Pantazes claimed that as B.A. hit L.P.M., K.C. commenced hitting L.P.M. on his head as well, using an open hand. Pantazes could not hear any noise from K.C.'s hand hitting L.P.M. on the head, but she described the facial expressions of B.A. and K.C. as "tight, angry, clenched and red." According to Pantazes, B.A.'s sister, Caroline Nocella ("Nocella"), who drove a school bus, was not in the room during the incident. However Pantazes claimed that Emma Pennello ("Pennello"), another teacher's aide, was standing in the kitchen area serving breakfast. When asked to describe how long the incident lasted, Pantazes stated that the "entire scene only lasted a few seconds."

Pantazes testified that on the date of the incident she was a "floater," an aide who would be assigned to a particular class as needed. She indicated that she was only in K.C.'s classroom for one day, the date of the incident. According to Pantazes, K.C.'s class, which began around 9:00 a.m., was already in session when she entered the classroom around 9:30 a.m. Concerning her assignment, Pantazes indicated that when she entered K.C.'s classroom, she recalled that she was told to help with breakfast. Pantazes further testified that breakfast had already been served, and that the children were sitting around the table. As noted above, Pantazes recalled Pennello being in the kitchen area assisting in the food preparation and service. Pantazes could not recall if there were any children sitting on the side of the table farthest from the blackboard and the swings. Pantazes also could not recall the names or the exact number of students in the classroom on the date of the incident, but estimated the number of students to be about five. Additionally, she could not remember the specific disabilities of every child. However, she did know that L.P.M. was self-abusive, non-verbal, and that he occasionally wore a helmet. (L.P.M. was not wearing a helmet at the time of the incident.)

As to any subsequent discussions she had with others about the incident, Pantazes indicated that the first person she spoke to was Enrique Augusto ("Augusto"), a personal friend. According to Pantazes, she talked to Augusto on November 17, 2004. Pantazes further indicated that she discussed the matter with Craig Costigan, the teacher whose classroom adjoined K.C.'s classroom. According to Pantazes, she told both people that she thought she "witnessed abuse, but was not sure."

Pantazes further indicated that on November 18, 2004, she went to the office of Principal Pat Dannenberg ("Dannenberg") and discussed the entire incident. At Dannenberg's direction, she prepared a written statement without any coaching by Dannenberg. Pantazes also claimed that she talked with K.C. after the incident. According to Pantazes, as she and K.C. walked outside in the afternoon of the day of the incident, they talked about L.P.M.'s conduct, including his shoe-throwing. Pantazes asserted that she questioned K.C. about the school policy regarding how behavior such as L.P.M.'s was handled. However, she claimed that she did not mention anything to K.C. about the incident because she was scared, in denial, and wanted to avoid a confrontation.

When asked if she observed any injuries on L.P.M. as a result of the incident, Pantazes explained that he had marks all over from self-abuse. Therefore, she was unable to determine whether there were any injuries as a result of the November 16, 2004, incident. When asked if she thought K.C. could have prevented the shoe-throwing incidents, Pantazes stated, "No, it happened too quickly." When asked which hand B.A. had the shoe in while she was hitting L.P.M., Pantazes had no present memory. When asked whether B.A. admonished L.P.M. after the first incident, Pantazes could not recall.

When asked about K.C.'s actions during the incident, Pantazes confirmed that K.C. lightly swatted L.P.M. on the head after the child threw the first shoe, and that K.C. pushed L.P.M. with an open hand in the head after the child threw his other shoe. When asked to describe the velocity of the shoes when they were thrown, on a scale of one to ten, with ten being the highest velocity, Pantazes described the velocity as a ten. She indicated that the potential for injury to other students was great.

With respect to Pantazes' testimony, the ALJ noted the following:

> During Pantazes' direct and cross-examination, she was very emotional. She cried on and off, talked in a low voice, and rarely made direct eye contact. She was asked repeatedly whether she needed a break. I observed that Pantazes could hardly stand and walk across the room. She was trembling.

Alfonso Renna ("Renna"), the IAIU investigator assigned to the case, also testified about his investigation. Among the witnesses Renna interviewed during his investigation of the incident were K.C., B.A., Pantazes, Pennello, and Nocella. According to Renna's interview with K.C., which took place at her attorney's office on January 6, 2005, K.C. described L.P.M. as an aggressive student, who suffered from severe disabilities, and who was self-mutilating. K.C. also denied hitting L.P.M.

According to Renna's interview with teacher's aide Pennello, which took place on November 23, 2004, and on January 18, 2005, Pennello recalled that L.P.M. threw shoes very frequently. However, she did not recall if L.P.M. threw shoes on November 16, 2004. Pennello also specifically denied that L.P.M. was struck or hit by anyone. She further stated that there were four staff members in the room at the time the alleged incident occurred. According to Renna, Pennello indicated that she was not sure whether Nocella was in the room that day.

According to Renna's interviews with Pantazes, which took place on November 23, 2004, and January 18, 2005, Pantazes denied having any conflicts with staff members. However, Pantazes did indicate that she did not like to work with difficult students. The ALJ also noted that Pantazes told Renna that K.C. flicked L.P.M. (as opposed to hit him) in the back of the head using her index finger and thumb after the child threw his first shoe. As far as what happened after L.P.M. threw the second shoe, Pantazes confirmed that both B.A. and K.C. struck L.P.M. in the head, apparently to get his attention.

According to Renna's interview with B.A.'s sister, Nocella, Nocella indicated that she believed that she was in K.C.'s classroom on November 16, 2004 for approximately one-half hour.

When cross-examined concerning the process of substantiating abuse, Renna indicated that he would review his investigations with his supervisor. Concerning his interview notes, Renna further explained that he interpreted Pennello's statement that she did not witness K.C. or B.A. hitting L.P.M. to mean that she (Pennello) did not observe the incident, but that it could have occurred, as opposed to a statement of fact denying that the incident occurred.

When asked to summarize the basis of his decision that abuse should be substantiated, Renna indicated that he based his conclusion almost entirely on the testimony of Pantazes. According to Renna, he concluded that Pantazes had no ill will or ill motive. He further indicated that he entirely discounted the statements of the other witnesses, including K.C., B.A., Pennello and Nocella. According to the ALJ, Renna "could not explain with particularity why he discounted the statements of the other witnesses. He did not make any credibility judgments. He simply stated that he just accepted what Edra Pantazes told him."

Continuing, the ALJ expressed the following:

> I observed Mr. Renna to be an honest and candid investigator. However, his investigation was cursory or sketchy. Material portions of his testimony were not documented in his report. He candidly admitted that many of the statements he made before this administrative law judge ... should have been more specifically documented in his report. He did not seriously probe interviewees in terms of recollection, vantage point, trustworthiness of statements, follow-up questions and similar techniques used by investigators. By comparison, the Prosecutor's Office conducted a thorough investigation using the tools mentioned above.

With respect to the investigation by the Atlantic County Prosecutor's Office, Kevin Walsh, an investigator for that office, testified on behalf of the District. Walsh reported that he believed Pantazes' statements were credible, and that the statements of other witnesses (including K.C., Pennello, and Nocella) were credible, but that they had some questionable inconsistencies. (ALJ Miller pointed out that the credibility determinations of an investigator are not relevant or binding upon his decision.)

During cross-examination, Walsh indicated that he did not have the IAIU report when conducting his interviews, and that he was unaware of inconsistencies between the IAIU report and his own. For example, the IAIU report indicated that Pantazes claimed that the first contact between K.C. and L.P.M. consisted of a flick of the finger. According, to Walsh's own report, Pantazes indicated that K.C. initially swatted L.P.M. in the head. Walsh also discussed the procedure for determining whether the prosecutor's office submits a case for indictment. According to Walsh, the entire case file was reviewed by

the assistant chief county prosecutor, who, after reviewing the matter at hand, determined that there was insufficient evidence to file criminal charges or to justify a continuing criminal investigation. That decision was confirmed by a closing memo to the file, dated July 1, 2005, from the assistant chief county prosecutor.

When asked if Pennello indicated in her statement, dated February 8, 2005, that she witnessed either K.C. or B.A. hitting L.P.M., Walsh indicated that Pennello confirmed that neither B.A. nor K.C. smacked or hit L.P.M. in any way. According to Pennello, she could not see everything that was going on with K.C., L.P.M., and B.A. because her view was obstructed. However, Pennello indicated that she did observe B.A. waiving L.P.M.'s shoe at the child with her left hand as she scolded him. Pennello claimed that B.A. waived the shoe around the child's face and head. Because her view was obscured, she could not confirm whether either adult hit L.P.M. However, Pennello indicated that she did not hear any sounds that were consistent with L.P.M. being hit. According to Pennello's statement, she also observed L.P.M. hitting the left side of his face as B.A. was scolding him.

Pat Dannenberg, the school principal, also testified. Dannenberg explained that L.P.M.'s disabilities include Down's syndrome, mental retardation (at approximately a two-year level), and an I.Q. between 35 and 36. According to Dannenberg, L.P.M. also has auditory, visual, and behavioral impairments, is non-verbal, and unable to communicate. Therefore, he would not be able to advocate for himself if he was subject to abuse. In addition, according to Dannenberg, L.P.M. is seriously self-abusive, non-compliant, and he hurts others. Dannenberg further explained that L.P.M.'s behavioral intervention plan included techniques such as distraction, redirection and incentives, but not techniques such as hitting or slapping.

With respect to the November 16, 2004, incident and her response to it, Dannenberg indicated that she met with Pantazes in her office on November 18, 2004 to discuss the incident. During that discussion, Dannenberg asked Pantazes to immediately write a statement detailing the incident. According to Dannenberg, on that same date, she also spoke to Superintendent Morvay, and met with K.C. in her (Dannenberg's) office. K.C. was accompanied by a union representative who advised K.C. not to say anything.

When asked if K.C. reported any incidents of abuse from November 16, Dannenberg stated that K.C. did not report any incidents. When asked if there were any prior concerns involving K.C., Dannenberg testified that on an unspecified date, she received an anonymous note that K.C. was tying L.P.M. to a chair. When she confronted K.C. on the matter, K.C. indicated that L.P.M. was being restrained in his seat with a belt for legitimate educational reasons as L.P.M.'s Rifton chair, which is designed to assists with posture and positioning, was too low to the ground for him to meaningfully participate in classroom activities. According to Dannenberg, the technique was brought before the Child Study Team (CST), which was required to approve mechanical devices in order for them to be implemented. The CST, which included L.P.M.'s parents, approved the restraining technique utilized by K.C. No disciplinary charges were filed against K.C. as a result of that matter.

When asked how B.A. was assigned as an aide to K.C.'s classroom, Dannenberg recalled that B.A. was known as a take-charge, aggressive aide, who could be negative at times. According to Dannenberg, when B.A. was assigned to K.C., Dannenberg advised K.C. to keep an eye on B.A. to make sure that B.A. behaved in a dignified manner with the students and to make sure that B.A. toned down her assertive behavior.

On cross-examination, Dannenberg indicated that B.A. received satisfactory performance reviews (the highest possible reviews) while under K.C.'s stewardship, a period of approximately two and one-half years prior to November 2004. Dannenberg acknowledged that B.A.'s satisfactory performance appraisals confirmed that K.C. was effectively curtailing B.A.'s bad habits. Dannenberg further acknowledged that K.C. had also received satisfactory performance reviews during the period between 2000 and 2004, all but one of which, were prepared by Dannenberg, herself. The ALJ noted that Dannenberg had exclusively positive comments about K.C.'s classroom behavior and methodology.

Barbara Morvay, the superintendent of the District since 2002, testified that the District did not conduct its own investigation upon receiving word of the incident. Instead, the District relied on the investigations of the IAIU and the Atlantic County Prosecutor's Office. Accordingly, Morvay did not interview Pantazes in connection with the incident.

After reviewing the testimony offered on behalf of the agency, the ALJ then reviewed the testimony offered on behalf of K.C. Among K.C.'s witnesses was teacher's aide Pennello who explained that she had no present knowledge of the incident on November 16, 2004. Pennello further explained that any impression she had given investigators that she had specific knowledge of what happened in K.C.'s classroom on November 16, 2004, was incorrect, and that she only meant to provide her general recollection of the activities of a typical day in K.C.'s classroom. Pennello also indicated that she had known both B.A. and K.C. for several years and that she respected them.

B.A. also testified on K.C.'s behalf. B.A. estimated that she had worked in K.C.'s classroom between two and two and one-half years. As to her recollection of the events of November 16, 2004, B.A. indicated that on that date, K.C. took two students to the kitchen area outside of the classroom to get snacks and food for breakfast. According to B.A., while K.C. was out of the room, L.P.M. threw a shoe at one of the students. In response, B.A. took the shoe and tossed it towards K.C.'s desk. Within seconds, L.P.M. took his other shoe and threw it at another student, T.N. The second shoe bounced off of T.N. and back onto the table. B.A. indicated that she picked up the shoe, approached L.P.M. who was sitting at the head of the table, and began scolding him while holding the shoe in her left hand. According to B.A., she was waiving the shoe within approximately six to ten inches of L.P.M.'s face. B.A. claimed that L.P.M. then began scratching his face, which he would sometimes do when being scolded, and that she attempted to stop him from doing so. According to B.A., when L.P.M. self-mutilated, he clenched his hand, dug his fingernails into his face, and grabbed on to something to prevent her from restraining him. B.A. further explained that she would then have to grab L.P.M.'s arm

and pull his fingernails out of his face to release his hand so it could be restrained. B.A. stated that the entire incident occurred within a two or three-minute time span when K.C. was not present.

When asked where Pantazes was during this incident, B.A. indicated that Pantazes was sitting next to another student, H., who was sitting in a rocking chair away from the table. When asked if her sister, Nocella, was in the room, B.A. indicated that Nocella came into the room for a short period after K.C. had left the room, sometime between 9:30 and 9:45 a.m. According to B.A., Nocella was in the room for both shoe-throwing incidents; however, B.A. was unsure whether Nocella had observed the shoes being thrown because of where Nocella was seated.

According to B.A., K.C. returned to the room sometime after 9:45 a.m., after Nocella had left the room. B.A. also indicated that the students who were assisting K.C. returned to their seats at the table on the side opposite the blackboard. The food was then passed out and the students ate their morning snack. B.A. indicated that she assisted L.P.M. with his food and Pantazes helped another student with his food at the table.

During cross-examination, B.A. was asked to provide the specific times K.C. left the room and returned. When it was pointed out that the times B.A. approximated were fifteen to thirty minutes different than the times K.C. gave to Walsh, B.A. explained that she did not look at the clock to determine the specific time of day. She further explained that there were no bells for classroom changes and no set schedules that the teachers had to follow. However, B.A. believed that her estimates were more accurate than K.C.'s estimates.

When asked why she refused to give a statement to the investigators from the IAIU and the Prosecutor's Office, B.A. indicated that she took the advice of her attorney not to provide a statement. When asked whether she had a close personal friendship with K.C., B.A. indicated that they had worked together for over two years, but that they were not close personal friends. According to B.A., outside of work, she and K.C. saw each other at a union affair they attended together and had lunch on one occasion. When asked whether shaking a shoe at a student was appropriate behavioral intervention, B.A. explained that she yelled at L.P.M. in a firm voice to prevent further injury to other students while she was shaking the shoe approximately six to ten inches away from his face. B.A. also indicated that on prior occasions she had scolded L.P.M. in the same manner.

According to the testimony of Craig Costigan, the teacher whose classroom was adjacent to K.C.'s, when he met with Pantazes on either November 16 or November 17, Pantazes told him that B.A. threw a shoe at L.P.M. and that K.C. slapped L.P.M. on the head. According to Costigan, Pantazes also wanted to know whether she should report the incident as abuse. Costigan said that he explained to Pantazes that if she believed it was abuse then she should report it, and if she believed that it was not abuse, then she should not report it. In response to a question by the ALJ regarding what techniques he used for behavioral intervention, Costigan indicated that when a student misbehaves, he does use a

loud, firm voice to back the student down. Costigan also explained that some students have auditory issues and that is common for teachers to yell at students to get their attention. However, Costigan indicated that he would not waive an instrument, including a shoe, at a student's face to intimidate the student.

According to K.C.'s testimony, she did not recall B.A. waving a shoe in L.P.M.'s face or any details of the alleged incident on November 16, 2004. K.C. further asserted that she never struck anyone as a form of behavioral intervention. When asked to recount her recollection of Pantazes' actions on the morning in question, K.C. explained that Pantazes sat in the corner of the classroom and that it appeared that she did not want to be in there. According to K.C., Pantazes also had to be prompted to assist the students.

When asked about her social interaction with her class aides, K.C. stated that she rarely socialized with her aides outside of work. According to K.C., after November 15, 2004, she met with her aides possibly three times, usually in a group setting or related to some event. As an example, K.C. explained that she met with her aides after a death in someone's family when a group of eight people went to lunch. She did acknowledge meeting B.A. for lunch on one occasion and that she may have discussed the case briefly.

When asked whether she had observed either of her aides, B.A. or Pennello, shake a shoe at L.P.M., K.C. explained that aides were permitted to do so as a form of intervention because the ordinary intervention of taking his shoes away was not successful. According to K.C., L.P.M. had been throwing his shoes on a regular basis and had either injured others or placed others at risk of being injured. Accordingly, K.C. decided that the more active intervention of using L.P.M.'s shoe demonstratively in his presence was necessary in order to attempt to gain some control over the problem. K.C. explained that she also created behavioral charts for monitoring L.P.M.'s behavior which included categories for shoe throwing, food throwing, self-injury, and injury to others.

When asked by the ALJ whether she specifically recalled the events of November 16, 2004, K.C. explained that while the events of that date may seem extraordinary to an outsider, it was routine for L.P.M. to engage in self-mutilating behavior, to throw his shoes, and to have other outbursts. Consequently, the events of November 16, 2004, did not strike her as extraordinary or unusual.

Concerning the breakfast routine, K.C. explained that she would choose two or three students to help her with breakfast, which was usually served between 9:20 a.m. and 9:40 a.m. According to K.C., she and the students would walk down several hallways to the cafeteria to get the breakfast. K.C. further explained that all of the other classes were having breakfast at the same time; therefore, there were many students and teachers in the cafeteria at the same time. According to K.C., depending on the number of people in the cafeteria and the disabilities of the children who were assisting, it could take as long as fifteen minutes before K.C. and her students returned to the classroom.
K.C. indicated that she was reasonably certain that on November 16, 2004, she left the classroom to get the food for breakfast with at least two students. She also claimed that had a shoe-throwing incident occurred while she was out of the classroom, it would not

have been an extraordinary event that would have been reported to her immediately. It would have been considered a routine incident that would just have been entered in the behavioral log by either K.C. or a classroom aide. However, according to K.C., paperwork was of the least importance, below the students' needs and controlling the classroom.

In analyzing the testimony, ALJ Miller observed that the outcome of this case was largely dependent on staff members' observations of an incident that lasted less than a few seconds. With respect to Pantazes, the ALJ noted that she was a newly hired aide who was unfamiliar with K.C., B.A., and the students in the classroom. The ALJ further noted that she had only been in K.C.'s classroom one day, for approximately fifteen minutes. According to the ALJ, although she appeared honest and truthful, Pantazes' recollection and statements had a variety of "material inconsistencies." Among the inconsistencies, according to the ALJ, was that Pantazes told Renna, the investigator for IAIU, that K.C. flicked L.P.M. on the ear with her index finger and thumb after L.P.M. threw his first shoe. In contrast, Pantazes reportedly told Walsh, the investigator for the Atlantic County Prosecutor's Office, that K.C. hit L.P.M. on the back of the head with an open hand, using a swinging motion, after the first shoe-throwing incident. In addition, Pantazes reportedly advised Costigan, the teacher, that B.A. threw a shoe at L.P.M. Subsequently, Pantazes reportedly told investigators that B.A. was hitting L.P.M. with a shoe.

The ALJ characterized the schematics drawn by Pantazes, which depicted K.C.'s classroom just prior to and during the incident, as the most important inconsistencies. The schematics show no students sitting on the side of the table opposite the blackboards and swings. In addition, when Pantazes was specifically asked whether there were students on the side of the table opposite the blackboard, she either responded "no" or indicated that she could not recall. According to the ALJ, the schematics were of particular significance because they corroborated the version of events offered by B.A. The ALJ reasoned that if the students were not at the table, they must have been out of the room with K.C. Accordingly, that would have meant that K.C. was outside of the room when the incident occurred.

The ALJ then recounted B.A.'s testimony that K.C. left the classroom perhaps as late as 9:45 a.m. with the students who had been seated on the side of the table opposite the blackboard to go to the kitchen to pick up the food for breakfast, which according to the classroom routine. The ALJ reasoned that if the students were with K.C., that would explain why Pantazes did not observe any students on the right side of the table when the incident occurred.

Continuing, the ALJ the expressed the following:

> As indicated earlier, Pantazes appeared extraordinarily nervous and even scared during her testimony. She spoke in a low voice. Initially, she stated that she was not sure if she witnessed abuse. When asked about pertinent details of the events of November 16, 2004, she repeatedly stated

that she did not recall. This does not suggest that Pantazes was untruthful. However, it does call into question her recollection of events, her ability to recall, and her opinion and interpretation of the circumstances. She was unfamiliar with the class routine and the students' disabilities; therefore, her interpretation of events may have been somewhat skewed. L.P.M. was self-mutilating. Aggressive intervention was necessary to prevent him from injuring himself or others. Intervention in the form of pulling his hand away from his face or scolding him may look like abuse. These actions could be misconstrued by someone unfamiliar with the class. Most importantly, however, Pantazes specifically recalled that the students who were with K.C. in the kitchen were outside of the classroom during the incident. This places K.C. outside of the classroom.

The testimony of B.A. and K.C. was more trustworthy and reliable than that of Pantazes. B.A. was firm, confident, and appeared sure and calm while testifying. She did not prevaricate or equivocate. She candidly admitted that she had problems with L.P.M. on November 16, 2004. She acknowledged that she scolded him and waved a shoe within six to ten inches of his face. She candidly admitted that she routinely uses that technique as behavioral intervention. She did not back away from this. B.A.'s testimony was more consistent than that of Pantazes. She was more familiar than Pantazes with the students' disabilities and classroom routine. She remains exposed to a abuse charges by both DYFS and the District. Nevertheless, she was candid about her conduct on November 16, 2004.

More importantly, B.A. confirmed that K.C. was not in the room when both shoe-throwing incidents occurred. While B.A.'s time frames differ somewhat from the time frames estimated by K.C., I find this immaterial to the staff member's ability to recall events. As explained by B.A., she is not focused on the clock and does not record events minute by minute. While the class has a routine that it tries to follow, this routine is regularly interrupted by events such as altercations, toileting, feeding, or other events of the day. The class does not follow the clock to the minute. Moreover, the fact that B.A. and K.C. had different opinions as to time reflects that they did not rehearse or coordinate their testimony. As mentioned earlier, B.A. confirmed that K.C. left the room with two students from the right side of the table. This is specifically corroborated by Pantazes and K.C. Pantazes drew a schematic of the room and did not identify any students on the right side of the table. Pantazes estimated that there were five students in the room. B.A., a full time aide, placed seven students at the table before K.C. took two of them to the kitchen outside the classroom. Hence, five students remained in the room when K.C. left. B.A.'s and Pantazes' statements confirm that five students remained in the room while K.C. was gone. Pantazes' initial statement dated November 18, 2004, states that the "all of the children were sitting at the table

> waiting to eat" when she entered the room. This statement suggests that the food had not arrived when she entered the room at 9:30 a.m. It confirms that K.C. was still getting some food from the main kitchen. Also, witnesses testified that the in classroom kitchen had some food or snacks. This explains why some children may have had milk or yogurt before K.C. returned from the main kitchen. Finally, K.C. did not recall any shoe throwing incident on November 16, 2004, because she was not in the room. Her statements to the IAIU investigator and prosecutor's office are consistent in this regard. Consequently, B.A.'s testimony, together with Pantazes' testimony and November 18, 2004, statement, confirmed that K.C. was more likely in the kitchen with the students, that is, outside the classroom, than in the classroom with L.P.M. during the shoe-throwing incidents. I so FIND.

In addition to the above, the ALJ speculated that Pantazes may have mistaken someone else (Nocella) for K.C., who, according to B.A., was not in the room when L.P.M. threw his shoes. According to the ALJ, because of Pantazes' unfamiliarity with the teachers and students in the classroom, it was "conceivable that during the excitement of this emotional event Pantazes confused certain staff members." According to the ALJ, in her November 18, 2004 written statement, as well as her testimony at the hearing, Pantazes did not specifically identify K.C. as the teacher who engaged in abuse. The ALJ also noted what he characterized as B.A.'s "convincing" testimony that K.C. was getting breakfast with two other students in another room when the incident occurred. In addition, the ALJ noted that Pantazes failed to place those same students at the table in K.C.'s room or anywhere else in K.C.'s room. In the ALJ's opinion, the conclusion to be drawn from all of the testimony is that K.C. and the students helping her were not in the room during the incident. Consequently, the ALJ found that it was "more believable and credible that K.C. was not in the classroom during the incident." Further, the ALJ noted that there was no evidence offered of any injuries or marks consistent with what Pantazes described.

The ALJ concluded that Pantazes' emotional state, her unfamiliarity with K.C., B.A., the class routine, and the students' disabilities, her witnessing the aggressive interventions used to prevent L.P.M. from injuring himself or others, placed some doubt on her recollection or interpretation of events.

In response to the requests by the DAG on behalf of the DCF that the testimony of Pantazes be found credible and that the conclusion be reached that K.C. violated *N.J.S.A.* 9:6-8.21a and c(4)(b), the ALJ declined. The ALJ reiterated his belief that Pantazes' emotional state skewed her interpretation of events. In addition, the ALJ reiterated his conclusion that Pantazes' testimony was inconsistent as to the nature of the alleged abuse (flicking the ear, versus hitting or pushing). The ALJ also noted that Pantazes only identified five children at the table, which corroborated B.A.'s testimony that K.C. was out of the room with the other two students at the time of the incident. Further, the ALJ noted there were no injuries observed on L.P.M. that could be specifically attributed to this incident.

In summarizing his analysis of the case, the ALJ reiterated his belief that B.A.'s testimony "was clear and reasonably consistent." The ALJ further commented that Pantazes had no motive to fabricate her version of events, nor did the alleged perpetrators have any obvious motive to abuse L.P.M. in the manner Pantazes described. However, the ALJ determined that, "[o]n balance, credibility rested with K.C.'s witnesses. They were more experienced, familiar with disabilities of the children, aware of the intervention techniques and the classroom routine." The ALJ determined that while an incident did occur on November 16, 2004, it was a non-abusive type of incident that happens every day with severely disabled children.

Finally, the ALJ, concluded "that K.C. did not commit abuse of a student or fail to prevent any aides from inflicting abuse. K.C. did not witness any abuse and, therefore, had no obligation to report anything." Additionally, the ALJ determined that the DCF and the Atlantic County Special Services School District failed to meet their burden of proof. Therefore, the ALJ ordered that both the tenure[1] and abuse actions be dismissed and that K.C.'s name be removed from the abuse registry.

C. COMMENTS

None.

D. FINAL DECISION

The OAL file was transmitted to this agency for consideration pursuant to *N.J.S.A.* 52:14B-10(d) and was reviewed in its entirety. Careful consideration was given to the ALJ's findings of fact and conclusions concerning the credibility of the witnesses.

The record established that an incident involving L.P.M. occurred on November 16, 2004 in K.C.'s classroom. The record further established that B.A. was involved in the incident. However, the evidence presented concerning K.C.'s presence in the classroom at the time of the incident was contradictory. According to the testimony of Pantazes, K.C. was present during the incident and took part in the alleged abusive behavior. According to the testimony of both K.C. and B.A., who are both accused and who clearly have motive to exculpate themselves, K.C. was not in the classroom when L.P.M. threw his shoes or when any intervention took place. As noted above, the ALJ found that K.C.'s witnesses, specifically B.A. and K.C., herself, to be most the credible. (The testimony of teacher's aide Pennello who initially claimed that neither K.C. nor B.A. hit L.P.M. on the date in question must be discounted because of Pennello's subsequent acknowledgment that she did not specifically recall what happened in K.C.'s classroom on the date of the incident.)

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[1]The tenure matter, and all issues related thereto, will be addressed in a separate decision to be issued by the Commissioner of Education.

B.A., who along with K.C. is alleged to have abused L.P.M., acknowledged that she did in fact scold L.P.M. on the date in question by yelling at him and waving one of his shoes close to his face. B.A. further claimed that L.P.M. began scratching his face as he would sometimes do when he was being scolded, and that she attempted to stop the student from doing so. In addition, B.A. estimated that the entire incident occurred within a two or three-minute time span. She further maintained that K.C. was out of the room the whole time. In addition, B.A. claimed that during the incident, Pantazes was sitting next to another student some distance from the table. In addition, B.A. claimed that her sister, Nocella, came into the room after K.C. left the room, sometime between 9:30 and 9:45 a.m., and that her sister was in the room for both shoe-throwing incidents.

As noted above, K.C. maintained that she did not recall either a shoe-throwing incident involving L.P.M. or B.A. admonishing L.P.M. with a shoe on November 16, 2004. As far as her actions on the date of the incident, K.C. explained that it was her routine to take two or three students with her to get breakfast for the class. K.C. also contended that if a shoe-throwing incident had occurred while she was out of the classroom it would not have been immediately reported to her because it was nothing unusual.

Thus, the evidence is at odds concerning whether or not K.C. was present during the incident. The accused both claim that K.C. was not present during the incident. The accuser claims that K.C. was present.

If it had been established that K.C. was in the room during the incident, the issue of whether the staff's alleged conduct rose to the level of abuse or neglect as defined by *N.J.S.A.* 9:6-8.21 would still need to be resolved. I note that any form of physical discipline of students is unacceptable. I further note that the alleged victim, L.P.M., was a severely and multiply disabled special education student, and thus especially vulnerable to mistreatment.

Pantazes testified that after L.P.M. threw his first shoe, K.C. swatted L.P.M. on the back left side of his head with an open hand and told him not to throw his shoes. (Previously, Pantazes reportedly told the IAIU Investigator that K.C. flicked L.P.M. in the back of the head using her index finger and thumb after the child threw his first shoe.) According to Pantazes, the level of force K.C. used was relatively minor. Pantazes indicated that after L.P.M. threw his other shoe, she observed B.A. pick up the shoe, walk over to L.P.M., and hit the child with the shoe on the right side of the head two or three times near his ear with at least moderate force. According to the transcripts, Pantazes further testified that she could hear the sound of the shoe hitting the child's head. In addition, Pantazes asserted that B.A. hit L.P.M., K.C. also started hitting L.P.M. on his head somewhat harder than her earlier swat, using an open hand. Pantazes indicated that she did not hear any noise from K.C.'s hand hitting L.P.M. on the head. The inappropriateness of physically disciplining of students, notwithstanding, even if it had been established that K.C., did in fact slap or push the child, there is insufficient evidence in the record to find that the force K.C. allegedly used placed the child at substantial risk of harm.

In contrast to K.C.'s alleged conduct, B.A.'s alleged conduct, which was alleged to have included striking the child in the head with the sole of a boot-type shoe with at least moderate force, was more egregious and, if proven, more indicative of abuse. Accordingly, if K.C. effectively condoned such behavior, and thus unreasonably allowed the child to be exposed to substantial risk of harm, a finding with respect to K.C. would be appropriate under the statute.

However, as noted above, the evidence concerning whether K.C. was in the room at the time of the incident is contradictory. The accused both claim that K.C. accompanied by two students, had gone to get breakfast and was not present when L.P.M. threw his shoes. The accuser claims that K.C. was in the classroom during the entire incident. In her testimony, Pantazes guessed that there were "at least five" students present when she entered the class. (It was apparently not disputed that there were seven students assigned to K.C.'s class on the date of the incident.) The ALJ speculated that, perhaps, Pantazes confused K.C. with bus driver, Nocella. The ALJ noted that the schematics drawn by Pantazes, which depicted K.C.'s classroom just prior to and during the incident, showed no students sitting on the side of the table opposite the blackboards. The ALJ reasoned that if the students were not at the table, then they must have been out of the room with K.C. Accordingly, that would have meant that K.C. was outside of the room when the incident occurred. However, the fact that Pantazes could not recall the exact number students present does not invalidate her entire account. In reviewing her testimony, Pantazes was clear and definitive that she saw both K.C. and B.A. hitting L.P.M. Pantazes also testified that she talked with K.C. later that same day as the two walked together. Based upon my review of the record, I am confident that Pantazes knew who K.C. was and could distinguish her from Nocella, the bus driver.

With no apparent motive to fabricate her story, the ALJ determined that Pantazes misinterpreted the events that took place on the date in question because she was sensitive and emotional; because she was unfamiliar with being in a classroom of disabled students; and, because she was disturbed by L.P.M.'s self-abusive behavior. The ALJ based the conclusion that she was sensitive and emotional on her display of emotion during the hearing. However, I find no basis in the record for the ALJ's determination that Pantazes' emotional state played any role in her interpretation of the incident. I further note that Pantazes testified that L.P.M. was not being self-abusive during the incident.

Based upon the record before me, it is impossible to determine exactly what happened on the date in question. Clearly, Pantazes did the right thing in making a referral if she believed what she witnessed may have been abuse. That being said, the fact that she made the referral to the IAIU does not mean that the behavior she observed was in fact abuse. B.A. admitted that she scolded L.P.M. on November 16, 2004 by waving a shoe within six to ten inches of his face, but she maintained that she never hit the child with the shoe. In addition, B.A. and K.C. maintain that K.C. was not in the room when the shoe-throwing incidents occurred. As noted above, the ALJ found the testimony of B.A. and K.C. to be more trustworthy and reliable than that of Pantazes.

While I do not agree with all of the ALJ's reasoning and findings, I am constrained by the limitations of the evidence, as well as the ALJ's observations and credibility determinations concerning witnesses. Therefore, based upon my review of the record, except as noted above, I **ADOPT**, the ALJ's findings and conclusion that the DCF failed to meet its burden of proof that K.C. abused the student in this matter. Accordingly, I **ORDER** that K.C.'s name be removed from the abuse registry.

Date: 9/28/2007

Arburta Jones
Director of Central Operations
Department of Children and Families

State of New Jersey
DEPARTMENT OF CHILDREN AND FAMILIES
PO BOX 729
TRENTON, NJ 08625-

JON S. CORZINE
Governor

KEVIN M. RYAN
Commissioner

ORDER OF EXTENSION
OAL DKT. NO. HSV 916-06
AGENCY DKT. NO. AHU 06-013

DEPARTMENT OF CHILDREN AND FAMILIES, INSTITUTIONAL ABUSE INVESTIGATIONS UNIT,
Petitioner,

v.

K.C.

Respondent.

and

IN THE MATTER OF THE TENURE HEARING OF K.C., ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT, ATLANTIC COUNTY

OAL DKT. NO. EDU 6753-06
AGENCY DKT. NO. 276-10/05
(Consolidated)

K.C. appealed a finding of abuse to the Department of Children and Families and certified tenure charges filed to the Department of Education. At the time that the cases were consolidated, the Department of Children and Families was determined to have the predominant interest in the matter. In accordance with *N.J.A.C.* 1:1-17.8c, the agency with the predominant interest in a consolidated appeal must obtain an Order of Extension following its entry of a Final Agency Decision to permit final action by the agencies that do not have the predominant interest. Therefore, it is the responsibility of the Department of Children and Families to obtain an Order of Extension so that the Commissioner of Education can take final action under *N.J.A.C.* 1:1-18.6.

Good cause having been shown, pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, **IT IS ORDERED** that the time limit for the Commissioner of Education to issue a final decision is extended until November 12, 2007.

DATE: 9/28/2007

Arburta Jones
Director of Central Operations
Department of Children and Families

Date agency mailed proposed order to OAL: 10/03/07

c: Lisa Landsman, Esq., Office of the Attorney General
Ned Rogovoy, Esq., for K.C.
Robert A. Muccilli, Esq., for Atlantic County Special Services School District

DATE: _____

Laura Sanders, Director and
Chief Administrative Law Judge

Date OAL mailed executed order to agency: _____

Date agency mailed executed order to parties: _____

#440-07SEC

440-07

AGENCY DKT. NO. 322-10/07

IN THE MATTER OF IRENE FELDSOTT,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF SADDLE RIVER,	:	DECISION
BERGEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the Commissioner has been notified that the respondent did attend training on October 23, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its decision dated October 11, 2007 – suspension until attendance at the next scheduled training, and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, the question of removal is moot in light of the respondent's having attended training as directed, and no suspension can be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner cannot order the sanction recommended.

Under the circumstances, the Commissioner instead finds that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish her for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/13/07

Date of Mailing: 11/14/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T02-07**
Irene Feldsott	:	
Saddle River Board of Education	:	**DECISION FOR FAILURE**
Bergen County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Irene Feldsott was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Ms. Feldsott to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Feldsott did not respond to the Order; and

WHEREAS, the Commission notified Ms. Feldsott that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Ms. Feldsott has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until she attends the October 23, 2007 training session and removal if she fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Irene Feldsott violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until she attends the October 23, 2007 training session and removal if she fails to attend the October 23, 2007 training session.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions/decision template

441-07

#441-07S

OAL DKT. NO. HDY 5207-07, OAL DKT. NO. EDU 3809-07 (CONSOLIDATED)
AGENCY DKT. NO. AHU 07-153, AGENCY DKT. NO. 78-3/07

RECORD SEALED

DEPARTMENT OF CHILDREN AND FAMILIES – INSTITUTIONAL ABUSE INVESTIGATION UNIT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A.S.,	:	DECISION
RESPONDENT,	:	
AND		
IN THE MATTER OF THE TENURE HEARING OF A.S., JR., SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	

The record of this matter, the parties' proposed Settlement Agreement and General Release, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner cannot be satisfied – as she must be in order to meet her obligation to the schools and children of New Jersey – that the proposed agreement meets the established standard for settlement of tenure matters, as set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and *N.J.A.C.* 6A:3-5.6.

The charges filed against respondent in this matter – which include allegations of corporal punishment of students reported to and investigated by the

institutional abuse unit of the Division of Youth and Family Services (DYFS)[1] – are such that the Commissioner cannot approve a settlement that leaves the Board's allegations unadjudicated unless she can be certain that respondent will no longer be able to work in New Jersey schools or present himself for any type of employment – in New Jersey or elsewhere – as an educator duly licensed by the State. As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County*, decided September 7, 1999, and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that the terms of a proposed settlement in a tenure hearing matter call for the teaching staff member's resignation or retirement does not in and of itself assure that the *Cardonick* standards have been met, since the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges or, in this case, the interests of a particular State agency.

In the present instance, it is clear that all parties involved view the proposed settlement as satisfactory because it saves the Elizabeth Board of Education and the Department of Children and Families (DCF) from the costs of litigation while "obtaining Respondent's agreement to retire from teaching" (Term No. 9).[2] [3] However,

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[1] Now the Department of Children and Families – Institutional Abuse Investigation Unit.

[2] Term No. 6 provides that respondent "will no longer teach in any of the public schools within the State of New Jersey."

[3] It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* Superior Court January 30, 1986.

it is unclear how respondent's compliance with such a provision could realistically be monitored or enforced, particularly since respondent would continue to be able to represent himself – to private schools, schools outside New Jersey and otherwise – as the holder of a certificate in good standing issued by the New Jersey State Board of Examiners; indeed, the settlement does not even specifically acknowledge the Commissioner's ability to refer this matter to that body pursuant to *N.J.A.C.* 6A: 9-17.5(a)1.[4] Moreover, in view of the DCF's agreement to revise its finding of "substantiated" to "not substantiated" abuse[5] – in an aspect of the settlement over which the Commissioner has no jurisdiction – it would be difficult in any event for the Board of Examiners to take action against respondent's certificate.[6] Thus, in order to effectuate the stated intent of the parties and satisfy the *Cardonick* standard, the minimum condition necessary for settlement of this matter, in the Commissioner's view, is the relinquishment by respondent, pursuant to *N.J.A.C.* 6A:9-17.11, of all certificates issued to him by the Board of Examiners.

Accordingly, while not precluding the possibility of settlement, the Commissioner rejects the Initial Decision of the OAL approving the proposed settlement in its present form, and directs instead that this matter be remanded for such further proceedings as are necessary to address the concerns expressed herein. If the parties are

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[4] Term No. 11 states only that respondent "has been fully apprised of...the duties of the Commissioner...in approving this Settlement...," and the Initial Decision makes no reference to any understanding on respondent's part of this particular duty.

[5] The Commissioner notes that the underlying abuse has *not* been deemed "unfounded" under the rules in effect at the time of referral of the underlying incident. See Settlement Agreement at 3.

[6] In this regard, it is noted that the Board would be obliged to cooperate fully with the Board of Examiners in any hearing held to suspend or revoke respondent's certificate, thus obviating in significant part the benefits of settlement claimed by the Board.

unwilling or unable to agree on an appropriately modified agreement, the matter shall then proceed to plenary hearing.

IT IS SO ORDERED.[7]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/13/07

Date of Mailing: 11/14/07

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

442-07

AGENCY DKT. NO. 321-10/07

IN THE MATTER OF LAWRENCE CUBAS, CENTRAL JERSEY ARTS CHARTER SCHOOL, UNION COUNTY.	: : : :	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, and the Commissioner has been notified that the respondent did not attend training on October 23, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its decision dated October 11, 2007 – suspension until attendance at the next scheduled training, and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, no suspension could be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner was unable to order the respondent's suspension while the question of his attendance at training was pending.

That question having now been resolved, the Commissioner concurs with the penalty of removal recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, as of the filing date of this decision, the above-named respondent is hereby removed from office as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/14/07

Date of Mailing: 11/14/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T19-07**
Lawrence Cubas	:	
Central Jersey Arts Charter School	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
Mercer County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Lawrence Cubas was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Mr. Cubas to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Cubas did not respond to the Order; and

WHEREAS, the Commission notified Mr. Cubas that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Mr. Cubas has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Lawrence Cubas violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions/decision template

443-07

OAL DKT. NO EDU 3970-07
AGENCY DKT. NO. 94-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD B. DAVISON,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION
	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; 1990 *S.L.D.* 842, 846.

Accordingly, the Commissioner approves the settlement – to the extent she has jurisdiction over the issues – and the tenure matter is dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/14/07

Date of Mailing: 11/14/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03970-07

AGENCY DKT. NO. 94-3/07

IN THE MATTER OF THE TENURE HEARING OF RONALD B. DAVISON, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

Karen A. Murray, Esq., for petitioner, School District of the City of Elizabeth (The Murray Law Firm, LLC, attorneys)

Robert F. Varady, Esq., for respondent, Ronald B. Davison (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: September 27, 2007 Decided: October 5, 2007

BEFORE **LESLIE Z. CELENTANO,** ALJ:

On April 23, 2007, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for September 13 and 14, 2007. Prior to the date of hearing the parties settled the matter. The Stipulation of Settlement and Board Resolution executed by the parties is attached hereto.

Pursuant to N.J.A.C. 6A:3-5 .6(a), the Commissioner of Education must approve settlement and withdrawal of certified tenure charges. The standards established by the State Board of Education In re Cardonick,1990 S.L.D. 842, 846 must include the following: 1) the nature of the charges; 2) an explanation of the circumstances justifying the settlement or withdrawal; 3) consent of both the charged and the charging parties; 4) the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate .N.J.A.C. 6A:3-5 .6 .

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Based upon the foregoing, I **CONCLUDE** that the Settlement Agreement and Board Resolution executed by petitioner School District of the City of Elizabeth and respondent Ronald Davison satisfies the requirements of In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846): Therefore, the Settlement Agreement and Release of Claims executed the parties should be **APPROVED.**

It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 5, 2007
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 10-11-07

Mailed to Parties:

OCT 11 2007
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 27 A 11:07

This Agreement is made this _____ day of _____, 2007, by and between Ronald B. Davison (hereinafter "Davison"), who resides at 64 Cedar Green Lane, Berkeley Heights, New Jersey 07922 and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Davison is currently employed as a tenured Administrator, and,

WHEREAS, Davison and the Board are parties to three (3) proceedings; In the Matter of the Tenure Hearing of Ronald Davison, OAL Dkt. #EDUTH-03970-2007N; Agency Ref. #94-3107 and a case in the U.S. District Court; District of N.J., Davison v. City of Elizabeth Board of Education, et al., Dkt. 07-cu-02773, and arbitration, PERC Dkt. #AR-2007-109, Davison increment withholding;

WHEREAS, after discovery and a review of the facts, and taking into account the uncertainty of litigation and the significant expense of litigation, especially for the Board, an Abbott District, the parties have decided that their respective positions can best be addressed through a global Settlement Agreement; and

WHEREAS, the terms of settlement take into account the public interest, in view of the fact that litigation of these three (3) above-referenced cases have caused and will continue to cause disruption to the educational programs in the Elizabeth School District due to the absence of administrators, teachers, and students who have and will hereinafter have to testify at hearings and further, that the parties, specifically the Board, which is an Abbott District, have incurred and

will continue to incur substantial financial costs in order to continue these cases;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed that:

1. Davison shall sign and submit an irrevocable letter of resignation from all employment with the Board, effective at the close of business on January 8, 2010. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be conditioned upon the Board's compliance with this separation of employment agreement. The Board waives all statutory or contractual claims for notification of Davison's resignation. The letter shall be held in escrow by the Board's labor attorney and shall be submitted for approval in November 2009.

2. Davison hereby promises and agrees to actively seek employment, other than with the Board, immediately upon execution of this Agreement and, if other employment is obtained prior to January 2010, he agrees to resign from his employment with the Board prior to January 2010 and his letter of resignation (Exhibit A) shall be revised accordingly. Davison agrees to provide on a monthly basis, information to the Assistant Superintendent of Human Resources evidencing his compliance with this paragraph.

3. The salary and adjustment increment withheld from Davison for the 2005-2006 school year, which sum is stipulated to be Four Thousand Three Hundred ($4,300.00) shall remain and stand uncontested by Davison.

4. The Board shall restore the salary and adjustment increment for the 2006-2007 school year, which amount is stipulated to be Thirteen Thousand Forty-One Dollars ($13,041.00), which shall be paid to Davison, net of normal payroll deductions for State and Federal Income taxes and pension. The Board's payroll record and pension reports to the N.J.

Division of Pensions shall be adjusted so that Davison's salary for the 2006-07 year shall be recorded and reported as One Hundred Nine Thousand Five Hundred Twenty-Three Dollars ($109,523.00).

5. The Board shall restore the salary and adjustment increment for the 2007-2008 year and the prorated amount for the period from July 1, 2007 up through and including the date of approval for this agreement by the Commissioner of Education shall be paid to Davison, net of normal payroll deductions for State and Federal income taxes and pension contributions. The Board's payroll record and pension report to the N.J. Division of Pension shall be adjusted so that Davison's salary for the 2007-08 year shall be recorded and reported as One Hundred Fifteen Thousand Six Hundred Fifteen Dollars ($115,615.00) as per Contractual Agreement with the Administrators and Supervisors' Union.

6. The parties agree that the gross amount of thirty two thousand six hundred sixty and sixty-seven cents ($32,660.67) was withheld from Davison pursuant to N.J.S.A. 18A:6-14. This amount , less five thousand ($5,000.00), for a sum of twenty-seven thousand six hundred sixty and sixty-seven cents ($27,660.67) shall be paid, net of normal payroll deductions for State and Federal income taxes and pension contributions.

7. The Board shall pay to LaCorte, Bundy, Varady, & Kinsella, the sum of sixteen thousand ($16,000.00) for legal, investigative and expense fees incurred in the three above-referenced actions. A 1099 shall be issued to LaCorte, Bundy, Varady, & Kinsella for this amount. The Board shall pay to Michael J. Renahan Associates the sum of Three Thousand Four Hundred Fifty Dollars ($3,450.00) for expert witness fees. A 1099 shall be issued to Michael J.

Renahan Associates.

8. Davison shall retain his accrued and accumulated sick and vacation days, subject to use per Board policy. The parties shall confirm his accumulation of six (6) vacation days and two hundred sixty three and one-half (263.5) sick days. Upon return of Davison to active employment, he shall commence earning vacation and sick days, prorated, for the 2007-08 year.

9. Davison will be returned to work with the Board, effective upon approval of this Agreement by the Commissioner of Education. Upon Commissioner approval, Davison's assignment for the balance of the 2007-08 year, shall be to the position of School Disciplinarian at School 70 Cleveland Middle School. He shall be paid at the salary stipulated in paragraph 5 above.

10. In consideration of the above and except for acts specified in this Agreement, Davison agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board (Releasees"), past present and future; of and from any debts, obligations, claims, demands, judgements, claims for attorneys' fees, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or his estate, might otherwise have or have had in connection with any of the issues in the aforementioned cases. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans with Disabilities Act of 1990, The Employment Retirement Income

Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, the Workers' Compensation Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment upon his initial hire up through the approval of this Agreement.

11. The parties agree that, subsequent to the retirement of Davison, any inquiries from potential employers regarding Davison shall be channeled solely to the then current Assistant Superintendent for Human Resources. Responses to such inquiries shall be limited to providing the dates of Davison's employment, his position, his salary, and that he resigned.

12. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner or Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same position(s) which they held prior to this Settlement Agreement, and all rights are reserved in that event.

13. Davison acknowledges that, notwithstanding the parties entry into this Settlement Agreement, he has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding his teaching certificates as it deems appropriate.

14. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

15. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to the signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

16. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

17. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

18. All terms in this Settlement Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

19. This Agreement incorporates and settles all claims and disputes which may exist between Davison and the Board arising from his employment or otherwise.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Witness Robert F Varlaro

Dated: 9/19/07

Ronald B. Davison

Dated:

Board Secretary/Business Administrator

Dated: 9/20/07

Board President

Dated: 9/20/07

Exhibit A

RONALD DAVISON

64 Cedar Green Lane
Berkeley Heights, New Jersey 07922

_____, 2007

Armando Da Silva, Board President
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Re: Letter of Resignation

Dear President Da Silva:

Pursuant to the terms of the Settlement Agreement between the Elizabeth Board of Education and myself, I hereby submit my irrevocable resignation from the Elizabeth Board of Education, effective the close of business on January 8, 2010.

Sincerely,

Ronald B. Davison

Ronald B. Davison

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RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 27 A 11:07

BOARD OF EDUCATION

RESOLUTION

WHEREAS, counsel for the Elizabeth Board of Education and Ronald B. Davison have negotiated the resolution of the following cases: In the Matter of the Tenure Hearing of Ronald B. Davison, OAL Dkt. No. EDUTH 03970-2007N; Agency Ref. No. 94-3/07; and Federal District Court Dkt. No. 07-cv-02773; and PERC Dkt No. AR-2007-109; and,

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, trial and arbitration, the parties have agreed to resolve the above-referenced cases with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

AGENCY DKT. NO. 323-10/07

IN THE MATTER OF HARRY LUNA,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the Commissioner has been notified that the respondent did attend training on October 23, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its decision dated October 11, 2007 – suspension until attendance at the next scheduled training, and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, the question of removal is moot in light of the respondent's having attended training as directed, and no suspension can be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner cannot order the sanction recommended.

Under the circumstances, the Commissioner instead finds that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish him for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 11/14/07

Date of Mailing: 11/14/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T06-07**
Harry Luna	:	
Trenton Board of Education	:	**DECISION FOR FAILURE**
Mercer County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Harry Luna was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Mr. Luna to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Luna did not respond to the Order; and

WHEREAS, the Commission notified Mr. Luna that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Mr. Luna has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Harry Luna violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions/decision template

447-07

AGENCY DKT. NO. 319-10/07

IN THE MATTER OF ANTHONY LANGSTON, SCHOMBERG CHARTER SCHOOL, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, and the Commissioner has been notified that the respondent did not attend training on October 23, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its decision dated October 11, 2007 – suspension until attendance at the next scheduled training, and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, no suspension could be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner was unable to order the respondent's suspension while the question of his attendance at training was pending.

That question having now been resolved, the Commissioner concurs with the penalty of removal recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, as of the filing date of this decision, the above-named respondent is hereby removed from office as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/14/07

Date of Mailing: 11/14/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T15-07**
Anthony Langston	:	
Schomberg Charter School	:	**DECISION FOR FAILURE**
Hudson County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Anthony Langston was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Mr. Langston to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Langston did not respond to the Order; and

WHEREAS, the Commission notified Mr. Langston that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Mr. Langston has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Anthony Langston violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 training session.

Paul C. Garbarini MET
Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions/decision template

447-05

#447-05

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER MOLOKWU, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Interim Superintendent of the State-Operated School District of the City of Paterson certified multiple tenure charges of unbecoming conduct and insubordination against respondent -- a tenured special education teacher -- for conduct which included, *inter alia*: obtaining a medical leave of absence under false pretenses, during which respondent participated in a hospital practicum for a nursing program; falsely claiming to have attended mandatory staff training; repeatedly making threatening and derogatory remarks to fellow staff members and students; and sleeping while assigned to monitor standardized testing.

The ALJ dismissed several of the charges because they: pertained to incidents prior to respondent's attainment of tenure, were not sufficiently substantiated in the record, or did not rise to a level of conduct unbecoming; the remaining seven tenure charges were sustained as conduct unbecoming pursuant to *N.J.S.A.* 18A:6-10. The ALJ concluded that the petitioner had, by a preponderance of the credible evidence, proven that the respondent engaged in conduct unbecoming a teaching staff member; accordingly, she ordered the respondent dismissed from his tenured teaching position.

The Commissioner agreed with the ALJ that the proven charges -- in the aggregate -- were more than sufficient to warrant the respondent's dismissal, and ordered him dismissed from employment as of the date of this decision. The Commissioner referred the matter to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 12, 2005

OAL DKT. NO. EDU 9650-04
AGENCY DKT. NO. 294-8/04

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER MOLOKWU, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY	:	COMMISSIONER OF EDUCATION DECISION

Upon independent review of the record, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions, the Commissioner has determined to adopt both the administrative law judge's (ALJ) conclusion that respondent engaged in conduct unbecoming a teaching staff member, and her order dismissing respondent from his tenured teaching position.

Respondent, Christopher Molokwu, began employment in the State-operated School District of Paterson on September 1, 1999, and became tenured there on or about September 1, 2002. On August 25, 2004, petitioner filed fourteen tenure charges against respondent, for which the Interim Superintendent certified that there was probable cause to warrant respondent's dismissal. The first of the fourteen charges was subsequently withdrawn by petitioner. The following constitutes a summary of the remaining thirteen charges.

Second Charge

On or about November 29, 2001, respondent forcefully pushed a ninth grade classified student out of the classroom while screaming at him, which action petitioner urged was unbecoming conduct and provided other just cause for dismissal.

Third Charge

On or about November 29, 2001, in the presence of staff, students and the building principal, respondent yelled and cursed when his supervisor asked to see him, and declared that he was not obliged to comply with the supervisor's direction. Later in the day – yelling, and using profanity and threatening language -- respondent first refused to enter his supervisor's office, and then refused to leave. Petitioner urges that this behavior was conduct unbecoming a teacher and constituted other just cause for dismissal.

Fourth Charge

On or about March 11, 2002, respondent entered a colleague's classroom and removed desks. When the colleague later asked for an explanation, respondent became loud, argumentative and threatening, standing close to the colleague, waving his finger in the colleague's face and blocking the exit from the room. This behavior was witnessed by several students. Petitioner urges that it was unbecoming conduct and/or other just cause for removal.

Fifth Charge

On or about September 12, 2002, respondent failed to report to his assigned tenth period detention assignment, leaving four students unsupervised. Petitioner alleges that this behavior constituted conduct unbecoming a teacher and/or other just cause for dismissal.

Sixth Charge

During the Fall of 2002, respondent applied and obtained approval for a three-month medical leave of absence under false pretenses. While maintaining that he was unable to work due to a medical condition that required aggressive interventions, respondent actually attended a nursing program and worked at Hackensack Hospital to complete practicum

requirements. Petitioner contends that respondent's misrepresentation constituted conduct unbecoming a teacher and/or other just cause for dismissal.

Seventh Charge

On or about February 6, 2003, respondent pushed a female student multiple times to remove her from the detention room, which behavior constituted conduct unbecoming a teacher and/or other just cause for dismissal.

Eighth Charge

On or about February 28, 2003, respondent told his supervisor, Department Chairperson David Cozart, that he attended the mandatory staff training for the administration of standardized testing to ninth graders. He had not, in fact, attended the training, and petitioner urges that the falsehood constituted conduct unbecoming a teacher and/or other just cause for dismissal.

Ninth Charge

On or about February 28, 2003, without obtaining permission, respondent dismissed students early from the detention period he was assigned to supervise, and then waited in the school office until the end of the period to sign out for the day. Petitioner contends that this behavior constituted conduct unbecoming a teacher and/or other just cause for dismissal.

Tenth Charge

On or about March 5, 2003, respondent failed to execute his duty as examiner to assist the classified students assigned to his care with their ninth grade assessment test. His proctor, Colleen Breen-Lopez, assisted the students while he slept in the classroom. Petitioner asserts that this behavior constituted conduct unbecoming a teacher and/or just cause for dismissal.

Eleventh Charge

On or about December 23, 2003, without permission, respondent looked through the office mailbox of department chairman Cozart. When advised by Richard Roberto, building principal, that he was not supposed to look through the department mailbox, respondent gestured at Roberto in a threatening manner, accused him of harassment, and threatened to sue him and report him to the NAACP. Respondent continued the behavior later in the day, and told Roberto that he had taped their earlier conversation. Petitioner maintains that this behavior constituted conduct unbecoming to a teacher and/or other just cause for dismissal.

Twelfth Charge

On or about May 5, 2004, in the immediate vicinity of Principal Roberto's office, respondent made threatening statements directed at Roberto. Respondent further attempted to enter Roberto's office, while at the same time continuing the threats and grabbing at something in his pocket. He subsequently left, making derogatory remarks about Roberto as he did so. This behavior, urges petitioner, constituted conduct unbecoming a teacher and/or other just cause for dismissal.

Thirteenth Charge

On or about May 11, 2004, in his classroom with other students present, respondent told a classified ninth grade female student assigned to his care that she was acting like a "street girl," and used other profanity in speaking with her. Petitioner asserts that this was conduct unbecoming a teacher and/or other just cause for dismissal.

Fourteenth Charge

Petitioner contends that charges one through thirteen, when viewed as a whole, constitute an ongoing pattern of conduct unbecoming a teacher and/or other just cause for dismissal.

On September 10, 2004, respondent filed an answer and affirmative defenses denying all the charges, and alleging harassment, discrimination, retaliation, unfair labor practices and a violation of his first amendment speech rights.

A hearing in the OAL took place on April 25, 26, 27 and 28, 2005. Respondent did not testify, presented no independent exhibits, and offered only one witness, John Sullivan, a teacher's assistant who worked with respondent for one or two class periods per day for one or two years. Sullivan stated that he had never observed respondent put his hands on students or use improper language.

At the outset, the Commissioner notes that the ALJ correctly articulated the standard of proof applicable to this case. The burden of proof in a case such as this is on petitioner by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962).

Second, Third and Fourth Charges

In her Initial Decision dated October 26, 2005, the ALJ dismissed the second, third and fourth charges because they pertained to incidents prior to respondent's attainment of tenure. Petitioner does not appear to challenge the dismissal, and the Commissioner cannot disagree with the ALJ's determination. Under *N.J.S.A.* 18A:28-5 a teacher with the appropriate certificate "shall be under tenure during good behavior and efficiency" after employment in a

district for the requisite time. Petitioner's charges against respondent for events that occurred prior to respondent's attainment of tenure are inconsistent with petitioner's implicit determination -- at the time it renewed respondent's contract for the fourth year, giving respondent tenured status -- that respondent had demonstrated "good behavior and efficiency." However, the Commissioner need not reach the merits of the ALJ's determination about the second, third and fourth charges, because seven of the remaining charges were proven by petitioner and of sufficient gravity to warrant dismissal.

Fifth Charge

The Commissioner concurs with the ALJ that petitioner proved the fifth charge. Petitioner produced witnesses with first hand knowledge of respondent's failure to supervise students in detention on September 12, 2002, and failure to properly request that he be excused. Respondent offered no contradictory evidence.

In his exceptions, respondent directs attention to a question allegedly posed by science teacher Ivan Madjar, the detention supervisor, who was also respondent's union representative. When respondent was found to be absent from the detention room on September 12, 2002, Madjar allegedly asked respondent's supervisor, Charles Cozart, "Where's my boy?" While this choice of words, uttered by Madjar when respondent was not present, could arguably have suggested disrespect, the Commissioner finds that the comment is not germane to the issue of whether or not respondent abandoned his detention duties on the above referenced date.

Sixth Charge

The Commissioner also agrees with the ALJ that petitioner met its burden to prove that respondent willfully abused the sick leave granted to him. Respondent applied for

medical leave on or about September 6, 2002 (P-28). With the application was a note from a doctor with the same last name as respondent (P-28), which note alleged that respondent needed three months off for "aggressive medical interventions" to prevent "continuing progression and end organ damage."

However, Janet Daly, an instructor at Felician College, testified that respondent was a student in her nursing class from September 3, 2002, to October 2, 2002. (3T109-3T110; 3T113) He attended the lectures and skills labs, and participated in the nursing practicum at Hackensack University Medical Center. (3T110-3T112) The nursing practicums were from 7:00 a.m. to 1:30 p.m., and the skills labs were from 8:00 a.m. to 3:00 p.m. (3T116) On October 2, 2002, after Felician College received calls from petitioner asking whether respondent was a student there, respondent withdrew from the nursing program. (3T113) He submitted a form to Daly that stated "I requested for leave of absent [sic] from my job in order to attend classes during the day, was denied [sic]." (P-85).

Petitioner's evidence, showing that respondent misrepresented the reasons for the leave time he requested, and used the leave improperly, was unrebutted at the hearing. In his exceptions, respondent points out that he must have been at his school job on September 12, 2002, because that is the day he was found to have abandoned his detention duties. Notwithstanding this apparent discrepancy in instructor Daly's testimony, the totality of the evidence adequately supports petitioner's charge of abusing medical leave.

Seventh Charge

The Commissioner agrees with the ALJ that petitioner's seventh charge, regarding the alleged pushing of a female student, may not be sustained by hearsay testimony

alone. Nor does petitioner appear to challenge the ALJ's determination. Thus, for the reasons expressed in the Initial Decision, the seventh charge is dismissed.

Eighth Charge

The teachers in JFK High School were advised at the end of February 2003, that they were to attend mandatory training in how to administer standardized tests to their students. (2T43-44) The evidence presented at the hearing established that Cozart had asked respondent if he had attended that mandatory training, and respondent had answered in the affirmative. (P-37) However, Barbara Campisi, the school's testing coordinator and Stephen Frith, the guidance director who worked with Campisi on the administration of the testing and teacher training, both testified that respondent did not attend their mandatory training in February/March 2003. (2T23; 2T30-32; 2T37-38; 2T43-44)

The Commissioner agrees with the ALJ that petitioner proved that respondent lied to his supervisor about attending the mandatory training for test administration. The Commissioner rejects the characterization of the text of trial exhibit P-37 that respondent advocates in his exceptions, and finds that, in answer to Cozart's inquiries, respondent represented that he had attended the training. Further, in light of the corroborative testimony of Cozart, Campisi and Frith, the Commissioner is satisfied that, despite the absence of 2003 training attendance sheets, the evidence proves that respondent did not attend the training.

Ninth Charge

Petitioner's ninth tenure charge against respondent was based upon JFK High School Vice-Principal Anna Marie Vannatta's recollection that respondent had dismissed his detention class early on or about February 28, 2003 without administrative permission. She testified that respondent had told her that his reason for dismissing the students early was that he

had had to go to the bathroom. Vannatta could not recall by how many minutes the period was cut short. The ALJ found that this conduct was unprofessional but not "unbecoming." Petitioner does not appear to challenge the ALJ's determination, and the Commissioner sees nothing in the record that would justify rejecting it. Accordingly, the ninth charge is dismissed.

Tenth Charge

Colleen Breen Lopez, a physical education teacher who was trained to be a proctor for the administration of standardized testing at JFK High School in March 2003, was assigned to work with respondent, who was serving as a test examiner. (2T63) She testified that after he gave initial instructions for each test section, he would read a newspaper. (2T64) When students asked questions he ignored them. (2T64-65) Multiple times, in the course of reading the newspaper, respondent fell asleep for five to ten minutes and snored. (2T65-66) Lopez woke him up. (2T67-68) At the beginning of one of the sections, which contained a vocational survey, respondent indicated that he did not understand the directions and asked Lopez to read them to the class. (2T68-69) While she did so, respondent fell asleep again. (2T69)

At this point Cozart, respondent's supervisor, noticed that Lopez was helping the students. (2T69). When he asked Lopez why she was doing so, she brought his attention to respondent -- who was sleeping -- and explained that respondent had asked her to read the directions to the students. (2T69-70) Cozart reassigned Lopez and woke up respondent. (2T71) He put the survey directions in respondent's hands and asked him to continue where Lopez left off. (2T71) This testimony was unrebutted by respondent.

In his exceptions, respondent both argues that he never acknowledged sleeping and -- in the alternative -- that if he had been sleeping, Cozart improperly woke him in a humiliating fashion in front of the class. Cozart should have excused respondent from duty and

determined whether there was a medical problem. Respondent also argued that he fulfilled his responsibilities by reading the directions at the beginning of two out of the three test sections.

Testing administrator Campisi testified that examiners may not read, drink, eat or chat during the standardized tests. (2T36) The focus must be entirely on the testing. (*Ibid.*) The ALJ found, and the Commissioner concurs, that respondent slept when he should have been administering tests. He did not walk around the room or answer questions. The Commissioner notes further that respondent directed a proctor to perform duties that he should have performed. While the Commissioner does not approve of the manner in which Cozart woke respondent up, the fact remains that respondent both shirked his duties and modeled poor behavior in the presence of his students. If he had a medical problem, it was incumbent upon him to bring it to the attention of his supervisor at the time of the testing. There is nothing in the record that would indicate that he did so.

For the foregoing reasons, the Commissioner adopts the ALJ's determination that petitioner proved its tenth charge.

Eleventh Charge

JFK High School Principal Richard Roberto testified that he observed respondent going through the Special Education departmental mailbox and told him that he had no authority to do so. (3T77) There were confidential items in the mailbox for department chairman Cozart (*Ibid.*), who himself testified that he had never given respondent permission to peruse the mailbox's contents. (1T160) Respondent had his own mailbox. (3T77) (P-63)

The respondent's reaction to Roberto's instruction was to raise his voice, insist that he had a right to go through the mailbox, contend that he was looking for his mail, accuse Roberto of harassment, and threaten legal action. (3T77-78) He left the office and returned

shortly thereafter with an even angrier demeanor, pointing, yelling and making threatening comments. (3T78) (P-63)

In his exceptions, respondent pointed out that although a secretary was supposed to have witnessed the incident, petitioner did not call the secretary as a witness. He urges that there is consequently no "confirmation" of the manner in which respondent gestured or behaved toward Roberto. However, the ALJ apparently found Roberto's testimony credible, and respondent offered no contradictory evidence.

The Commissioner will not reject the ALJ's determinations concerning the credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record. *S.D. v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services*, 349 *N.J. Super.* 480, 484 n.1 (App. Div. 2002). The Commissioner's review of the record reveals no such defects.

The Commissioner concurs with the ALJ's findings that respondent's perusal of the department mailbox, and his reaction when his principal told him to stop, constituted insubordinate and unbecoming conduct.

Twelfth Charge

Another incident of insubordination by respondent was described in the testimony of both Roberto and Madjar, respondent's union representative. At a meeting on April 30, 2004, attended by Roberto, Vice-Principal Kathy Kellan, respondent and Madjar, respondent was given a letter advising that his abandonment of his assignment on parent conference night was a breach of his contractual duties and could result in discipline. (P-70; P67) Another appointment was set up to allow respondent to prepare a rebuttal. (3T102)

On May 3, 2004, respondent and Madjar returned to Roberto's office with respondent's rebuttal. (3T103) Madjar testified that Roberto listened to respondent explain why he wrote the rebuttal letter, accepted it with a polite "thank you," said he would review it later, and brought the meeting to a close. (3T104-105) Madjar believed that respondent was not satisfied and "started to say things." (3T105). "Things got a little out of hand." (*Ibid.*) Respondent took steps back into Roberto's office, and Roberto went behind his desk. Madjar placed himself between the two men, escorted respondent out of Roberto's office, and "had a little tough time calming him down." (*Ibid.*) Madjar characterized respondent's statements as aggressive, irrational and threatening, and opined that Roberto said nothing to incite such behavior. (3T106-107)

Respondent offered no evidence to rebut the foregoing facts presented at the hearing. Nor is there anything of substance in his exceptions to contradict the ALJ's determination that respondent's behavior on May 3, 2004 was insubordinate. Accordingly the Commissioner adopts the ALJ's determination that petitioner has proven the twelfth charge.

Thirteenth Charge

The Commissioner agrees with the ALJ that petitioner's thirteenth charge may not be sustained by hearsay testimony alone. Nor does petitioner appear to challenge the ALJ's determination. Thus, for the reasons expressed in the Initial Decision, the thirteenth charge is dismissed.

Fourteenth Charge

As to this charge of an ongoing pattern of unbecoming conduct, the ALJ wrote that "Charge Fourteen is sustained in part and dismissed in part. She further found, on the basis of all the facts and controlling law, that petitioner had proven that respondent had engaged in

conduct unbecoming a teaching staff member. The Commissioner specifically finds that on basis of substantiated tenure charges five, six, eight, ten, eleven and twelve, that petitioner proved the fourteenth charge of an ongoing pattern of unbecoming conduct.

In his exceptions, respondent alleges that he was treated with disrespect by his colleagues in general and by his supervisor, Cozart, in particular. He urges that the testimony of petitioner's witnesses be regarded as lacking in credibility, due to this alleged animosity. The Commissioner finds respondent's argument unpersuasive. Respondent made three references to the record: one involving the inappropriate remark made in jest by union representative Madjar, one involving the way Cozart woke him up during the standardized test administration, and one involving Cozart's unfriendliness when approached by respondent at Cozart's place of worship. Two of the three references have been addressed above. The third is not significant in the face of the facts presented at the hearing in this case.

Similarly, the Commissioner is not persuaded by respondent's discussion, in his exceptions, of his evaluations. Respondent himself points out that in April 2003, he received a failing grade on his ability to accept constructive criticism, and a comment that he needed improvement in his relationships with department and general staff members. Notwithstanding that respondent received grades of satisfactory on a March 12, 2004 evaluation, the unrebutted hearing testimony and exhibits about his behavior more than adequately support the ALJ's conclusion that petitioner's charges were proven.

Finally, the Commissioner agrees with the ALJ that the proven charges, in the aggregate -- particularly the sixth, eighth, tenth and twelfth charges -- were more than sufficient to warrant dismissal. Christopher Molokwu is hereby dismissed from his tenured teaching position in the State-Operated School District of the City of Paterson, as of the date of this

decision. This matter is being referred to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

IT IS SO ORDERED*

Lucille Eday

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/12/05

Date of Mailing: 12/12/05

* The Commissioner's decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9650-04
AGENCY DKT. NO. 294-8/04

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER MOLOKWU, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON/PASSAIC COUNTY

Joanne Butler, Esq., for Petitioner,
(Schenck, Price, Smith & King, attorneys)

Nancy I. Oxfeld, Esq., for respondent
(Oxfeld, Cohen, attorneys)

Record Closed: July 5, 2005 Decided: October 26, 2005

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 24, 2004, petitioner, State-Operated School District of the City of Paterson ("District") filed tenure charges of conduct unbecoming against the respondent, Christopher Molokwu, (Molokwu) a District teacher.

On or about September 10, 2004, Molokwu filed an answer denying all the charges against him. The matter was transmitted to the Office of Administrative Law (OAL) on September 13, 2004 for hearing as a contested case.

A pre-hearing conference was held on December 8, 2004 and the matter was heard on April 25, 26, 27, and 28, 2005. The parties submitted post-hearing briefs and the record closed July 5, 2005. The time for the issuance of the Initial Decision was extended by the Commissioner until November 17, 2005.

FACTS

I **FIND** the following **FACTS** to be undisputed, thus they are adopted as the **FACTS** herein:

1. Christopher Molokwu is employed by the State Operated School District of Paterson as a teacher and is tenured.
2. He attained tenure in September 2002.
3. On July 26, 2004 Sworn Tenure Charges of Conduct Unbecoming a Teaching Staff Member and/or Other Just Cause for Dismissal and Sworn Statement of Evidence in Support of the Sworn Tenure Charges against Christopher Molokwu, were filed by Mr. James Smith, Director of School Security.
4. On August 24, 2004 Dennis Clancy, Ed. D., Interim Superintendent certified the Sworn Tenure Charges to the Commissioner of Education in accordance with *N.J.S.A.* 18A:7A-39.
5. Tenure Charges and the Sworn Statement of Evidence were served upon the respondent and his attorney on August 25, 2004.

LEGAL DISCUSSION

Tenure of teaching staff members is bestowed by statute, *N.J.S.A.* 18A:28-5, and acquired by satisfactory performance by teachers who have a position in which a teaching certificate is required, if they hold the appropriate certificate and if they been employed for the requisite time, generally, three consecutive calendar years. Because it is a form of job security teachers must be diligent in retaining their tenured status, and School Boards must be scrupulous in meeting their evidentiary burden in order to bring tenure charges against a tenured teacher. *N.J.S.A* 18A:6-10 provides that: "No person shall be dismissed or reduced in compensation. If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state...except for inefficiency, incapacity, unbecoming conduct, or other just cause..."

Standard of Proof

The determination of whether to remove a teacher from a tenured position requires consideration of the nature of the act, the totality of the circumstances, and the impact on the teacher's career. *In re: Fulcomer,* 93 *N.J. Super* 404, 421 (App. Div. 1967). Usually, a series of events demonstrating a pattern of behavior is an indication of "unbecoming conduct." However, if the incident is sufficiently flagrant, one incident will suffice. *Redcay v. State Board of Education*, 130 *N.J.L.*369 (Sup. Ct. 1943), *aff'd o.b.* 131 *N.J.L.* 326 (E & A., 1944). Dismissal is usually reserved for cases in which there has been a continuing pattern of misconduct accompanied by prior warnings. *Fulcomer* at 421.

Petitioner bears the burden of proof and consequently to prevail in the instant case, the truth of the charges must be established by a preponderance of the "credible evidence." *Cumberland Farms, Inc. v. Moffett,* 218 *N.J. Super.* 331, 341 (App. Div. 1987), *see also In re: Tenure Hearing of Grossman*, 127 *N.J. Super* 13, 23 (App. Div.

1974) cert. denied 65 *N.J.* 292 (1974), *In re: Philips*, 117 *N.J.* 567, 575 (1990). The term "preponderance" has been defined as the "greater weight of the credible evidence in the case," as testified to, at trial by the witnesses. *State v. Lewis*, 67 *N.J.* 47 (1975). In establishing the credibility of witnesses, the New Jersey Supreme Court has pronounced that credibility "must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well." *Spagnuolo v. Bonnett*, 16 *N.J.* 546, 554-55 (1955).

Residuum Rule

It is well established in administrative hearings hearsay evidence is admissible. *Weston v. State*, 60 *N.J.* 36 (1972). However, hearsay evidence is accorded whatever weight the administrative law judge deems appropriate. The nature, character and scope of the evidence, the circumstances of its creation and production, and, in general, its reliability must all be considered. *N.J.A.C.* 1:1-15.5(a).

It is also well established that notwithstanding the admissibility of hearsay evidence some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. *N.J.A.C.* 1:1-15.5(b). The New Jersey Supreme Court has pronounced: [T]he rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." *Weston v. State*, 60 *N.J.* at 50-51.

Unbecoming Conduct

Respondent has been charged with several counts of "unbecoming conduct", pursuant to *N.J.S.A.* 18A: 6-10. The term unbecoming conduct is an elastic one broadly

defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Hartmann v. Police Department of Ridgewood*, 258 *N.J. Super.* 22, 40 (App. Div. 1992). In the context of a teacher tenure case, "...the touchstone is fitness to discharge the duties and functions of one's office or position." *In re the Tenure Hearing of Grossman* 127 *N.J. Super.* 13, 29 (App. Div. 1974) *cert. denied* 65 *N.J.* 292 (1974).

Findings with respect to the charges

Charge one was withdrawn by the petitioner. Charges Two, Three and Four, while testimony and evidence were received on them, occurred prior to the respondent's attainment of tenure. For that reason, I hereby **DISMISS** Charges Two, Three and Four.

Charge Five: Failure to report to 10th period detention supervision on September 12, 2002.

The District alleges that Molokwu failed to report to his assigned 10th period detention class, thus leaving four students unsupervised. In support of the charges, Mr. Ivan Madjar, (Madjar) testified for the district. Madjar is a science teacher at JFK and is also the detention supervisor. He is also a representative for the Paterson Education Association (PEA). As detention supervisor, Madjar is required to discipline the students.

On September 12, 2002, Madjar was notified by Security personnel that the 10th period detention students were unsupervised. He went to the class and after some ten

minutes removed the students to "cut" office. Madjar later learned that the assigned teacher, Dr. Molokwu was on personal business.

David Cozart (Cozart) was the Molokwu's supervisor during much of the time when the charges originated.[1] He was the Chairperson of the Department of Special Services at John F. Kennedy High School in Paterson. He held that position for approximately four years, and previously was a teacher assistant (Dean of Students) to the principal at JFK.

Cozart confirmed that on September 12, 2002, Molokwu was assigned to supervise the last period detention class. A teacher asked him about Molokwu's whereabouts because the detention students were in the classroom unsupervised. Subsequently, Molokwu told Cozart that he had asked David Kott, if he could be late to his tenth period detention supervision, so he could go downtown to the personnel office to drop off paperwork related to his medical leave. (P-30).

David Kott is a social studies teacher at JFK and also works in the cut office. He does not supervise the cut office. At the hearing, Kott did not specifically recall the date, but did recall having a conversation with Molokwu regarding his request to go downtown to the Board offices. Further, he recalled that Molokwu said he would return in ten or twenty minutes.

I **FIND** that on September 12, 2002, Christopher Molokwu neglected his duty and left his detention students unsupervised and therefore Charge Five is sustained. Such lack of supervision placed all the students at their peril, demonstrated poor judgment, and showed a disregard for proper procedure for requesting leave.

[1] Cozart is presently the Vice Principal of P.S. 25 in Paterson. He has been in this position since February 2004.

Charge Six – Obtaining Medical Leave Under False Pretenses

During his first year as the respondent's supervisor, Molokwu complained to Cozart about a student in his afternoon English class. Cozart went to the class to observe. However, Molokwu did not appear for the entire period. Cozart contacted security to locate him. Molokwu was found sleeping in the teacher's lounge. Molokwu told Cozart that he had took some medication which tended to make him drowsy in the afternoon. A meeting was held with Molokwu, Cozart and Ms. Corrado, the Vice Principal and it was agreed that Molokwu's detention supervision period would be changed from the afternoon to the morning.

Ultimately, Molokwu did go out on medical leave. However, Cozart was unsure whether the leave was approved because neither he nor the principal were informed of the leave until after Molokwu was gone.

At the end of the 2002 spring term Cozart refused to sign off on Molokwu's Professional Improvement Plan (PIP) because the course of study was nursing, which obviously had nothing to do with special education. Molokwu challenged Cozart's refusal because Cozart has signed it the previous year. Cozart was aware that the practicum for Molokwu's nursing course had to be completed in September. Further, he was aware that Molokwu had requested a medical leave, as well as the rumor that Molokwu would use the leave time to complete his studies. Cozart called Felician College and was told that Molokwu was enrolled in the nursing program. Cozart then related same to the principal and the District Labor Relations Department.

Janet Daly, (Daly) an instructor at Felician College confirmed that Molokwu was in her class from September 3, 2002, until he withdrew on October 2, 2002. The course ran until October 31, 2002. Molokwu was present for the lecture portion of the course

on September 4, 5, 9, 10, 11, 12[2], 16, 18, 19, 25 and 26. Additionally, he was present on September 23, 24 and 30, 2002 for classes at the hospital. Daly recalled receiving two phone calls from the Paterson School District inquiring if Molokwu was in her class. Subsequent to those phone calls, the respondent withdrew from her class on October 2, 2002. Molokwu alleged that he was returning to his job. On cross-examination, Daly stated that the clinical labs were from 8:00a.m. until 3:00 p.m., and the hospital clinicals were from 7:00 a.m. until 1:30 p.m.

I **FIND** that from September 2002 until at least October 2, 2002, the date of the respondent's withdrawal from the Felician College nursing program, Molokwu engaged in a willful abuse of sick leave. Thus, Charge Six is sustained.

Charge Seven: Inappropriate Physical Contact with a Student

In February 2003, Cozart was notified by the Parent School coordinator, Patricia Harris, that a student was upset and crying regarding an incident with the "doctor fellow." The student said that she was in Molokwu's classroom speaking with another student when Molokwu asked her to leave. She replied that she wanted to finish her conversation. Molokwu placed his hands on her shoulders and pushed her out of the classroom. The student put her complaint in writing. (P-35) Security, the police, and the principal, as well as the girl's grandfather, were notified.

A meeting was convened in the school social worker's office where respondent and Madjar, as a Union Representative, were present. When asked about the incident, Molokwu was clearly shaken. He was perspiring and his hands trembled. He denied doing anything and asserted that the girl hit him in the face, knocking off his glasses. He, did not, however write a report about the incident. During the meeting, Molokwu demonstrated how he put his hands on the student's shoulders and how she reached back and knocked off his glasses.

[2] There is a disparity between this witness' record of the respondent's attendance on September 12, 2002 and the petitioner's claim that the Respondent was present for most of the day and performed his teaching duties until, the tenth period. Such disparity does not impinge the witness' credibility.

After the student and her grandfather left the office, Cozart received a call from security to come outside. Security personnel had observed Molokwu attempting to speak to the student and her grandfather as they walked to their respective cars. When Harris and Cozart arrived on the scene, the respondent was already in his own truck and had pulled away.

I **FIND** that there is insufficient proof in the record to sustain the charges: The student did not testify and thus the only proof is hearsay testimony of witness Cozart. Hearsay while admissible cannot be used as the ultimate finding of fact. See *N.J.A.C.* 1:1-15.5(b) and *Weston v. State supra* at 60 *N.J.* 50, 51.

Charge Eight - Lying to his Supervisor

For three days in February and March of 2003, standardized tests were administered to the students. Teachers were required to attend mandatory training on the testing procedures. When Cozart questioned Molokwu about whether he had attended training, Molokwu replied that he was "with Pugh", another teacher who was assigned to the same testing room. Thereafter, Cozart asked Molowku several times about his attendance at the training session and was always given the same response. Finally, Molokwu asked Cozart to stop asking him about the matter.

Ms. Barbara Campisi (Campisi) an employee of the Paterson School District was an English teacher at JFK for thirteen years. She was also the school's testing and SRA coordinator for the last seven years. She was responsible for conducting the training and overseeing the administration of the 2003 standardized tests. Campisi told Cozart that the Molokwu had not attended either the first or the second day of the training session. Although, Molokwu had not attended any training sessions, he was allowed to be an examiner because it was his homeroom.

At the hearing, Campisi recalled that meeting reminders were announced over the school's PA system as to what was to be done and where to pick up the testing

materials. She admits that she no longer has the sign in sheets from 2003, nor her personal attendance notes.

Campisi's testimony was corroborated by Stephen Frith, (Frith), JFK's Director of Guidance. He worked with Campisi during the SPA and HSPA testing. He assisted her in setting up the test and training the staff to administer the test. Frith testified that the respondent did not attend training in March 2003.

I **FIND** that the petitioner has proven by preponderance of the credible evidence that Molokwu lied to Cozart, his supervisor, about his attendance at the Training Session. Thus, Charge Eight is hereby sustained.

Charge Nine – Dismissing Detention Students without Administrative Approval

Anna Marie Vannatta, (Vannatta) is the Vice Principal at JFK. As such, she had numerous occasions to interact with the Molokwu. She recalled an incident on or about February 28, 2003 where she found Molokwu in her office before detention dismissal. When asked why he was there, the respondent told her he had a "bathroom problem" and had dismissed his detention students early. She told him that he could not leave the students unattended and he reiterated that he had a personal emergency, and so he had dismissed them. At the hearing, Vannatta could not recall the exact time or what time it was that Molokwu reported dismissing his students. Vannatta concluded that if it were seven minutes or one minute, it was unacceptable to dismiss the students early without administrative permission.

I **FIND** that Molokwu's conduct, although unprofessional, does not rise to a level of conduct unbecoming. Charge Nine is **DISMISSED**.

Charge ten: Sleeping in test room while delegating examiner's duties to a proctor:

After the first day of testing in March of 2003, Cozart removed the teacher originally assigned as proctor and assigned Colleen Breen Lopez, a physical education teacher, to proctor in the Molokwu's classroom. Subsequently, Cozart observed Lopez speaking in front of the classroom. He motioned to Lopez to come outside so he could determine what was going on, and she gestured to the respondent who appeared to be asleep at his desk.

Lopez confirmed that she was reassigned to proctor in the respondent's class. On several occasions, she had to awaken the respondent because he was sleeping during the administration of the test. Molokwu was not only sleeping, he was snoring. Further, Lopez noted that Molokwu asked her to read the survey directions aloud to the class, because he did not understand them. While she was reading, the respondent appeared to drift off to sleep again. At this point, she saw Cozart in the hallway. She confirmed that Cozart asked her why she was reading to the class since she was the proctor, not the examiner. She pointed to the respondent who was sleeping. Cozart told her to leave. He then entered the classroom and placed the survey on top of Molokwu's folded hands stating: "Why don't you pick up where she left off?", or words to that effect. Lopez gathered her belongings and left the classroom.

Thereafter, Cozart drafted a letter outlining the allegations that the respondent did not report to mandatory training, that he left the classroom unsupervised to sharpen pencils and that he was sleeping in front of the classroom. (P-37). Additionally, the letter contained an admonition concerning the carrying of a concealed tape recorder. When Cozart attempted to give this letter to the Molokwu, he refused to take it. Cozart reported same to the principal, and gave him the letter intended for the respondent.

I **FIND** that the petitioner has proved by a preponderance of the credible evidence that Molokwu was sleeping in his classroom. The conduct is unprofessional and unbecoming. This Charge is sustained.

Charge Eleven - Insubordination.

Cozart asserts that he never gave the respondent permission to get mail or look in his mailbox. The principal informed him that he found the respondent rifling through the departmental mailbox.

Roberto confirmed that he asked the respondent why he was in the department's mailbox and Molokwu responded by accusing him of harassment. Further, Molokwu said that he was allowed to go through the mailbox. Molokwu appeared to be very upset, his voice was raised and he threatened Roberto with legal action. Molokwu left, and then came back, more enraged. The respondent was loud and finger pointing, Roberto found this behavior to be threatening.

I **FIND** that this conduct to be insubordinate. Further, it is conduct unbecoming a teacher. Thus, Charge Eleven is hereby sustained.

Charge Twelve - Insubordination:

Roberto further testified to an incident involving the respondent that took place in April 2004. It was memorialized in a memo from the Vice Principal, Kathy Kellan. On April 30, 2004, Roberto, Kellan, the respondent, and his PEA representative, Madjar, met to discuss the incident. Another meeting was scheduled on May 3, 2004, to give Molokwu time to prepare a rebuttal. At that meeting, Molokwu submitted his rebuttal and the meeting was concluded. However, he became enraged and began yelling and pointing at Roberto in a threatening manner. Madjar encouraged Molokwu to leave and ultimately had to stand between Molokwu and Roberto. Roberto testified that he felt

physically threatened. As a result of that meeting, Roberto requested that Molokwu be transferred.

I **FIND** that Charge Twelve constitutes insubordinate conduct. Further, it is conduct unbecoming a teacher. Charge Twelve is hereby sustained.

Charge Thirteen: Verbal Abuse of a Student

Tanya Jordan testified that she became the administrative department Chair for Special Education in April of 2004. In May, she received a complaint from a parent that the respondent called her daughter a "street girl." Jordan suggested that the mother should meet with her, Roberto, and the respondent. At the meeting, Roberto was not present, but Jordan met with the student, her mother and the respondent. The mother was very upset, stating she did not want teachers calling her daughter "a whore." The student stated that she interpreted being called a "street girl" synonymous with being a whore."

Molokwu denied calling the student a "street girl", but qualified it by stating he told her she was acting like "one of those street girls." Jordan explained that the respondent's behavior was inappropriate and she gave him a verbal reprimand.

I **FIND** that the petitioner has failed to meet the required burden on this charge. While Jordan was a credible witness, the student was not presented to corroborate the hearsay testimony. Thus, Charge Thirteen is hereby Dismissed.

Charge Fourteen - An Ongoing Pattern of Conduct Unbecoming a Teaching Staff Member

For all of the reasons summarized above, Charge Fourteen is sustained in part and dismissed in part. Having considered all the facts and the controlling case law, I **CONCLUDE** that the petitioner has, by a preponderance of the credible evidence,

proven that the respondent has engaged in conduct unbecoming a teaching staff member.

It is **ORDERED** that the respondent, Christopher Molokwu, be dismissed as a tenured teaching staff member in the employ of the State Operated School District of the City of Paterson.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/26/05
DATE

Irene Jones
IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/2 /05
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 2 8 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses

James Smith

David Charles Cozart

Barbara Campisi

Stephen Frith

Tyrone Pugh

Colleen Breen- Lopez

Charles Bell

Robin O'Brien

Ann Marie Vannatta

David Michael Kott

Tanya Jordan

Ivan Madjar

Janet Daly

John Sullivan

Exhibits

P1 Sworn Tenure Charges

P2 Sworn Statement of Evidence

P3 Answer and Affirmative Defenses

P4 Stephenson to Molokwu -7/19/99

P5 Non-Tenured Classroom Teacher Evaluation

P6 Non-Tenured Classroom Teacher Evaluation

P7 Non-Tenured Classroom Teacher Evaluation

P8 Statement & Non-Tenured Classroom Teacher

P10 Cozart to Molokwu -2/14/01

P11 Molokwu to Cozart -2/14/0 1

P12 Cozart to Granick w/attachments -2/28/01

P13 Non-Tenured Classroom Teacher Evaluation -Molokwu -3/8/01

P14 Statement by Harris -5/23/01

P15 Statement by Molokwu -5/23/0 1

P16 Cozart to Molokwu -5/24/01

P17 Molokwu to Cozart-5/25/01

P18 Non-Tenured Classroom Teacher Evaluation -Molokwu -11/5/01

P19 Cozart to Molokwu -11/26/01

P20 O'Brien to Cozart— 11/28/01

P21 Cozart to Molokwu 11/29/01

P22 Molokwu to Cozart -12/03/01

P23 Non-Tenured Classroom Teacher Evaluation -Molokwu -1/2/01

P24 Not admitted

P25 Non-Tenured Classroom Teacher Evaluation - Molokwu 3/4/02

P26 Bell to Cozart— 3/11/02

P27 Molokwu to Vanatta & Cozart

P28 Molokwu to Duroy with attachments

P29 Cozart to Molokwu -9/13/02

P30 Molokwu to Cozart -9/13/02

P31 Duroy to Molokwu -*10/9/02*

P32 Velez to Smith -11/18/02

P33 Shafer to Molokwu -1/8/03

P34 Not admitted

P35 Statement by Gales -2/6/03

P36 Notes: Duboise and Gales

P37 Cozart to Molokwu -3/5/03

P38 Roberto to Shafer -3/6/03

P39 Molokwu to Shafer -3/7/03

P40 Cozart to Roberto -3/10/03

P41 Shafer & Krause to Kelley & Lyde w/attachments- 3/11/03

P42 Shafer & Krause to Kelley & Lyde w/attachmerits -3/12/03

P43 Molokwu to Roberto -3/12/03

P44 Shafer & Krause to Molokwu -3/17/03

P45 Tenured Classroom Teacher Evaluation -Molokwu w/rebuttal attached

P46 Padilla to Molokwu -4/1/03

P47 Tirri to Roberto w/attachments -4/7/03

P48 Statement by McKoy 4/9/03

P49 Cozart to Roberto -4/24/03

P50 Roberto to Shafer -4/25/03

P51 Roberto to Krause w/attachments -4/29/03

P52 Shafer to Lyde & Kelley -5/7/03

P53 Cozart to Padilla -5/20/03

P54 Shafer to Duroy -6/2/03

P55 Posting for Vice Principal -7/14/03

P56 Molokwu to Roberto -9/18/03

P57 Shafer to Anna -9/21/03

P58 Roberto to Johnson -10/9/03

P59 Cozart to Molokwu -12/2/03

P60 Cozart to Molokwu (second copy) -12/2/03

P61 Molokwu to Cozart -12/03/03

P62 Cozart to Roberto w/attachments -12/03/03

P63 Roberto to Shafer -12/30/03

P64 Johnson to Guzman -1/23/04

P65 Guzman to Karpf— 1/27/04

P66 Evaluation Instrument -3/10/04

P67 Roberto to Molokwu -4/29/04

P68 Kellett to Roberto -4/30/04

P69 Kellett to Roberto -5/5/04

P70 Statement by Madjar -4/30/04

P71 Molokwu to Roberto -5/3/04

P72 Statement by Madjar -5/3/04

P73 Torres to Roberto -5/5/04

P74 Roberto to Shafer -5/5/04

P75 Roberto to Merachnik -5/5/04

P76 Oliver to Jordan

P77 Jordan to Roberto -5/17/04

P78 Molokwu to Duroy w/attachments -5/19/04

P79 Plans for School

P80 Campisi to Staff: SPA & HSPA testing (2005)

P81 Non-Interview Packet

P82 Interview Packet

P83 Petitioner's first set of Interrogatories

P84 Petitioner's first set of Interrogatories with Answers

448-07

#448-07

OAL DKT. NO. EDU 9451-01
AGENCY DKT. NO. 411-10/01

VICTOR EISENBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter comes before the Commissioner by way of a request – filed by the petitioner and granted in accordance with *N.J.A.C.* 1:1-14.10 – for interlocutory review of Administrative Law Judge (ALJ) Irene Jones' Order of October 17, 2007, which narrowed the scope of the Office of Administrative Law (OAL) proceedings by eliminating two of four issues identified in a pre-hearing order as needing resolution. More specifically, the two issues removed from consideration were:

1. Whether petitioner was denied due process.
2. Whether petitioner's personnel file was "papered" and positive evaluations removed to ensure what he contends was a predetermined result.

The Commissioner will not disturb the ALJ's elimination of the first issue, for two reasons. First, for the purposes of this proceeding, the first issue is congruent with the third question articulated in the pre-hearing order, *i.e.,* what process was petitioner given and was that the process due him? Second, petitioner's arguments to the Commissioner focus exclusively on the second issue identified in the prehearing order.

While expressing no opinion regarding the merits of petitioner's contention that respondent – by altering petitioner's personnel file – arrived at its non-renewal decision by arbitrary, capricious and unreasonable means, the Commissioner directs the ALJ to preserve the second issue in the pre-hearing order. The Commissioner agrees with petitioner that the issue was not directly resolved in petitioner's action in Superior Court, Law Division, which concerned discrimination, contract, quasi-contract and defamation/tort causes of action: *Victor Eisenberg v. Fort Lee Board of Education, et al.*, L-5272-02, *aff'd,* (App. Div. November 3, 2005) A-0233-04T3.

In point of fact, the defamation count was dismissed on procedural grounds, *i.e.,* failure to comply with the Tort Claims Act, and failure to file within the appropriate limitations period. The Judge also: 1) noted that the documents which were alleged to contain defamatory statements were covered by the qualified privilege applicable to speech that advances such matters of public interest as the conduct of teachers, and 2) determined that respondents did not abuse the qualified privilege. The issue of whether respondents acted arbitrarily and unreasonably in terminating petitioner based upon a personnel file which he contends was unfavorably altered, was not squarely addressed. The doctrine of issue preclusion does not apply.

The discrimination count was dismissed because petitioner did not meet his burden to produce sufficient evidence to show that the reasons respondent gave for petitioner's non-renewal were pretexts for discriminatory intent.

The Judge ruled on a 'spoliation' of evidence claim pressed by petitioner, but that claim pertained to a missing attachment to one specific memorandum from

January 2001. That memorandum does not appear to be at issue in the present interlocutory motion for review of ALJ Jones' order.

Finally, regarding the 'contract' claim and allegations of breach of the covenant of good faith and fair dealing, the judge equated them with claims challenging non-renewal, and explained that such claims are subject to the jurisdiction of the Commissioner of Education. More specifically, the judge stated:

> New Jersey Courts have clearly held that if a party has a grievance charging arbitrariness even by reason of discriminatory practices or other capricious considerations, here which is [allegedly] falsity, that they papered the file, they predetermined, the avenue of relief is by way of review under the School Laws by the Commissioner of Education.
>
> Transcript of hearing in *Eisenberg v. Fort Lee BOE,* L-5272-02, *supra,* p.101. Emphasis added.

Thus, the judge did not reach a decision on petitioner's claims about the alteration of his file; she told petitioner that the Commissioner of Education is the correct arbiter of those claims, and that petitioner needed to exhaust his administrative remedies. The doctrine of issue preclusion does not attach to petitioner's contentions about the alleged manipulation of his file because Judge Moses herself told petitioner to take it up with the Commissioner of Education.

The Commissioner notes that there appears to be no disagreement about petitioner's assertion that five observation reports and one annual evaluation are missing from his personnel file. The ALJ may include this information in her consideration of the facts of this case, and give it the weight, if any, that she believes it warrants.

Finally, the Commissioner finds that petitioner's allegations concerning the contents of his personnel file cannot be removed from consideration based on the

grounds that petitioner did not avail himself of the grievance remedy included in the collective bargaining agreement between respondent and its employee's union. The State Board of Education determined, in *Victor Eisenberg v. Board of Education of the Borough of Fort Lee, Bergen County,* SB # 43-02 (November 5, 2003), that the window for filing petitioner's appeal properly began on the day that he learned of the alleged alteration of his personnel file, *i.e.,* on or about June 28, 2001. It is undisputed that petitioner's employment ended the next day. The Commissioner therefore concludes that, as a practical matter, a grievance was no longer available to petitioner at the point in time when he learned that the contents of his file might warrant the pursuit of such a remedy.

In summary, the Commissioner agrees with the conclusion of the ALJ that the first issue set forth in the pre-hearing order may be removed from consideration, but rejects the ALJ's determination that the second issue may be similarly dropped from this case. Thus, respondent's motion to limit the scope of this matter is granted only as regards the elimination of the first issue identified in the pre-hearing order.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/15/07

Date of ~~Mailing~~ Faxing: 11/15/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
Memorandum of Law

ORDER
ON MOTION TO LIMIT
THE SCOPE OF THE PROCEEDINGS
OAL DKT. NO. EDU 9451-01
AGENCY DKT. DKT. 15172-17

VICTOR EISENBERG,
Petitioner,
v.
FORT LEE BOARD OF EDUCATION,
Respondent.

Victor Eisenberg, petitioner, pro se

Joanne Butler, Esq. for respondent, Fort Lee Board of Education (Schenck, Price, Smith & King, LLP, attorneys)

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the respondent's Fort Lee Board of Education's Motion to Limit the scope of the proceeding. This matter was commenced in 2001, thus it has a long and tortured procedural history. However, the facts and procedural history may be reduced as follows:

Victor Eisenberg (Eisenberg) was initially employed by the Fort Lee Board of Education (the Board) as a substitute teacher from January 1996 until June 1998. He was then hired as a high school English teacher for the 1998-1999, 1999-2000, and the 2000-2001 school years. The Board determined not to re-new his contract. Pursuant to N.J.S.A. 18A:27-3.2[1], Eisenberg requested a written statement detailing the reasons for his non-renewal. The Superintendent timely complied with this request and provided him with the basis for the renewal. Eisenberg then requested a hearing. Subsequent to that hearing, the Superintendent sent a letter informing Eisenberg that the Board had upheld the decision not to re-new his employment.

Thereafter, on September 29, 2001, Eisenberg filed a petition of appeal with the Commissioner of Education. In that appeal, Eisenberg claimed that he recently learned that his personnel file had been "papered" in order to justify the non-renewal. He also alleged that certain positive evaluations were missing from his personnel file.

The Board moved to dismiss contending the petition was not filed timely. The motion was denied on the basis the 90-day period under N.J.A.C.6A: 3-1.3(d)[2] only began to run after Eisenberg received the final determination letter of July 3, 2001. The Board then sought interlocutory review of that dismissal. The Commissioner granted the Board's motion to dismiss the petition on grounds that it was untimely. The State Board reversed the decision of the Commissioner and reinstated the petition.

Concurrent with the administrative actions, Eisenberg filed a civil complaint in Superior Court seeking damages and tenured re-employment. He alleged: (1)

---

[1] N.J.S.A.18A:27-3.2. provides that any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

[2] § 6A:3-1.3 Filing and service of petition of appeal

...

(d) A petitioner claiming that his or her employment was nonrenewed for reasons that are statutorily or constitutionally proscribed shall set forth in the petition at least a minimal factual basis for such allegation(s), consistent with New Jersey Court Rules at R. 4:5-2.

...

defamation, (2) breach of contract, (3) breach of covenant of good faith and fair dealing, and (4) discrimination based upon age and religion.

The Board moved for Summary Judgment and oral argument was heard before the Hon. Sybil Moses, J.S.C. on July 16, 2004. Judge Moses dismissed the defamation and the discrimination claims. Further, on the breach of contract, breach of covenant of good faith and fair dealing claims, Judge Moses dismissed those claims based on Eisenberg's failure to exhaust administrative remedies under the Collective Bargaining Agreement. Finally, the non-renewal issue was dismissed on a finding that jurisdiction rested with the Commissioner of Education.

Eisenberg appealed, and on November 3, 2005, the Appellate Division affirmed Judge Moses' decision and remanded the matter to the OAL.

A prehearing conference was held on April 11, 2007 and a prehearing order issued on April 17, 2007. The Board contends that during the prehearing conference, the issues were delineated as follows: (1) Was there a denial of due process? (2) Was the personnel file altered to justify the non-renewal, and is this issue precluded because it falls under the collective bargaining agreement? (3) Did the Board follow the proper procedure with respect to the non- renewal? (4) Was the Board's action arbitrary and capricious?

On August 9, 2007, the Board moved to limit the scope of the proceeding. The Board contends that the only issue remaining in this proceeding is whether the Board acted properly in not renewing Eisenberg's contract, and if not, whether its action was arbitrary and capricious? Respondent filed an Answer in opposition to the motion on September 5, 2007 contending, inter alia, that the Collective Bargaining Agreement is inapplicable. Further, that he was denied due process. Finally, that the instant motion, notwithstanding an Order of Extension, is out of time.

Based on review of the record, I **FIND** that doctrines of res judicata and collateral estoppel are applicable herein and thus respondent's Motion to Limit is hereby **GRANTED.**

Briefly, the doctrines of res judicata and collateral estoppel apply when the same issue, arising out of the same facts, and involving the same parties are presented before different forums. The term "res judicata" refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated. Cf. In re Coruzzi, 95 N.J. 557, 568, 472 A.2d 546, appeal dismissed, 469 U.S. 802, 105 S.Ct. 56, 83 L.Ed.2d 8 (1984) (doctrine of collateral estoppel not mandated by constitution or statute). In essence, the doctrine provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding. Roberts v. Goldner, 79 N.J. 82, 85, 397 A.2d 1090 (1979).

The rationale underlying the doctrine recognizes that fairness to the defendant and sound judicial administration requires a definite end to litigation. Further, it maintains judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter. Restatement (Second) of Judgments, § 19 comment a (1982). See generally 1B J. Moore, J. Lucas, & J. Currier, Moore's Federal Practice para. 0.405 (2d Ed.1988). Velasquez v. Franz, 123 N.J. 498, 505 (1991); see also City of Hackensack v. Winner, 82 N.J. 1 (1980). The doctrine of "res judicata" has three requirements:(1) the judgment in the prior action must be valid, final and on the merits ;(2) there was a final judgment on the merits; and (3) the claims in the second action must arise from the same transaction or occurrence as the claims in the first action." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398,412 (1991).

Similarly, the doctrine of collateral estoppel has four elements: "(1)the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar was asserted was a party, or in privity with a party to the prior adjudication; (4)the party against whom the bar is asserted had a full and fair

opportunity to litigate the issue in question." Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra, 983 F.2d 495, 505 (3rd. Cir. 1992).

Here, the allegations that Eisenberg's file had been "papered" or otherwise altered, was before Judge Moses in the Summary Judgment motion. The Velasquez Court recognized that:

> . . . .
>
> d. When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. An issue may be submitted and determined . . . **a motion for summary judgment** (emphasis added) . . .
>
> Ibid at 506-507.

Under the Summary Judgment standard of review, Judge Moses was required to look at the issue in a light most favorable to Eisenberg. She found:

> . . . that Plaintiff has not presented sufficient evidence other than his arguments that defendants' reasons are not believable and that his contract was not renewed for some invidious reason.

The Appellate Division affirmed stating:

> Judge Moses concluded that there was no basis upon which to conclude that the Board intentionally destroyed the memorandum or that its contents constituted a "smoking gun" to support plaintiff's claim. Indeed there is nothing to indicate that the contents were critical to plaintiff's proofs. Judge Moses concluded that if "three pieces of paper are missing from the case that has hundreds, and hundreds, and hundreds of pieces of paper, it is of no moment.
>
> [Decision of the Appellate Division, November 3, 2005 (p.11-12)]

I **FIND** and **CONCLUDE** therefore that the issue of whether petitioner's personnel file was "papered" and issues related to breach of contract and breach of covenant of good faith and fair dealing were the subject of Summary Judgment ruling and will not be re-litigated herein.

Eisenberg further alleges a denial of due process. He contends that he was not able to grieve the misconduct of the Board, because the same Board against whom he had the grievance would have been in a position to rule on it, had he chosen to pursue the grievance under the Collective Bargaining agreement. He alleges the principal, his supervisor and the Superintendent of Schools were all engaged in a pre-meditated scheme not to renew his contract. This conspiracy theory is inextricably linked to his allegation that there was some "invidious reason" for his non-renewal. I **FIND** that Judge Moses reviewed this issue and found it to be without merit and thus it too is subject to the doctrines of res judicata and collateral estoppel, having been previously heard and decided.

Finally, I **FIND** and **CONCLUDE** that the due process claim is likewise subject to the doctrine of res judicata and collateral estoppel.

I **CONCLUDE** that the only remaining issues in this proceeding are whether the Board followed the proper procedure in not re-newing Eisenberg's contract and whether the Board acted in an arbitrary and capricious manner in taking the action that they did.

It is therefore **ORDERED** that Board's motion to limit the scope of the proceeding is hereby **GRANTED** consistent with this Order.

It is further **ORDERED** that this matter shall proceed to hearing on December 5 & 6, 2007.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

10/17/07
DATE

IRENE JONES, ALJ

sej

449-07

449-07

OAL DKT. NO. EDU 3773-06
AGENCY DKT. NO. 92-3/06

IN THE MATTER OF THE TENURE HEARING	:	
OF ANTHONY JONES, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
HILLSIDE TOWNSHIP, UNION COUNTY	:	DECISION
	:	

The record, Stipulation of Dismissal (Stipulation) and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the Stipulation's terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the Stipulation terms.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07
Date of Mailing: 11/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 3773-06
AGENCY DKT. NO. 92-3/06

IN THE MATTER OF THE TENURE HEARING OF ANTHONY JONES, SCHOOL DISTRICT OF HILLSIDE TOWNSHIP, UNION COUNTY.

Thomas O. Johnston, Esq., for Petitioner Hillside Township Board of Education (Porzio, Bromberg & Newman, attorneys)

Gregory T. Syrek, Esq., for Respondent Anthony Jones (Bucceri & Pincus, attorneys)

Record Closed: September 25, 2006 Decided: September 26, 2007

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on April 3, 2006, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On May 10, 2006, counsel for Petitioner requested that this matter be placed on the inactive list pending Petitioner's criminal proceedings, which was granted and an Order of Inactivity was entered.

On February 21, 2007, counsel for Respondent submitted the Superior Court of New Jersey Law Division, Union County, Criminal Action Order, Dkt. No. 06000300 and requested that the OAL matter be dismissed.

After numerous discussions pertaining to the OAL matter, the parties have agreed and have prepared a Stipulation of Dismissal indicating the terms thereof, which is attached and fully incorporated herein, as well as the Board Resolution approving the dismissal.

I have reviewed the record and the terms of the dismissal and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 26, 2007
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency:

10-3-07

Mailed to parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT - 3 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner
Hillside Board of Education

In The Matter Of Tenure Hearing Against ANTHONY JONES	BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION OAL Docket No.: EDU-03773-2006N Agency Ref. No.: 92-3/06

STIPULATION OF DISMISSAL

This Stipulation of Dismissal ("Stipulation") is made and entered into, pursuant to, and in accordance with, N.J.A.C. 6A:3-5.6, by and between counsel for the HILLSIDE BOARD OF EDUCATION (hereinafter "the Board") and ANTHONY JONES (hereinafter "Mr. Jones"), for full settlement of all claims that could have been alleged in the above tenure proceedings.

WITNESSETH:

WHEREAS, the Board operates the Hillside Public School District; and

WHEREAS, Mr. Jones had been employed by the Board from September 1997 through January 12, 2006 as a physical education teacher in the Hillside High School; and

WHEREAS, in December 2005, certain allegations came to the Board's attention concerning Mr. Jones' conduct with students; and

WHEREAS, it was alleged that Mr. Jones engaged in conduct endangering the High School Students in the Hillside Public School District; and

8/6/07

WHEREAS, on January 11, 2006, a criminal complaint was filed against Mr. Jones on behalf of the State of New Jersey; and

WHEREAS, on January 12, 2006, based on the foregoing, Mr. Jones was suspended from his position as physical education teacher, with pay; and

WHEREAS, on February 1, 2006, Tenure Charges (the "Charges") were filed with the Board, against Mr. Jones, as a result of Mr. Jones' alleged actions. (A true and correct copy of the Charges is attached hereto as Exhibit A and incorporated herein by reference.); and

WHEREAS, at its February 21, 2006 Board meeting, the Charges were certified to the Commissioner of Education (the "Commissioner") and Mr. Jones was suspended without pay; and

WHEREAS, on March 20, 2006, pursuant to N.J.S.A. 18A:6-16, the Commissioner referred the Charges (Agency Docket No.: 92-3/06) to the Office of Administrative Law ("OAL"); and

WHEREAS, on or about May 10, 2006, pursuant to N.J.A.C. 1:1-9.7, by way of Consent Order, the parties agreed to hold the Charges in abeyance, placing the matter on the inactive docket, pending the outcome of the related criminal proceedings; and

WHEREAS, Mr. Jones submitted a letter of resignation to the Board, effective June 6, 2006, which was accepted by the Board; and

WHEREAS, Mr. Jones entered a plea of guilty to one count of Official Misconduct in violation of N.J.S.A. 2C:30-2; and

WHEREAS, on August 4, 2006, Mr. Jones signed a Consent Order forfeiting his employment with the Board pursuant to N.J.S.A. 2C:51-2a(2) and agreeing to be forever barred from obtaining public employment pursuant to N.J.S.A. 2C:51-2(d).

8/16/07

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, including that which is in the public interest, it is hereby agreed by and between the parties hereto as follows:

1. Mr. Jones resigned from his position as physical education teacher at Hillside High School, effective June 6, 2006.

2. Mr. Jones has forfeited his position as physical education teacher at Hillside High School, effective August 4, 2006.

3. The Board agrees to withdraw the Charges that are currently pending before the Honorable Maria M. LaFiandra, A.L.J., OAL Docket No.: EDU-03773-2006N, as the forfeiture of employment by Mr. Jones renders the tenure charges moot.

4. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interests and in the public interest for the following reasons:

a. to avoid disruption of the school district and, possibly, other districts currently employing individuals who would be called upon to testify in these proceedings; and

b. to avoid a lengthy, expensive hearing on the charges and any possible appeals; and

c. to avoid the expenditure of additional public funds to pursue charges against an employee who has resigned and forfeited his present employment position with the Board and who is barred from obtaining public employment in the future.

A.J
8/6/07

5. In accordance with N.J.A.C. 6A:3-5.6(a)(6), Mr. Jones has been advised and understands that it is the Commissioner's duty to refer this agreement, as it results in the loss of position, to the State Board of Examiners for suspension or revocation of his teaching certificate(s).

PETITIONER

Angela R. Garretson
Board President
Hillside Board of Education

Dated:

Kenneth Weinheimer
Board Secretary/Business Administrator

Dated: 8/29/07

RESPONDENT

Anthony Jones

Dated: 8/6/07

Former Employee/
Physical Education
Teacher
Hillside High School

LABOR RELATIONS – Korzeneski/Schierer-Dino (continued)

24. Motion to approve the Stipulation of Dismissal in the Matter of Tenure Hearing Against [employee A.J.], bearing docket number EDU-03773-2006N, in accordance with the terms therein, subject to attorney review.

RECEIVED
2007 SEP 25 P 4:56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Motion: Korzeneski **Second: Garretson**

Daniels	Y	Schierer-Dino	Y
Garretson	Y	Smith	Y
Korzeneski	Y	Yafet	Y
Menza	Y	Sileem	Y
O'Shea	Absent		

Motion 24 carried. 8 Yes 0 No

I hereby certify that this is a true copy of the minutes of the Caucus/Regular Meeting of the Hillside Board of Education held on March 29, 2007.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

450-07

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

PETITIONER,

V.

Y.D., on behalf of minor children, S.D., N.D., Z.B., and Z.B.

and

STATE-OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board of Education of the Township of Belleville challenged the decision of the Essex County Superintendent that petitioner must provide free public education to four children of Y.D. following a determination that the children were homeless, and the last permanent place of residence of the children's mother was in petitioner's district. Petitioner argues that since Y.D. and her children stayed in Newark for a significant portion of 2005/2006, the Newark School District should be responsible for reimbursement of tuition and transportation costs.

Upon full consideration, the Commissioner concurred with the ALJ that the County Superintendent's determination that Y.D. and her children were homeless during the 2005-2006 school year must be sustained, and that Belleville was responsible for the children's education during this period. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition is dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 19, 2007

OAL DKT. NO. EDU 1319-06
AGENCY DKT. NO. 315-11/05

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
Y.D., on behalf of minor children, S.D., N.D., Z.B., and Z.B.	:	DECISION
and	:	
STATE-OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.[1]

Upon full consideration, the Commissioner concurs with the ALJ that the County Superintendent's determination that Y.D. and her children were homeless during the 2005-06 school year, and that Belleville was responsible for the children's education during this period, must be sustained.[2]

[1] Such exceptions seek to correct certain statements made by the Administrative Law Judge (ALJ) in her decision. In that such corrections are irrelevant to the outcome of this matter, the Commissioner finds presentation of or comment on these to be unnecessary.

[2] It should be clarified, however, that on appeal examination of the correctness of the County Superintendent's determination of homelessness under an arbitrary, capricious or unreasonable standard does not necessarily end the inquiry, as subsequently received information could alter the propriety of this decision. In this matter, however, the

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons stated therein – and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07

Date of Mailing: 11/19/07

record confirms that the facts are as the County Superintendent believed they were at the time of his determination of homelessness and, therefore, his determination was entirely reasonable.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01319-06
AGENCY DKT. NO. 315-11/05

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

Petitioner,

v.

Y.D., ON BEHALF OF MINOR CHILDREN, S.D., N.D., Z.B. AND Z.B.,

and

STATE-OPERATED SCHOOL DISTRICT OF NEWARK, NEW JERSEY

Respondents.

Mark A. Wenczel, Esq. for petitioner Belleville Board of Education (Gaccione, Pomaco and Malanga, attorneys)

Adrienne L. Isacoff, Esq. for respondent Y.D. (Lowenstein Sandler, PC)

Arsen Zartarian, Esq. for respondent State-Operated School District of the City of Newark (Office of the General Counsel Newark School District)

Record Closed: July 19, 2007 Decided: October 3, 2007

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the Township of Belleville, New Jersey appeals a determination made by the Essex County Superintendent of Schools that respondent, Y.D. and her children are homeless and that the Belleville School District is responsible for the children's education during the 2005/2006 school year. The Belleville School District challenges the superintendent's decision.

Y.D. acknowledges that she and her children were evicted from several apartments in Belleville due to non-payment of rent. Between evictions from the Belleville residences, Y.D. and the children occasionally and temporarily resided with various family members in Irvington and Newark, New Jersey. Y.D. argues that since she and her children first became homeless in Belleville and Belleville was their last regular permanent place of residency, that the law requires the District to maintain responsibility for the education of her children without entitlement of tuition reimbursement.

The Belleville School District argues that, since Y.D. and her children stayed in Newark for a significant portion of 2005/2006, the Newark School District should be responsible for tuition and transportation reimbursement. The Newark School District contends that, if Y.D. and her children were not homeless and were actually domiciled in Newark, but attending school in Belleville, petitioner's relief would not be against Newark, but rather against Y.D.

PROCEDURAL HISTORY

The Belleville BOE appealed the superintendent's determination, that Y.D. and her children were homeless and that the Belleville School District was responsible for the children's education. The Department of Education transmitted this case to the Office of Administrative Law (OAL) on January 12, 2006 for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et. seq. The undersigned received the

case on March 17, 2006 and scheduled the first hearing for June 2006; the commencement of the case was delayed due to counsels' maternity leave.

On September 29, 2006 petitioner filed an amended petition to add the Newark School District as a third party. The rational for the amendment was based on allegations that respondent's children were never homeless during the period of the claim in this matter because they were domiciled in Newark. The motion was denied after the undersigned took into consideration certifications, briefs and oral arguments.

Testimony was completed in May 2007 and on July 19, 2007 the record was closed upon receipt of summation briefs.

SUMMARY OF TESTIMONY

Edward Appleton has been the Belleville School Business Administrator and Board Secretary since 1988, with responsibility for advertising board meetings, note taking and submission of reports and records to the New Jersey State Board of Education. He also holds the titles of homeless liaison and affirmative action coordinator.

Mr. Appleton was in the private session of the board meeting on October 17, 2005, when Y.D. presented her situation. No minutes were recorded for the private session, but notes were taken by Mr. Appleton. In the private session Y.D. explained her month-to-month whereabouts and said she was homeless. Y.D. told the board members that, when she was initially evicted in Belleville, she found another apartment in Belleville and lived there until she was evicted. Y.D. then stayed with her mother in Irvington, New Jersey until she had to leave because the lease prohibited her from staying any length of time. She then found and moved into another apartment in Belleville, but was soon evicted. She alternated staying with her mother, aunt and cousins in Newark, while she continued to look for another apartment in Belleville. In October 2005 she was staying in Newark with her mother and was working at Newark Airport.

The board members voted to remove the children from the rolls. Mr. Appleton testimony summarized the school boards reasoning, "The board decided to disenroll the students because of Y.D.'s short stays in Belleville. The board believed Y.D. was disingenuous because there was no stability and she just wanted the children to attend Belleville Public Schools." Mr. Appleton said that no homeless liaison was assigned to Y.D.'s family, but the Belleville's Special Services Division requested coordinated transportation services for Y.D.'s children when they were moving from place-to-place. The documents and testimony presented disclosed that during the 2004/2005, 2005/2006 and 2006/2007 school years, the Belleville BOE randomly transported Y.D.'s children from Irvington and Newark pick-up addresses to the Belleville schools. The transportation cost per pupil per day is approximately $171. During 2005/2006, the annual per pupil cost was $34,965; the rate and cost for Y.D.'s children was adjusted because four students had to be transported. Mr. Appleton presented a certification and also testified that basic state aid funding has been constant in Belleville since 2003, and no added or decreased funding has occurred because Y.D.'s children were listed on the rolls.

Bruce Morgan has served as an investigator, for the Belleville BOE since 2001. He investigates the residence of all students and coordinates investigations pertaining to change of address disputes. Usually it's the parent's responsibility to inform the school of a change in address and to register their child in a new location. Mr. Morgan investigated Y.D.'s domicile and recalled that disenrollment efforts first started in September 2003. However, the Belleville BOE re-enrolled Y.D.'s children at the direction of the county superintendent of schools after he determined they were homeless.

Y.D. provided a 21 Clinton Street, Belleville address on all initial 2003 enrollment documents for her children. She signed a lease for 21 Clinton Street on February 14, 2003 and was evicted from that address on October 2, 2003. When correspondence to Y.D. sent to 21 Clinton Street was returned to the school, an investigation commenced. The owner of 21 Clinton told Mr. Morgan that Y.D. had been evicted for non-payment of rent, and relocated to Irvington. Mr. Morgan learned that Y.D. returned to Belleville on March 6, 2004, after signing a lease for an apartment at 69 Emmet Street. Y.D. was

evicted from Emmet Street in September 2004 for non-payment of rent. Thereafter, Y.D. stayed with her mother in Newark, until on February 4, 2005 when she moved to Division Street in Belleville. She remained on Division Street until June 1, 2005 when she was evicted for non-payment of rent. Y.D. then, returned to live with relatives in Newark until October 31, 2006, the date on which she located an apartment on Franklin Street in Belleville. Y.D. continues to live at the Franklin Street address.

Mary Paige, respondent's mother has resided at 366 14th Avenue in Newark since May 15, 2005. Ms. Paige receives Section 8 tenant-based assistance and cannot house persons in her apartment who aren't on the lease agreement. The Section 8 guidelines allow Ms. Paige a total of thirty days per year to have guests remain overnight. Ms. Paige suffers from a coronary disease and has asthma. Only Ms. Paige and her nephew are approved on the lease for residency in the two-bedroom apartment located at 366 14th Street. Her nephew is eleven year old, HIV positive and has also asthma. During the hearing, Ms. Paige reviewed the September 5, 2006 letter from her landlord, which cited a violation of lease terms due to unauthorized individuals staying in the apartment.

Y.D. is the mother of four children, who attended Belleville schools commencing September 2003. S.D. was born November 17, 1987; N.D. was born May 30, 1993; Z.B. was born June 10, 1999; and Z.B. was born June 10, 1999.

Y.D. was married for eleven years to S.D., the father of S.D. and N.D. S.D. infected Y.D. with a sexually transmitted disease. While she was trying to end the relationship, her husband beat and raped her. In January 1997, Y.D. obtained a restraining order against S.D. in an effort to stop his domestic violence acts against her. S.D. served prison time and, upon release, he provided child support until he stopped working in 2003.

The father of Z.B. and Z.B. is K.B., who resides in Newark, New Jersey. K.B. and Y.D. never married. K.B. didn't provide child support between 2003 and 2005, but commencing late in 2005 his whereabouts became known and Y.D. acquired court assistance to obtain $380 every two weeks in child support.

Y.D. and her children initially moved to Belleville in February 2003, and signed a lease with Egidio and Elisabete Floro for an apartment located at 21 Clinton Street. S.D. was enrolled in Belleville High School and ND was enrolled in Belleville Middle School. Z.B. and Z.B. underwent pre-school evaluations, which determined their need for enrollment in special education classes at Belleville Elementary School No.5.

When S.D. stopped working, Y.D. was unable to pay the rent. Y.D. also had to temporarily stop working when she suffered a miscarriage. The rent arrears increased and Y.D. was evicted from the 21 Clinton Street apartment by a court order dated September 25, 2003. She was forced to move into her mother's Section 8 apartment at 70 Park Place, Irvington, New Jersey, where her brother also legally resided. She remained for several months until she recuperated and located another apartment in Belleville. Y.D. always wanted to return to Belleville; she never planned to continue living with her mother in Section 8 housing and knew that her mother's lease agreement would be jeopardized the longer she and the children had to remain there. For a brief period, Y.D. moved with the paternal grandmother of her youngest child, but grandmother also had a restricted lease arrangement and couldn't house other people in her apartment for more than thirty days.

In March 2004, Y.D. moved back to Belleville, and signed an apartment lease with Maria Ortiz at 69 Emmet Street. Y.D. still was not receiving child support and, even though she was working for FJC Security Services at Newark Airport, she found it very difficult to earn enough money for survival and payment of rent. Y.D. was evicted from 69 Emmet Street by court order dated August 31, 2004 for failure to pay rent. She then moved temporarily to her mothers' apartment, now located at 15 Tremont Terrace, Irvington, New Jersey.

Y.D. had no means of transporting the children from Irvington to Belleville, so E.F., the father of Y.D.'s youngest child, lent Y.D. money to stay in a motel in Belleville for a few weeks, in order to prevent interruption in the children's classes. For awhile, E.F. paid for the children to take a cab to school. E.F. was unable to house Y.D. and

the children in his apartment on Magnolia Lane in Belleville because of restrictions on his lease agreement. Y.D.'s mother, who was on temporary disability, was evicted from the 15 Tremont Terrace apartment and the family moved temporarily to Y.D.'s aunt's apartment located at 361 Sanford Avenue in Newark.

By February 2005 Y.D. signed an apartment lease to rent the second floor of a two-family house, located at 43 Division Street, in Belleville, New Jersey. Y.D. was evicted from this apartment by court order dated June 14, 2005, because her young children were noisy and the child with the speech impediment often screamed. Y.D.'s mother and cousin where then residing at 366 14th Avenue in Newark and Y.D. was forced to temporarily stay with them. Her children slept on the bed with their cousin and their grandmother, and Y.D. slept on the floor. Because this apartment was also governed by Section 8 guidelines Y.D. had to quickly make other living arrangements. While searching for an apartment in Belleville, Y.D. resided temporarily with her former boyfriend's mother, Ms. Hunt, who is the grandmother of Y.D.'s newest born child. That apartment was located at 671-B South 10th Street in Newark. Y.D. received mail there on a temporary basis when she started receiving child support from K.B. late in 2005. Child-support payments can't be delivered to a post office box, so Y.D. used the baby's grandmother's address. Y.D. responded to the inquiries of the Belleville BOE regarding her then current residence and explained that her stay with Ms. Hunt was temporary until she could locate another apartment in Belleville. Shortly after, Y.D. moved from Ms. Hunt's apartment because she too was restricted under the terms of her Section 8 lease agreement, to limit recurring overnight guest to stays of thirty-days. Y.D. temporarily moved back to her mother's apartment at 368 14th Avenue, in Newark.

Y.D. continued receiving child support from K.B. in 2006. Her tax records show earnings of $35,608 in 2004; $28,736 in 2005; and $21,738 in 2006. A decrease in earnings was realized in 2005/2006 when she stopped working due to medical complications arising from her pregnancy. Since the birth of her youngest child J.F., Y.D. has been able to resume work at Newark Airport, and hold a second job with Federal Express. She works 30 hours a week for FJS Security at $14.44 an hour, and 17 hours a week for Federal Express at $11.25 an hour. E.F. the father of Y.D.'s infant,

E.F's mother, Y.D's mother and other family members help her with child-care. Y.D. receives child support from E.F. through his wage garnishments at Clara Maas Hospital.

On November 1, 2006, Y.D. signed a new lease for an apartment at 511 Franklin Avenue in Belleville. She continues to reside there with her school-age children and J.F. her infant son. ND, Z.B. and Z.B. continue to attend school in Belleville. S.D. graduated from Belleville High School in June 2006.

Y.D. received a letter from Belleville BOE dated September 27, 2005, which provided notice that her children were not entitled to a free education in Belleville because they were residing at 366 14th Avenue in Newark, New Jersey. Y.D. explained her temporary living arrangements at a Belleville BOE meeting held on October 17, 2005. On October 18, 2005 the BOE notified Y.D. that her children would be disenrolled from the Belleville School District. On November 1, 2005 Y.D. appealed the decision of the BOE to the Essex County Superintendent of Schools. Thereafter the County Superintendent advised Y.D. that, based on the content of documents submitted by Education Law Center and the discussions Y.D. had with his staff, he had determined that Y.D. and her children could be considered homeless during the period they resided with family members; and that the Belleville School District was responsible for her children's education. The District then filed an appeal of the Superintendent's decision.

Y.D. testified that the tempestuous circumstances of her life forced her to temporarily stay from time-to-time with family in Irvington and Newark, until she could reestablish herself in Belleville. She never was able to pay or contribute to expenses during her temporary stays with relatives. Y.D. never acquired regular permanent housing when staying with relatives, who had restrictive lease agreements , which prohibited anyone not named on the lease from dwelling there for lengthy periods. She never had a lease agreement for an apartment in another municipality, only in Belleville. Y.D. always believed and intended that Belleville was her place of residence. She first became homeless in Belleville and only left there temporarily when she couldn't find a site for relocation in Belleville.

Y.D.'s children always attended Belleville schools, even when they were temporarily staying out-of-district. Y.D. said she was fined $500 on an occasion for keeping her children home for several weeks. The case was heard and dismissed based on the evidence that Y.D. was waiting for transportation. Y.D. never requested that another municipality transport her children during their temporary absence from Belleville. The Belleville School District approved transportation for the children from Irvington or Newark to the Belleville schools.

Y.D. said that, because of the special education needs of two of her children, she especially didn't want them pulled back and forth between different schools. Because her children had the same teacher throughout their years in Belleville elementary school, they have learned to speak, made tremendous progress and achieved the goals established for them.

Y.D. says she is now able to pay her $925 monthly rent, which includes heat and hot water. Her net weekly income is $850.00, which includes the $380 bi-weekly in child-support payments. Y.D. testified that she has developed a positive outlook about managing and improving her life.

FINDINGS OF FACT

1. Y.D. was married to S.D. for eleven years before divorcing;

2. Y.D and S.D. had two daughters (SD & ND);

3. Y.D. pressed domestic violence charges against S. D.;

4. S.D. caused Y.D. to have a sexually-transmitted disease;

5. S.D. beat and raped YD;

6. S.D. was incarcerated for his violence against Y.D.;

7. Y.D. met K.B. and they had two boys ZB and ZB;

8. K.B. did not pay child support between 2003 and 2005;

9. Late in 2005, the court ordered K.B. to make child-support payments every two weeks in the amount of $380;

10. When Y.D. first moved to Belleville in 2003, she and her children resided at located at 21 Clinton Street;

11. In 2003, one child was in middle school, one in high school and two in special education;

12. In 2003, S.D. stopped working and Y.D. stopped receiving support for S.D. and N.D.;

13. In September 2003, Y.D. was evicted from the 21 Clinton Street because of non-payment of rent;

14. Y.D. and her children moved into her mother and brother's Section 8 apartment at 70 Park Place, Irvington, New Jersey;

15. During September 2003, Y.D. also suffered a miscarriage;

16. Y.D. stayed with her mother several months and with the paternal grandmother of her youngest child, until she recuperated and located another apartment in Belleville;

17. Y.D. couldn't remain with her mother or the baby's grandmother because their Section 8 leases prohibited additional residents; and they could not house overnight guests for more than thirty-days;

18. In March 2004, Y.D. moved back to Belleville under a lease agreement for 69 Emmet Street;

19. In March 2004, Y.D. was working, but still was not receiving child support;

20. On August 31, 2004, Y.D. was evicted from 69 Emmet Street, in Belleville, for failure to pay rent;

21. On September 1, 2004, Y.D. temporarily returned to her mothers' apartment, which was then located at 15 Tremont Terrace, Irvington, New Jersey;

22. E.F., the father of Y.D.'s youngest child, lent Y.D. money to stay in a motel in Belleville for a few weeks, so the children's classes would not be interrupted;

23. E.F. was unable to house Y.D. and the children in his apartment on Magnolia Lane in Belleville because of restrictions on his lease agreement;

24. Y.D.'s mother was evicted from the 15 Tremont Terrace apartment and the family moved into Y.D.'s aunt's apartment located at 361 Sanford Avenue in Newark;

25. In January 2005, Y.D. signed an apartment lease for an apartment on the second floor of a two-family house, located at 43 Division Street, in Belleville, New Jersey;

26. On June 14, 2005, Y.D. was evicted from this apartment because her young children were noisy;

27. Y.D. temporarily returned to her mother and cousin's two-bedroom apartment located at 366 14th Avenue in Newark;

28. Y.D. stayed with her former boyfriend's mother Ms. Hunt, at 671-B South 10th Street in Newark. Y.D. received child support payments and mail at this address;

29. Child-support payments can't be delivered to a post office box;

30. Y.D. explained to the Belleville investigator that she was staying at the South 10th Street address temporarily until she could locate housing in Belleville;

31. Y.D. temporarily moved back to her mother's apartment at 366 14th Avenue, in Newark.

32. Y.D. continued receiving child support from K.B. in 2006 and she received a salary increase in 2006;

33. Y.D. earned $35,608 in 2004; $28,736 in 2005; and $21,738 in 2006;

34. Y.D. earnings decreased when she required medical attention and temporarily had to stop working;

35. Y.D. has returned to work at Newark Airport, has a second job with Federal Express; receives child support from E.F's wage garnishment and has child-care support from her family and her infant child's family;

36. Y.D. signed a new lease for on November 1, 2006 for an apartment located at 511 Franklin Avenue in Belleville, where she continues to reside with her school-age children and J.F. her infant son;

37. N.D., Z.B. and Z.B. continue to attend school in Belleville, and S.D. graduated from Belleville High School in June 2006;

38. Y.D. never secured an apartment outside of Belleville;

39. Y.D. never paid rent or contributed to the rent during her temporary stays with family and friends;

40. Y.D.'s children always went to school in Belleville, even when they were temporarily staying outside of the district;

41. Belleville always arranged for the transportation of Y.D.'s children to the Belleville schools, even when Y.D. and the children were temporarily outside of the district;

42. The Essex County Superintendent of Schools determined that Y.D. and her children were homeless and therefore entitled to an education paid for by the Belleville BOE, since Belleville was the school district of origin;

43. Y.D. and her children stayed with family and friends out of necessity. There was never a time when they could legally assume a residence with the relatives or friends because the leasing terms and conditions of the family member or friend prohibited the addition of residents;

44. Y.D. and her children were never domiciled in Newark;

45. Belleville School District reported to the New Jersey Department of Education that Y.D.'s children were enrolled in the Belleville school system.

LEGAL DISCUSSION AND ANALYSIS

EDUCATION OF HOMELESS CHILDREN AND DETERMINATION OF SCHOOL DISTRICT:

N.J.S.A. 18A:7B-12 is the authority for determining the district of residence for funding purposes, for homeless families. The Commissioner of Education shall determine district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless. The district of residence shall be the district in which the parent or guardian last resided prior to

becoming homeless. A homeless person or family temporarily lacks a fixed, regular and adequate residence. In this case the proofs show that there was no one place where Y.D. and her children could have stayed permanently. The leasing arrangements for her mother, aunt, cousin and even her boyfriend required that overnight guests be approved and only for a short period of time.

In accord with N.J.A.C. 6A:17-2.4, responsibilities of the school district of origin, for a homeless child shall include a determination of the school in which the child shall be enrolled after consulting with parents. The district board of education identified as the school district of origin for homeless children, shall be the school district of origin for as long as the parent remains homeless. In the instant case, Y.D.'s children first became homeless in Belleville. The Belleville School District has continued to educate the children in-district, and, approve, arrange for and continuously transport the children to the Belleville schools, for their academic training, even when they temporarily were staying out-of-district.

The Belleville School District bears the burden of showing, that the county superintendent's finding that Y.D.'s homelessness originated in Belleville, was arbitrary, capricious or unreasonable. There was no proof was offered by the school district to show that the superintendent's acts were unlawful, arbitrary, capricious, unreasonable or based upon or induced by improper motives. N.J.S.A. 18A:38-1 (f) provides that a public school education shall be free to any person over five and under twenty years of age, whose parent or guardian moves from one school district to another school district as a result of being homeless, and whose district of residence is determined pursuant to N.J.S.A. 18A:7B-12.

Y.D. resided and was domiciled in Belleville at the time she and her children first became homeless, therefore, Belleville is responsible for the continuation of the children's education during the extent of the parent's homelessness, even when they were temporarily away from Belleville.

In J.S. on behalf of D.S. v. Parsippany-Troy Hills Township Board of Education, OAL Docket No. EDS-01676-2001 (2001) the parents petitioned for a due process hearing to address placement in Vernon Township, as the domicile for the their child. The family lived in Troy Hills and was evicted from their apartment in Troy Hills due to nonpayment of rent. The children attended Parsippany-Troy Hills schools. The family temporarily resided with friends in Vernon Township and enrolled the children in Vernon Township schools, while they searched for a permanent relocation. When the family over-extended their temporary stay in their friends house and moved in various hotels and later in the home of petitioner's father in West Paterson. The parents attempted to continue their children's education in Vernon by arguing that they became "homeless" when their Vernon friends asked them to leave their home. ALJ McKeown rejected the reasoning and found that petitioner's became homeless when they were evicted for nonpayment of rent in Troy Hills. The stay in Vernon was always intended to be temporary and no evidence of permanency was ever established. Petitioner did not have a fixed, regular, and adequate residence while staying temporarily with friends. Petitioner became the homeless in Troy Hills when they were evicted.

In J.B. on behalf of C.B. and E.B. v. Board of Education of the Hopewell Valley Regional School District, OAL Docket No. EDU-4487-98 (1999) ALJ Duncan held that domicile has two elements, a physical residence and the intent to remain there; and both elements are required in order to establish a legal entitlement of domicile. In this case, Y.D. never had a place to stay outside of Belleville, that was her own. Neither Y.D. nor the persons she temporarily stayed with had any intention of converting a temporary situation into a permanent one. The lack of intention to establish permanency is strengthened by the facts that all lease holders in the temporary locations were restricted from housing persons not listed on their lease agreements.

Petitioner argued that Y.D. and her children were not homeless "out of necessity", but that Y.D. deliberately manufactured a domicile in Belleville so her children could attend school there. However, the facts of this case reveal that Y.D. and her children fulfill the meaning of N.J.A.C. 6A:17-2.3, which provides that, a child shall be deemed homeless when he or she resides in the residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the

family lacks a regular or permanent residence of its own. The testimony and documents do not indicate that Y.D. and her children located a regular or permanent residence outside of Belleville, which they independently could have maintained. Petitioner believes Y.D. is responsible for relocating to affordable housing outside of Belleville and could have located housing at lower monthly rentals than in Belleville, which would have prevented the multiple evictions.

Case law has been established that citizens of the United States have a right to travel from state to state without restriction and to be afforded all rights and privileges of citizens in every state:

> Although preservation of fiscal integrity is a valid state interest, states may not accomplish that goal by establishing invidious distinctions between citizens in violation of the equal protection clause of the United State Constitution. When benefits are distributed unequally, distinctions between citizens are subject toscrutiny under the equal protection clause... Sanchez v. Department of Human Services, 314 N.J. Super. 11 (1998)

Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. Likewise, intrastate travel is protected by the United State Constitution. The freedom to travel includes freedom to enter and abide in any State in the Union. Dunn v. Blumstein, 405 U.S. 330, 338, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972). A violation of the equal protection clause of the Fourteenth Amendment exists when, absent a compelling state interest, the right to pass and repass through every part of the country, as freely as in our own states (Connecticut and Pennsylvania), without interruption, is restricted. Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

TRANSPORTATION OF HOMELESS CHILDREN BACK TO SCHOOL DISTRICT:

N.J.A.C. 6A:17-2.4 provides that, when homeless children attend school in the district of residence while temporarily residing in another district, the district of residence shall provide for transportation to and from school. See N.J.S.A 18A:58-7; N.J.A.C. 6A:27-6.2 (b) and (c).

In Y.D.'s case Belleville always provided for the children's transportation to and from school Belleville schools, even when the children were temporarily away from Belleville.

THE NEWARK SCHOOL DISTRICT'S RESPONSIBILITY TO EDUCATE Y.D.'S CHILDREN:

The Newark School District argued that Y.D. came to Newark after becoming homeless as a result of an eviction from a Belleville apartment. It is petitioners allegation that Y.D.. and her children were not homeless and were actually domiciled in Newark during the 2005/2006 school year, even though they attended the Belleville schools. The Newark School District contends that petitioner's relief should be not against Newark, but against Y.D. N.J.S.A. 18A:38-1b(2) provides, "If in the judgment of the Commissioner the evidence does not support the claim of the residence, he shall assess the resident, tuition for the student prorated to the time of the student's ineligible attendance on the district".

The Newark School District argued that Belleville filed the petition against Y.D. in November 2005 and never notified Newark of a dispute until recently in 2007 when an amended petition was filed. Newark noted that Belleville's claim for reimbursement of tuition and travel cost, commenced after the OAL hearing started against Y.D. Specifically, Belleville never communicated with the Newark District to initiate the facilitation of enrollment for Y.D.'s children into the Newark Public Schools. The undue delay in filing against Newark negated any opportunity for Newark to mitigate potential exposure, since the 2005/06 school year has concluded. Newark cites, Pfeffer v. Delran Township, 159 N.J. Super. 497 (1978) in submitting that the delay in being named a

respondent has prejudiced Newark, and any claim should be barred by the doctrine of laches.

The County Superintendent required Belleville to include Y.D.'s children on the enrollment records. Consequently, the children were included in Belleville reports to the New Jersey Department of Education for purposes of the Application of Scholastic State Aid (ASSA) funding. Newark contends that Belleville's claim for reimbursement should be estopped and barred based on principles of equity and the doctrine of judicial estoppel, which precludes the same party in legal proceedings from taking contradictory positions on the same subject. Belleville school district personnel disagree with the county superintendent's determination that Y.D. became homeless in Belleville. The school district's objective is to recoup funds expended for educational services provided to Y.D.'s children, by showing that the superintendent's determination of homelessness was arbitrary and capricious. Belleville's inclusion of Y.D.'s children for funding purposes was within the standard of procedures for filing any funding application – all students in the school mustbe listed. Belleville did not receive ASSA funds. The circumstances of the case requires that testimony be completed and a conclusion presented prior to a determination of whether Newark has been or will be prejudiced by the outcome of the case.

CONCLUSION

Based on all of the foregoing, **I CONCLUDE** that Y.D. and her children never became domiciled in Newark or Irvington. The temporary housing arrangements during Y.D.'s homelessness alternated between Belleville and Irvington, and Belleville and Newark. There was never a time when Y.D. established a permanent residence after becoming homeless in Belleville. In all temporary dwelling locations respondent's hosts held restrictive lease agreements, which prohibited additional persons from acquiring residency without authorization and an amendment of the lease terms, if approved. Respondent never rented or leased an apartment in Newark or Irvington. Y.D.'s children never ceased being educated by the Belleville school system and the Belleville BOE never ceased transporting the children to school, even when they were temporarily staying out-of-district.

I also **CONCLUDE** that Y.D. has always remained a resident of and domiciled in Belleville and continues to be entitled to have her children enrolled in Belleville School District without responsibility for tuition or transportation reimbursement.

I further **CONCLUDE** that no proof exists in this case, that the Essex County Superintendent of Schools acted arbitrary, capriciously or unreasonably or based his decision upon or was induced by improper motives, when determining that Y.D. and her children were homeless.

ORDER

It is **ORDERED** that the determination of the Essex County Superintendent of Schools, that Y.D.'s family was homeless and last domiciled in Belleville shall remain in full force and effect;

It is further **ORDER** that Belleville shall remain responsible for the education of Y.D.'s children.

And, additionally it is **ORDERED** that Belleville shall not be entitled to any tuition or transportation reimbursement from Y.D. or from the Newark School District.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2007
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 10-3-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT - 4 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

WITNESSES

PETITIONER'S:

Edward Appleton, Belleville School Business Administrator, Board Secretary

Bruce Morgan, Investigator Belleville BOE

RESPONDENT'S:

Y.D., respondent

Mary Paige, respondent's mother

EXHIBITS

PETITIONER'S:

P-1 Investigator's notes

P-2 Residential Lease dated February 14, 2003 for 21 Clinton Street, Belleville

P-3 Residential Lease dated March 2, 2004 for 69 Emmet Street, Belleville

P-4 Residential Lease dated February 4, 2005 for 43 Division Avenue, Belleville

P-5 Lease dated October 31, 2006 for 511 Franklin Avenue, Belleville

P-6 Section 8 Certification signed by Mary Paige dated 8/1/05

P-7 Order for Orderly Removal dated September 25, 2003

P-8 Landlord/Tenant eviction pleadings between August and October 2004 regarding Y.D.'s tenancy at 69 Emmett Street, Belleville

P-9 Landlord/Tenant eviction pleadings regarding Y.D.'s eviction from 43 Division Avenue, Belleville

P-10 March 9, 2006 correspondence from Belleville Board of Education residency officer, to Y. D. with Landlord Certification completed by Y. D. and copy of mail address to Y.D. at Newark address with note from Y.D.

P-11 Student registration forms

P-12 to Notices of Initial Determination of Ineligibility from Belleville Board of Education Y.D.

P-13 & Belleville Board of Education transportation files documents for S.D., N.D., Z.B. Z.B.

P-14 Application for reduced price meals or free milk

P-15 Redacted notes from Belleville Board of Education private executive meeting dated October 17, 2005

P-16 2006-2007 estimated tuition rates

P-17 November 1, 2005 correspondence from Essex County Superintendent to Y.D., copying Belleville Board of Education Superintendent

P-18 Amended Petition of Appeal

P-19 Certification of Edward J. Appleton

RESPONDENT'S:

R -1 Letter from Education law Center dates October 27, 2005 ID ONLY

R-2 Restraining Order against S. D. dated January 17, 1997

R-3 Envelop from Child Support dated March 30, 2006 to Y.D c/o Marion Hunt

R-4 Income Tax Return 2004

R-5 Income Tax Return 2005

R-6 Income Tax Return 2006

R-7 Voucher from FJC Security Services to Y.D. dated April 27, 2007

R-8 Voucher from FJC Security Services to Y.D. dated May 4, 2007

R-9 Voucher from FJC Security Services to Y.D. dated May 11, 2007

R-10 Voucher from FedEx to Y.D. dated May 11, 2007

R-11 Section 8 Housing Certification by M. Paige dated August 1, 2005

R-12 Letter from R. Trinidad to M. Paige dated September 5, 2006

455-07

AGENCY DKT. NO. 320-10/07

IN THE MATTER OF WANDA TORRES,	:	
UNIVERSITY ACADEMY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 *solely for review of the Commission's recommended penalty*, have been reviewed. The Commissioner has been notified that the respondent did not attend training on October 23, 2007 as directed by the Commission.

It is noted that the penalty recommended by the Commission in its decision dated October 11, 2007 is suspension of the respondent until attendance at the next scheduled training, and removal if she did not so attend. Subsequent to the Commission's transmittal of this matter to the Commissioner for imposition of penalty, the following advisement was received from the Executive Director of the Commission:

> Please be advised that the letters dated October 11, 2007 from the School Ethics Commission to Wanda Torres, sent via regular and certified mail, were returned with a notation that they cannot be forwarded and are not deliverable. Upon checking the website for this school, I noted that Ms. Torres is not listed on the Board of Trustees. I placed a call to the school and spoke with the principal on November 1, 2007. He informed me that Ms. Torres had moved to Puerto Rico in June 2006.
>
> (Memorandum, dated November 7, 2007, from Joanne Boyle to Kathleen Duncan, Director, Bureau of Controversies and Disputes)

In light of this information, notwithstanding her concurrence with the Commission's action in principle, the Commissioner is unable to order the respondent's suspension and/or removal as it is obvious that this matter has been rendered moot. Additionally, since the Commission's decision indicates that respondent was newly elected or appointed in May 2006 and the recent

memorandum quoted hereinabove advises that she moved to Puerto Rico in June 2006, it does not appear that some lesser sanction – such as reprimand – is warranted either.

Accordingly, this matter is being returned to the School Ethics Commission for action as that body deems appropriate.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07

Date of Mailing: 11/21/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T17-07**
Wanda Torres	:	
University Academy Charter School	:	**DECISION FOR FAILURE**
Hudson County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Wanda Torres was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Ms. Torres to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Torres did not respond to the Order; and

WHEREAS, the Commission notified Ms. Torres that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Ms. Torres has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until she attends the October 23, 2007 training session and removal if she fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Wanda Torres violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until she attends the October 23, 2007 training session and removal if she fails to attend the October 23, 2007 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

456-07

D.Y. on behalf of minor child F.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of the Borough of Collingswood – contested respondent's determination that her nephew, F.J.G., was not entitled to a free public education in Collingswood schools. Respondent Board argued that F.J.G. was not a lawful resident; that the lawful residency of F.J.G. is in Puerto Rico; and that any placement of F.J.G. with the petitioner was solely for the purpose of obtaining a free public education in the district. The Board counterclaimed for tuition reimbursement. The matter was transmitted to the OAL, but prior to any hearing, the respondent represented to the ALJ that the petitioner and F.J.G.'s mother had submitted affidavits which were deemed sufficient to confer eligibility for F.J.G. to attend school in the district. Respondent requested that the matter be dismissed.

The ALJ found that respondent was able to substantiate that F.J.G. is eligible for enrollment in Collingswood schools, and concluded that the petitioner no longer wishes to proceed. Accordingly, the ALJ ordered the matter dismissed.

Upon an independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that it would have been preferable for the parties to have been asked to submit written requests for dismissal of the case.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 19, 2007

OAL DKT. NO. EDU 4245-07
AGENCY DKT. NO. 115-4/07

D.Y. on behalf of minor child F.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The petition alleging that F.J.G. is properly domiciled in respondent's district was filed on April 25, 2007. Respondent answered on May 17, 2007, disputing petitioner's allegations and including a counterclaim for tuition. On May 18, 2007, the matter was transmitted to the Office of Administrative Law (OAL).

By letter dated October 1, 2007, respondent's counsel represented to the Administrative Law Judge (ALJ) that respondent had received affidavits from petitioner and F.J.G.'s mother that were sufficient, in respondent's view, to establish F.J.G.'s elibility for a free public education in its district. Respondent's counsel therefore asked that "the matter be dismissed."

On October 10, 2007, the ALJ issued an Initial Decision concluding "that petitioner no longer wishes to proceed" and ordering that the petition be dismissed. The Initial Decision was mailed to the parties on October 11, 2007.

The Commissioner notes that it would have been preferable for the parties to have been asked to submit in writing their respective requests for the dismissal of the claim set forth in the petition and the counterclaim set forth in the answer. Nonetheless, since the Initial Decision dismissing the case was mailed to the parties on October 11, 2007, and neither party has excepted thereto, the Commissioner concludes that the matter may be regarded as a voluntary dismissal of both the petition and counterclaim.

The Initial Decision is adopted as the final decision in this case, as supplemented herein, and the matter is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07

Date of Mailing: 11/21/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 4245-07

AGENCY DKT. NO. 115-4/07

D.Y., ON BEHALF OF MINOR CHILD, F.J.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,

Respondent.

D.Y., mother of F.J.G., appearing pursuant to N.J.A.C. 1:1-5.4(a)7, for F.J.G.

Alan R. Schmoll, Esq., appearing for respondent (Capehart & Scatchard, attorneys)

Record Closed: October 3, 2007 Decided: October 10, 2007

BEFORE **DENNIS P. BLAKE,** ALJ:

A petition was filed with the Commissioner, and this matter was transmitted to the Office of Administrative Law on May 31, 2007 for a hearing pursuant to N.J.S.A. 52:14F-1 to –13. Thereafter respondent was able to substantiate that petitioner had established residency for her son and that he is eligible for enrollment.

Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-10-07
DATE

DENNIS P. BLAKE, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 15 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

/mamf

454-07

AGENCY DKT. NO. 317-10/07

IN THE MATTER OF JUANDA BOXLEY,	:	
NEW HORIZONS COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, and the Commissioner has been notified that the respondent did not attend training on October 23, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its decision dated October 11, 2007 – suspension until attendance at the next scheduled training, and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, no suspension could be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner was unable to order the respondent's suspension while the question of her attendance at training was pending.

That question having now been resolved, the Commissioner concurs with the penalty of removal recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby removed from office, as of the filing date of this decision, as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07

Date of Mailing: 11/21/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T13-07**
Juanda Boxley	:	
New Horizons Community Charter Sch.	:	**DECISION FOR FAILURE**
Essex County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Juanda Boxley was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Ms. Boxley to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Boxley did not respond to the Order; and

WHEREAS, the Commission notified Ms. Boxley that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Ms. Boxley has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until she attends the October 23, 2007 training session and removal if she fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Juanda Boxley violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until she attends the October 23, 2007 training session and removal if she fails to attend the October 23, 2007 training session.

Paul C. Garbarini MST
Paul C. Garbarini, Chairman
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

453-07

#453-07SEC

AGENCY DKT. NO. 318-10/07

IN THE MATTER OF JESUS PADILLA,	:	
ROBERT TREAT ACADEMY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, but the Commissioner has been notified that the respondent did attend training on October 23, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its decision dated October 11, 2007 – suspension until attendance at the next scheduled training and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, the question of removal is moot in light of the respondent's having attended training as directed, and no suspension can be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner cannot order the sanction recommended.

Under the circumstances, the Commissioner instead finds that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish him for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07

Date of Mailing: 11/20/07

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T14-07**
Jesus Padilla	:	
Robert Treat Academy Charter Sch.	:	**DECISION FOR FAILURE**
Essex County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Jesus Padilla was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Mr. Padilla to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Padilla responded to the Order on September 13, 2007, indicating that he registered for the October training; and

WHEREAS, the Commission notified Mr. Padilla that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Mr. Padilla has failed to attend the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2006 to March 2007 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Jesus Padilla violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until he attends the October 23, 2007 training session and removal if he fails to attend the October 23, 2007 training session.

Paul C. Garbarini MET

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: October 11, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 25, 2007.

Mary E. Torres
Acting Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

452-07

OAL DKT. NO. EDU 13141-05
AGENCY DKT. NO. 251-9/05

ROBERT T. PERKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/19/07

Date of Mailing: 11/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13141-05

AGENCY DKT. NO. 251-9/05

ROBERT T. PERKOWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Jae Y. Lee, Esq., for respondent (Harwood Lloyd, LLC, attorneys)

Record Closed: September 28, 2007 Decided: October 2, 2007

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on December 29, 2005, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

After numerous settlement discussions, a settlement was reached. The parties have submitted a Settlement Agreement as well as the Board's Resolution approving the settlement, as set forth in the attached documents.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 2, 2007
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

Date Received at Agency: 10-9-07

Mailed to Parties:

OCT - 9 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE OFFICE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831
(609) 860-9100
ATTORNEY FOR PETITIONER, ROBERT PERKOWSKI

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 28 P 4:44

ROBERT T. PERKOWSKI, Petitioner,	) BEFORE THE COMMISSIONER) OF EDUCATION, THE STATE OF) NEW JERSEY
v.	) OAL Docket No. EDU-13141-05) Agency Docket No.: 251-9/05
PASSAIC BOARD OF EDUCATION Respondent.	) SETTLEMENT AGREEMENT

WHEREAS, Robert T. Perkowski, (hereafter referred to as "petitioner") filed a cause of action alleging a violation of his tenure and seniority rights before the Commissioner of Education on or about September 23, 2005, and

WHEREAS, the respondent, Board of Education of the City of Passaic filed an and affirmative defenses on or about October 19, 2005, and

WHEREAS, this matter had been scheduled to proceed to a hearing on or about May 18th, 2007 before the Honorable Barry Frank, A.L.J., and

WHEREAS, the respondent and the petitioner were able to reach an amicable settlement, and

WHEREAS, the settlement agreement will avoid the unnecessary expense of litigation, and

WHEREAS, the Passaic Board of Education has met to discuss the proposed settlement and has agreed to the terms of the settlement,

NOW, THEREFORE, be it resolved that the parties hereto, Robert T. Perkowski as petitioner, and the Passaic Board of Education as the respondent, hereby agreed to resolve the within matter as follows:

1. Petitioner, Robert T. Perkowski shall be reinstated to the title of department chair with his assignment being to the position of department chair of science.

2. While the assignment itself will take place effective July 1, 2007, based on petitioner Perkowski's seniority and tenure rights, he shall be awarded all back pay and emoluments owed from the date on which he was removed from his former position of department chair for career and industrial education, mitigated by the salary he earned as a classroom teacher in the Passaic School District.

3. The position of department chair of science includes a teaching component. The respondent has agreed that petitioner Perkowski shall satisfy the component of the department chair position by continuing to teach the CISCO networking class in lieu of teaching a science class.

4. This constitutes the full and final settlement of this matter and both parties recognize that the settlement of this matter is conditioned upon acceptance by the Commissioner of Education.

Dated: Aug 25, 2007

Robert M. Schwartz, Esq.
Attorney for Petitioner
Robert Perkowski

Jae Y. Lee, Esq.
Attorney for Respondent
Passaic Board of Education

Settlement of Workers' Compensation Claims

RECEIVED
2007 SEP 14 P 4:47
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Dr. Robert H. Holster, Superintendent of Schools, recommends approval of the following:

RESOLUTION

RESOLVED, the Board of Education accepts the recommendation of its workers' compensation attorneys, in the settlement the following workers' compensation claim:

Claim No.	*Amount*
W8903-15488	$20,000.00

46. **Resolution to Enter into Settlement Agreement – Dr. Robert Perkowski**

WHEREAS, Petitioner Dr. Robert T. Perkowski filed a petition against the Passaic Board of Education before the State of New Jersey, Department of Education, Commissioner of Education, Agency Reference No. 251-9/05, and this matter was referred to the Office of Administrative Law, OAL Docket No. EDU-13141-05; and

WHEREAS, the Passaic Board of Education was represented by the firm of Harwood Lloyd, LLC, Attorneys at Law, as assigned by the Board's Insurance carrier; and

WHEREAS, the Passaic Board of Education finds that it is in the best interest of the school district to settle this case amicably; and

WHEREAS, the settlement terms require that the petitioner be placed in the position of Science Department Chairperson effective the beginning of the 2007-2008 school year; and

WHEREAS, the settlement terms also require that the Board pay the petitioner the back pay to which he would have been entitled had he been placed in a Department Chairperson position effective September 1, 2005;

NOW THEREFORE BE IT RESOLVED that the Passaic Board of Education authorizes the settlement of this petition, Perkowski v. Passaic Board of Education, pursuant to the terms and conditions of the settlement agreement set forth above; and

BE IT FURTHER RESOLVED, that the Passaic Board of Education hereby authorizes the Superintendent of Schools, the Business Administrator/Board Secretary, the Director of Human Resources, the Board Attorney and assigned legal counsel from Harwood Lloyd, LLC. to take any and all steps necessary to effectuate the purposes of this resolution.

#461-07

IN THE MATTER OF THE TENURE HEARING OF ABRAHAM MOORE, SCHOOL DISTRICT OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning school district certified tenure charges against respondent – a tenured custodian – alleging excessive absenteeism, insubordination and conduct unbecoming over the course of the past eleven school years. Respondent contested the allegation of chronic absenteeism, arguing that: he was entitled to all the days off that he took; the days he took off due to illness cannot be counted against him; and he had improperly been subject to discrimination, harassment, unequal treatment, and a hostile workplace. Respondent did not, however, dispute the attendance records submitted with the tenure charges.

The ALJ found that: respondent's absences increased from 1998 forward, and he received numerous warnings about his attendance problems; respondent's separate discrimination, harassment and retaliation claims in Superior Court and in U.S. District Court were all dismissed prior to the ALJ's consideration of this matter; respondent's absences were disruptive to the operations of his department over many years; and petitioner's tenure charges are well supported. The ALJ concluded that respondent should be terminated from his tenured employment with the District for excessive absenteeism.

Upon careful review and consideration, the Commissioner concurred with the ALJ that the record in this matter is more than sufficient to establish excessive and chronic absenteeism, and provided supplementation of the ALJ's discussion. Accordingly, the Initial Decision of the OAL, sustaining the tenure charges of excessive absenteeism, insubordination, and conduct unbecoming, is adopted as the final decision in this matter. Respondent is dismissed from his tenured employment as of the filing date of this decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 29, 2007

5. July 1, 2002 to June 30, 2003. Over and above his allotted vacation, personal leave and birthday, respondent took 13 or 13.5 "sick" days between July 1, 2002 and March 9, 2003, left after six hours on two or three occasions, and was docked for an extra eleven days. In addition, respondent took FMLA leave from March 10, 2003 through June 30, 2003. During the course of the year he requested six funeral days.

6. July 1, 2003 to June 30, 2004. Between July 1, 2003 and January 30, 2004, over and above his allotted vacation, personal leave and birthday, respondent took approximately 37 "sick" days, at least 25 of which were docked. In addition, respondent was docked for 4.5 days when he either failed to call in or left before his shift was over. From January 30, 2004 onward, respondent was absent and on dock status; the certified tenure charges were served upon him on or about March 25, 2004; and he was suspended thereafter.

The record also contains several evaluations that were completed for respondent during the period in which his attendance was slipping, and memoranda describing meetings at which management discussed the attendance issues with respondent and his union representatives. As mentioned above, attendance was flagged as a problem on respondent's November 1997 evaluation – which he signed. It was likewise addressed on his March 25, 1998 evaluation – which he signed. Further, on May 14, 1998, his supervisor met with him to discuss the need for improvement in attendance.

Respondent's November 1998 evaluation contained a grade of "satisfactory" for attendance, but his May 1999 evaluation, which he signed, showed attendance as "unsatisfactory." At this point in time, respondent filed a lawsuit in Superior Court alleging that

he was experiencing discrimination, harassment, a hostile work environment, and retaliation for a lawsuit that his wife filed against petitioner.

Respondent's May 2000 evaluation designated attendance as unsatisfactory and articulated the need for respondent to improve same. Respondent signed this evaluation. And two months later – on July 10, 2000 – a meeting was held with him to discuss his poor attendance and to explain the burden it placed upon respondent's colleagues, the students, and the staff at PCTI. He was advised that attendance would be the focus of each of his 2000 and 2001 evaluations, that further absences without doctors' notes would be grounds for withholding his increment, and that the next step after increment withholding would be tenure charges.

Respondent's November 21, 2000 evaluation showed attendance as satisfactory, but two months later a meeting was held – on January 31, 2001 – to again discuss attendance. Between November 21, and January 31, respondent had been absent ten times. At the January 31, 2001 meeting, respondent produced a doctor's note for January 3-5, 2001.

The April and December 2001 evaluations for respondent both showed that attendance needed improvement, and both stated that respondent's absenteeism created a burden for fellow workers, as well as an impact on the cleanliness of the school.

On April 1-5, 2002, respondent called in sick. Three of petitioner's witnesses – as well as petitioner's wife – testified that on those days, respondent was in court at the hearing that was held for C. Moore's lawsuit against petitioner.

Also among the documents in the record is a certified letter to respondent, dated April 18, 2002, concerning dates upon which he was absent without: 1) calling in before reporting time, or 2) producing a doctor's note upon his return to work. These days, *i.e.*, April 10-17, 2002, were immediately after the above hearing for his wife's lawsuit in

Superior Court. Steps were taken to terminate respondent for abandonment of position, but respondent belatedly produced a doctor's note for the five days and petitioner ultimately decided to reinstate respondent -- notwithstanding that petitioner had no record of respondent calling in for those days.

Respondent's next performance evaluation was dated July 3, 2002 and covered November 2001 through June 2002. It rated attendance as unsatisfactory and warned that respondent's increment could be withheld.

On November 25, 2003, a certified letter was sent to respondent by petitioner's business administrator, memorializing "management's" attempts to meet with him to discuss his attendance. By that time, respondent was on dock status because – after only five months of the 2002-2003 school year – he had used up his allotted sick leave, and because he had been absent several days without calling in.[2] The doctor's note that respondent later submitted did not identify a reason for his absences, and did not cover all of the days that he was out.[3]

The November 25 letter reiterated the unfair burden that respondent's absences put on his colleagues, reminded him of the verbal and written warnings he had already been given, and advised him to regard the letter as a "final reprimand" antecedent to further discipline – including tenure dismissal charges – if his attendance did not improve. Nonetheless, respondent apparently missed another 1.5 days, causing another registered letter – dated December 2, 2003 – to be sent to him, requiring that he submit a doctor's note verifying and explaining the medical need for those absences. In addition, petitioner's business administrator warned that any future absences without provision of the necessary medical documentation would result in a three day suspension without pay for abuse of the sick leave policy.

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[2] He had also used all of his personal leave and all but three days of his vacation.

[3] This period of time corresponds to the onset of respondent's drug dependency, according to the testimony of respondent and his wife.

Respondent failed to provide a doctor's note for one of the days mentioned in the December 2 letter and – further – he left work early on December 3, 2003, and did not report to work on December 4. These deficiencies resulted in a certified letter dated December 4, 2003, summoning respondent to a meeting to discuss his attendance problems, and requiring him to bring to the meeting doctors' notes explaining his absences on November 26 and December 3. The letter warned that failure to attend the meeting and/or provide the doctor's note(s) would result in a three day suspension without pay for abuse of the sick leave policy.

Petitioner's Business Administrator, Human Resources Director and Compliance Officer met with respondent and his union representative on December 10, 2003. Petitioner's representatives explained to respondent that his poor attendance was unfair to his co-workers, and that the custodial department could not continue to absorb his absenteeism. They specifically told respondent that he could not just tell management that he was sick and fail to report to work with such frequency, and without medical documentation from a physician.

Respondent stated that he had an illness that caused him to often miss work, but provided no details. The human resources director stated that she would provide respondent with information about the Family Medical Leave Act (FMLA), but unless respondent was qualified for FMLA leave, he would be required to submit medical documentation explaining the need for each future absence.

A memorandum was sent to respondent about a month later, *i.e.,* January 7, 2004, referring to three days (subsequent to the December 10, 2003 meeting) upon which respondent failed to report to work and did not provide medical documentation. He was suspended for three days without pay.

Respondent grieved the suspension and submitted a doctor's note after-the-fact. Petitioner rescinded the suspension and paid respondent for three days, but respondent was again absent from January 21 through the end of January, except for January 27. In a letter dated January 30, 2004, petitioner drew respondent's attention both to the district policy about leave time and to *N.J.S.A.* 18A:30-4, which allows boards of education to require that a "physician's certificate" be filed by employees with the board secretary "in order to obtain sick leave."

The letter also stated:

> As you know, you have exhausted all of your sick leave, have already been docked 35 days and, despite repeated requests, you failed to submit a doctor's note in a timely manner. The foregoing represents a repeated and blatant abuse of the school's leave provisions. Therefore, effective immediately any future absences due to illness will require a doctor's note to return to work, whether that absence is for one day or more.

Petitioner also reminded respondent that if he wished to apply for FMLA leave he was obliged to fill out the application for same. However, when respondent's attendance record was examined, it was ascertained that respondent had not worked enough days in the previous twelve months to qualify for FMLA leave.

Respondent was absent for the entire month of February 2004, and on March 5, 2004, petitioner sent him a Statement of Tenure Charges, and Certification of Evidence supporting them. The gravamen of the charges were respondent's excessive absenteeism, his insubordination (*i.e.,* in failing to follow petitioner's sick leave policies concerning calling in and providing medical explanations for absences), and unbecoming conduct (*i.e.,* for using sick leave for other purposes). On March 23, the petitioning board voted to certify the charges to the Commissioner and suspend respondent without pay, pursuant to *N.J.S.A.* 18A: 6-16. On March 24, the charges were forwarded to respondent and the Commissioner.

Eight months later, in November 2004, respondent's complaint in Superior Court was dismissed in its entirety.[4]

In the Initial Decision in this matter the ALJ found that respondent's absences increased markedly from 1998 forward. At that time he had banked several sick leave days. The Commissioner notes that by the 2001-2002 school year, however, respondent had used all the banked days and exceeded the amount of leave allotted to him annually. This pattern continued in the following years.

The ALJ further found that petitioner gave respondent numerous warnings about his attendance – via his evaluations, in certified letters, and during meetings specifically arranged to discuss the issue of his absenteeism and the impact it had upon his colleagues, his department, and the school.

By the time the hearing in this matter took place, respondent's discrimination, harassment and retaliation claims in Superior Court had been dismissed and his appeal had been denied. The ALJ made note of this. In addition, the ALJ took judicial notice of the fact that, before the post hearing briefs had been submitted and before the record in this matter was closed, the United States District Court for the District of New Jersey had dismissed respondent's federal discrimination complaint.

DISCUSSION

The ALJ determined that if a school district shows that a custodian's absences "make it difficult to keep the building clean and further jeopardize the health and safety of

[4] His appeal was denied by the Appellate Division in June 2006, and a lawsuit that respondent filed in federal court articulating substantially the same claims was dismissed in December 2006.

the staff and student[s]," a sufficient basis for that custodian's dismissal is established. (Initial Decision at 16) This is in keeping with school law precedent.

In *North Bergen Board of Education, Hudson County v. John Siano* 97 *N.J.A.R.* 2d (EDU) 631), a tenured custodian was charged with excessive absenteeism and insubordination due to his poor attendance and reporting habits over a period of years. The petitioning district provided testimony about the effect upon the school of respondent's excessive absences, some of which he attributed to unspecified medical issues, and the Commissioner – recognizing the importance to the staff and students of keeping the school clean, sanitary and safe – approved the dismissal of the respondent. *See, also, State-Operated School District of Paterson v. Watson*, 93 *N.J.A.R.* 2d (EDU) 362, which involved charges of excessive absenteeism and insubordination against a tenured custodian, and entailed a factual scenario similar to that of the instant matter. In *Watson*, a dismissal was deemed warranted because the duties of custodians are essential for the well being of school employees and students, and because respondent was notified of his problem of excessive absenteeism but failed to rectify it.

In the present case, the ALJ further explained that even where legitimate health issues drive chronic absenteeism, removal may be warranted. (Initial Decision at 16) This proposition is in keeping with such precedent as that established in *State-Operated School District of Jersey City, Hudson County v. Vincent Pellecchio*, 92 *N.J.A.R.* 2d (EDU) 267, where a tenured teacher with undisputedly good pedagogical skills – but with a protracted record of excessive absenteeism due to asthma – was dismissed from his employment, and *In the Matter of the Tenure Hearing of Monica Meade-Stephens, State-Operated School District of the City of Jersey City, Hudson County,* 93 *N.J.A.R.* 2d (EDU) 134, *aff'd.* A-3076-92 (App. Div.), *certif. den.* 137 *N.J.* 167, *certif. den.* 513 *U.S.* 991, 115 *S. Ct.* 491, 130 *L. Ed.* 2d 403 (1994), where a

teacher was dismissed for excessive absenteeism which she attributed to illness and the medications which she took for same.

Citing to *In the Matter of the Tenure Hearing of David Riddick,* 93 *N.J.A.R.* 2d (EDU) 345, the ALJ also discussed the importance of reliability in evaluating a custodian's performance. (Initial Decision at 17) Respondent Moore's work on the night shift was important in preparing the school for the next day, as was the case in *Riddick.* The lack of reliability of respondent Moore's attendance disturbed the night shift operations, resulting in extra work for colleagues and/or less satisfactory conditions in the school at the commencement of classes the following morning. This was considered grounds for dismissal in *Riddick.*

Having articulated the relevant legal principles, the ALJ applied them to the facts of this matter. First, the ALJ pointed out that in his answers to discovery and at the hearing, respondent did not dispute the number of absences that petitioner had recorded and presented as evidence. (Initial Decision at 18) Rather, respondent suggested that the absences should either be discounted because of alleged discrimination and retaliation perpetrated against him by petitioner, or excused as manifestations of medical problems that were not accommodated by petitioner. This position was rejected by the ALJ because the identical claims had been litigated and dismissed in other forums. (*Ibid.*)

The remaining thesis advanced by respondent was that his absences were, in fact, not excessive. He argued that his days of absence corresponded to the leave days to which he was entitled under the collective bargaining agreement (CBA) between his union and petitioner. The ALJ pointed out, however, that for the period outlined in the tenure charges, respondent was absent 259 days – not counting vacation time and FMLA leave. (Initial Decision at 19)

Weighing the evidence before him, the ALJ found that petitioner's decision to seek respondent's termination was well supported. Respondent's absences were disruptive to the important operations of his department and, in particular, his shift. The absences often occurred one or two days at a time with no advance warning and precluded compensatory planning. They unfairly burdened his colleagues. (*Ibid.*) Respondent's attendance – by his own admission – became progressively worse, in spite of verbal and written warnings, explanations of the negative effects that his absences had on the school and his co-workers, suspensions, and a prior attempt to terminate him. (Initial Decision at 20)

Nor could the ALJ ignore the evidence before him that – beginning in 2003 – respondent developed a dependency on illegal drugs which he admitted was a factor in his absences, which he could not seem to control, and which he hid from petitioner and his own doctors who were writing medical excuses for respondent to present to petitioner. (*Ibid.*)

Respondent's exceptions to the Initial Decision restate the positions that he took in the Office of Administrative Law. He argues, for instance, that he was entitled under the CBA to all the days that he took off. However, his own exhibits, *i.e.,* R-27, R-37, R-47, R-55, R-64 and R-84 reveal that he exceeded the leave to which he was entitled and lapsed into dock status for each school year from 2001-2002 forward.

Respondent reiterates his belief that days taken due to illness cannot be counted against him. The Commissioner agrees with the ALJ, however, that the relevant case law does not support that argument. *See, Pellecchio* and *Meade-Stephens, supra.*

Finally, petitioner alleges that the tenure charges should fail because he was subject to discrimination, harassment, unequal treatment and a hostile workplace. These are the claims that he articulated in Superior Court and federal court. As such they are barred by the doctrine of issue preclusion. *See, e.g. R.O. on behalf of minor child, R.O., II, v. Board of Education of the West Windsor-Plainsboro School District, Mercer County*, decided by the Commissioner March 17, 2006.[5]

In summary, the Commissioner adopts the Initial Decision as supplemented herein, and rejects respondent's exceptions. The record shows that respondent's absences from work were excessive, and that he was insubordinate with regard to petitioner's instructions to him about calling in his absences before the commencement of his shift and timely producing doctors' notes explaining the medical reasons for his use of sick leave. Further, the evidence supports petitioner's claim that respondent used sick leave for other purposes, such as attending the hearing for his wife's lawsuit against petitioner.

[5] The Commissioner notes that during the six-year time period covered by the tenure charges, a number of events occurred which respondent frequently identified as germane to his attendance. First, respondent's wife filed a lawsuit against petitioner in 1999 which suit was settled in 2002, and pursuant to which settlement C. Moore resigned from the employ of petitioner. Respondent's claims that this suit cause petitioner to retaliate against him were rejected in his Superior Court action. The respondent's similar claims that he was "picked on" because he filed actions against petitioner and the union are without support in the record.

Second, the district outsourced its bus transportation in Spring 2000 – causing respondent and others to become full-time custodians. While respondent was not happy with this change, he presented no evidence to show that it was improper or that the consequences affected him alone.

Third, respondent unsuccessfully requested – in 1997 and 2000 – to be put on the day shift. The evidence presented at the hearing showed that, contrary to respondent's contentions, no one was transferred to the day shift during the period in question, except for the individual who held the stipend position of transportation coordinator.

Accordingly, the petition in this matter is granted. Respondent's employment with petitioner is terminated.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 11/29/07

Date of Mailing: 11/30/07

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05518-04
AGENCY DKT. NO.: 110-3/04

IN THE MATTER OF THE TENURE HEARING OF ABRAHAM MOORE, SCHOOL DISTRICT OF PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY

Abraham Moore, petitioner, pro se

Eric L. Harrison, Esq., for respondent Passaic County Technical Institute (Methfessel & Werbel, attorneys)

Record Closed: March 30, 2007 Decided: August 30, 2007

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF THE CASE

On May 15, 1992, Abraham Moore was hired by the Passaic County Technical Institute (PCTI) as a full-time custodian and part-time bus driver. Moore became tenured in the position.

On or about March 24, 2004, the Board of Education of the Vocational School of the County of Passaic by a majority of its membership determined that there was probable cause in support of tenure charges and certified those charges to the Commissioner of Education.

The tenure charges sounded in three counts, the first being excessive absenteeism; the second being a charge of insubordination and conduct unbecoming as a result of the allegation that Mr. Moore failed to in a timely manner to provide documentation for his absences and notification to PCTI of his absences; and charge three contended that Moore abused the sick leave policy by using his sick leave for personal and/or vacation time.

On or about May 6, 2004, an answer to the tenure charges was filed with the Commissioner's office. In the answer filed by Moore, he contested the allegation of chronic absenteeism but specifically indicated that as a defense to this matter, he is not contending that the actions of PCTI were discriminatory, retaliatory, or in violation of the Law Against Discrimination (LAD) because he intended to litigate those contentions in a Superior Court case that was at the time already pending.

Mr. Moore's answer to the tenure charge of excessive absenteeism did not dispute the attendance records as presented in the tenure charges but did contend that they did not substantiate that he was excessively absent.

PROCEDURAL HISTORY

The matter was forwarded to the Office of Administrative Law on or about May 28, 2004, and assigned to the Honorable Stephen G. Weiss for hearing. Although dates were immediately assigned for the hearing, the case was marked inactive on or about October 28, 2004 pending the resolution of Moore's Superior Court case. This marking was the result of a request by his attorney at the time.

On or about April 28, 2005, Mr. Moore's case was reactivated and a multi-date hearing was scheduled for October 2005. This multi-day hearing was adjourned to give

Mr. Moore an opportunity to replace his attorney who petitioned Judge Weiss to be relieved.

The matter was reassigned to me as a result of Judge Weiss' retirement and several dates were set aside for hearing.

On the date that the hearing was to commence, Moore requested an adjournment along with an opportunity to enter into an inpatient drug treatment center. He was at this point pro se and the application was granted.

New hearing dates in July 2006 were scheduled, but once again adjourned as a result of Mr. Moore's request to hire a new attorney.

New hearing dates were scheduled for October 3, 4 and 6 and November 15, 2006.

The hearing concluded on November 15, 2006, with the parties requesting time to order the transcripts and submit briefs.

The final brief was submitted on or about March 15, 2006.

The documents marked in evidence, approximately 400 of them, were accompanied by four days of transcripts, extensive briefs and several hundred pages of miscellaneous motions, certifications and affidavits, which required the undersigned to request several extensions.

TESTIMONY AND FACTS

PCTI presented three witnesses to substantiate the allegations contained in the certified tenure charges. The first was Diana LoBosco, the Superintendent of Schools.

Ms. LoBosco first became employed at PCTI in 1984 as a Supervisor of Basic Skills and Bilingual Education and subsequently became a Vice Principal of Special

Education and then Principal of the school. She has been the Superintendent for the past twelve years.

She indicated that she is responsible to ensure that the policies of the Board are implemented and followed and that she is also the Custodian of Records for PCTI including budget, finances and personnel. During the course of her testimony, fifty-three documents were marked in evidence as described in Exhibit 1 attached hereto.

Superintendent LoBosco confirmed with records the contentions contained in the certified tenure charges. She produced documentation in the form of performance evaluations for Mr. Moore dating back to 1997. Ms. LoBosco also produced Mr. Moore's attendance records for the time periods between July 1, 1998 and June 30, 2004.

The next witness to testify was Sal Antoniello, a Supervisor of Maintenance at PCTI.

Mr. Antoniello was the author of a memo dated April 17, 2002 concerning Mr. Moore, marked P-31 in evidence. The memo which was written on April 17, 2002 indicates that Mr. Moore had not called in since April 9, 2002, but had been absent in excess of five days without calling in. According to Mr. Antoniello's memo, absence in excess of five days was considered job abandonment.

At the hearing, Mr. Antoneillo indicated that although Mr. Moore had not called in during the time period depicted in his memo, Mr. Antoniello had in fact seen Mr. Moore at his wife's trial during that time period.

Mr. Antoniello went on to indicate that Mr. Moore's absences created difficulties in completing janitorial services.

Mr. Antoniello also confirmed that he was at a meeting conducted on July 11, 2000, at which time Mr. Moore's absenteeism was discussed and that Mr. Moore was advised that his absenteeism was creating a hardship on his co-workers. According to

the memo written by Rich Giglio, who testified after Mr. Antoniello, Mr. Moore's explanation for his absences was that he was having family problems.

The next witness to testify was Richard Giglio who had worked for PCTI for approximately eleven years and was currently the School Business Administrator. As the School Business Administrator, he was responsible for the Finance Department, Food Service Department, and the Custodial Maintenance Department.

Mr. Giglio confirmed writing the memo marked P-23 in evidence and also confirmed the memo marked P-50, which he wrote to Ruby Baker concerning an attendance meeting that had been scheduled with Mr. Moore for the same date but was cancelled as a result of Mr. Moore having called in sick that day. Mr. Giglio also confirmed that on November 25, 2003 he authored a letter to Mr. Moore marked P-51 in evidence which reiterated the difficulties created by Mr. Moore's absence and also indicated that his poor attendance might well led to further disciplinary action including tenure charges.

On or about December 2, 2003, Mr. Giglio sent a letter to Mr. Moore indicating that despite his previous letter, he had once again been absent for a half a day on November 26 and an entire day on December 1. He went on to indicate to Mr. Moore that it would be necessary for Mr. Moore to provide a doctor's note verifying the explanation for the absences. The letter also said that if no medical documentation is presented by December 8, or if Mr. Moore called in sick without providing the necessary medical documentation, that he would be suspended without pay for three days.

On December 4, 2003, Mr. Giglio wrote another letter to Mr. Moore confirming that a doctor's note had been submitted for the absence on December 1 but that nothing was provided with respect to the half day that Mr. Moore had missed on November 26. Mr. Giglio had went on to advise Mr. Moore that he was requiring him to attend a meeting on Wednesday, December 10, 2003, which would be attended by not only Mr. Giglio, but also Ruby Baker and Michelle Johnson in Mr. Giglio's office.

The essence of that meeting is contained in P-55. Moore was again warned that his attendance was creating a huge problem, which was unfair to his co-workers. Mr. Moore indicated that he had some type of illness, which causes him to miss so many days. Ms. Baker indicated that she would provide him with information concerning medical leave.

Mr. Giglio confirmed that on January 7, 2004 he sent a memo to Moore docking him for December 18 and 19 and January 5 since those were days he was out and no note was produced explaining the reason for the absence. The suspension was subsequently rescinded on January 30, 2004, after Mr. Giglio received a medical note. Although the medical note was received after the absences and after the suspension had been imposed, the suspension was still rescinded and three days pay was restored. The letter goes on to say, "As you know, you have exhausted all your sick leave, have already been docked thirty-five days and, despite repeated requests, you failed to submit a doctor's note in a timely manner. The foregoing represents repeated and latent abuse of the school's leave provisions. Therefore, effective immediately, any future absences due to illness will require a doctor's note to return to work whether that absence is for one day or more."

Mr. Giglio went on to confirm that during the course of Mr. Moore's wife's trial, he did see Mr. Moore in attendance at the trial.

The next witness to testify was Ruby Baker, who testified out of turn on behalf of Mr. Moore.

Ms. Baker became an employee of PCTI in 1984 and is presently the Director of Personnel. As Director of Personnel, Ms. Baker had all the attendance records for the employees and sent out notices if and when required to do so by PCTI policy. According to Ms. Baker, although she had no role in determining whether tenure charges should be filed against Mr. Moore, she did in fact have a meeting with him sometime prior to the charges being filed, a meeting, which she indicated, was a one to one meeting. She went on to testify as follows:

Q	Okay. And this would be, this meeting would have taken place, this first meeting, in your office?
Baker	Yeah, it was in my office.
Q	Tell me, what was the purpose of that meeting?
Baker	Okay. And Mr. Moore would not be the only person that I do this with. You know, I do this with all of my employees that, you know, I feel that is in jeopardy of maybe losing something. I will call them in and speak with them, one on one, and just tell them. And my sentiment to them is don't give anyone ammunition to use against you. If you have a job, your obligation is to come to work and to do your job. If you're to come in, to sign in at 8 o'clock, sign in at 8 o'clock, not a quarter after eight or 8:30. In other words, my comments would be don't give anyone ammunition to use against you. If you do the right thing, then you don't have anything to worry about.

(Transcript of October 6, 2006, Testimony of Ruby Baker, page 52, line 10 to page 53, line 5.)

The last witness called on behalf of PCTI was Frederick Dieckmann.

Mr. Dieckmann was Secretary of the Maintenance Department. Mr. Dieckmann described the procedures supposedly in place to determine if and when someone calls in sick. His testimony indicated that there are several people who could have answered a phone and taken a call from an employee concerning an absence that was about to occur. Mr. Dieckman was confident that all calls from employees indicating that they were unable to attend work for any reason would have been logged into records.

Mr. Dieckman confirmed that notices were sent to employees after six days of absence, not necessarily consecutive days, although he was unsure of the purpose of the notice.

Testifying on behalf of Mr. Moore was his wife Cassandra Moore, who assisted him in preparing documentation to refute the claim of PCTI that he was absent excessively.

Mrs. Moore presented documents marked R-1 through R-246 which were eventually marked in evidence except for R-217 and R-228.

The emphasis of Mrs. Moore's testimony was focused on Mr. Moore's attendance record. The documents marked R-27, R-37, R-47, R-55, R-69 and R-84, refer specifically to paragraphs in the Certified Tenure Charges and focus on the specific days Mr. Moore was out of work and the characterization of those absences.

R-27 depicts the time period between July 1, 1998 and June 30, 1999. According to the Tenure Charges, Mr. Moore used seventeen and one-half sick days, three personal days and three funeral days during that time period in addition to his fifteen vacation days. The accuracy of these numbers were verified by Mrs. Moore. She did however point out that pursuant to contract, Mr. Moore was entitled to seventy-five days during the time period in question, made up of one birthday, fifty-three sick days which had been carried from previous years, fifteen vacation days, three personal days and three funeral days. According to Mr. and Mrs. Moore's calculation, that would mean he had seventy-five days to which he was "entitled" of which he used thirty-eight and one-half days.

According to Mrs. Moore, out of the twenty-three sick, personal, and funeral days, thirteen fell on either a Monday or Friday. R-28 in Evidence, the actual record of July 1, 1998 to June 30, 1999, disclosed that of the seventeen and one-half sick days taken by Mr. Moore, only two (December 1 and 2, 1998) were consecutive. All the remaining days were isolated, one-day, sick days.

R-37 in Evidence covers the period from July 1, 1999 to June 30, 2000 (Paragraph 11 of Certified Tenure Charges), and indicates that Mr. Moore used thirty-one and one-half sick days, four funeral days and three personal days along with his

fifteen vacation days. According to Mrs. Moore, her husband's "entitlement" for July 1, 1999 to June 30, 2000 was seventy and one-half days composed of thirty-six and one-half sick days that had been carried, one birthday, twelve additional sick days, fifteen vacation days, three funeral days and three personal days. Mrs. Moore acknowledged that according to the records, of the thirty-eight and one-half sick, funeral and personal days taken by Mr. Moore, twenty of them fell on either Monday or Friday. A review of R-38 indicates that of the thirty-one and one-half days absent, approximately twenty-four were isolated sick days. Not included in the sick or absent charges were four days when Mr. Moore left work after six hours, but according to contract is not charged a sick day.

R-47 covers the time period between July 1, 2000 and June 30, 2001 (Paragraph 15 of the Certified Tenure Charges), and indicates that Mr. Moore was out sick thirteen and one-half days, took six funeral days and three personal days in addition to his fifteen vacation days. According to Mrs. Moore, her husband was entitled to seventeen sick days (carried) one birthday, twelve additional sick days, fifteen vacation days, three funeral days and three personal days for a total of fifty-one days. Of the twenty-two and one-half sick, personal and funeral days, thirteen fell on either a Monday or Friday. Approximately nine sick days were isolated unconsecutive days.

R-55 covers the time period between July 1, 2001 and June 30, 2002 (Paragraph 20 of the Certified Tenure Charges), and indicates that Mr. Moore took twenty-six sick days plus sixteen and one-half days for which he was docked in addition to two funeral days and three personal days, along with his fifteen vacation days. According to Mrs. Moore, her husband was entitled to one birthday, thirteen and one-half days which he had carried, twelve sick days for the current year, fifteen vacation days, three funeral days and three personal days for a total of forty-seven and one-half "entitlement" days. Of the forty-seven and one-half sick, personal and funeral days, nineteen fell on either Monday or Friday. According to Mrs. Moore's testimony and R-56 in Evidence, between April 1, 2002 and May 20, 2002 Mr. Moore was not at work. Between April 1 and April 16, Mr. Moore was out of work. At least a portion of these two weeks encompasses a time period when Mrs. Moore was pursuing her civil action against PCTI in court. According to Mrs. Moore, her husband gave her emotional support during that time

period by attending the trial although he had been calling in sick to work. She indicated that a person could be both sick and emotionally supporting a partner at the same time. On or about April 16, 2002, Mr. Moore was terminated from his position as a result of not calling in his absences for a period of five days. After producing a doctor's note, his termination was rescinded and he was reinstated on or about May 20, 2002.

R-64 covers a six-month time period between July 1, 2002 and December 31, 2002. See Paragraph 28 of Certified Tenure Charges. During this six-month time period, Mr. Moore was sick for nine and one-half days, took five vacation days, three personal days and two funeral days. Of the fourteen and one-half sick, personal and funeral days, six fell on a Monday or Friday. Between January 1, 2003 and March 9, 2003 (Paragraph 30 of the Certified Tenure Charges), Mr. Moore used three and one-half sick days, four vacation days and was docked eleven days. Of the sick, vacation and docked days, eight and one-half fell or Mondays or Fridays. According to Mrs. Moore, on or about March 10, 2003, her husband commenced a Family Leave time period for which he was under doctor's care for approximately sixty days. There was some discussion about whether it was actually sixty days or seventy days of Family Leave, but this dispute went unresolved.

R-84 covers the time period between July 1, 2003 and the filing of Tenure Charges in March 2004. During that time period, Moore was absent without medical excuse and his pay was docked a total of fifty-six and one-half days. In addition to the docked days, Moore did, in fact, use twelve sick days, three personal days, one birthday and twenty vacation days. He was therefore not at work for ninety-two and one-half days between July 1, 2004 and March 4, 2004.

It was apparent from Mrs. Moore's testimony and documentation previously submitted by Mr. Moore and his attorneys, that the number of days absent was not in dispute, but rather the reason for and a characterization of those absences was in dispute. Despite the testimony of Mrs. Moore and the previous admissions both in documents filed, and the answer to the Certified Tenure Charges, and representations during the hearing, Mr. Moore inexplicably, in his brief, filed after the hearing contended that the documentation presented at the hearing concerning his attendance was in

dispute. He did not however, dispute the documentation at the hearing, nor anytime prior to the commencement of the hearing. R-27, R-37, R-47, R-55, R-64 and R-84 all confirm the attendance record submitted by PCTI.

Mrs. Moore on behalf of her husband contended that his absences were not excessive for he used no more than he was entitled to. PCTI failed to accommodate him by shifting him from a night shift to a day shift and along with the allegedly constant harassing in combination with family difficulties, led Mr. Moore into uncharacteristic conduct, specifically, serious drug abuse. Ms. Moore said she first found out about her husband's drug problem sometime in 2003, a time period which she conceded that she also indulged in the use of illegal drugs with her husband. Although Mrs. Moore was able to overcome the drug problem, it was not as easy for her husband. According to Mrs. Moore:

> He was in denial about his drug problem for a long period of time. And, a drug addict is not just going to come out and tell basically anybody of his condition. The one person that we did confide in was his attorney, Paula Garrett (phonetic), who in turn continued to say that it would affect . . . I want to use the term correctly that --- this would --- the Court: would affect his excessive absenteeism? The witness know because at the particular point, charges wasn't even placed on him. So it would compromise your case, that would she would continue to say and I think that was another reason why it was never told to anyone about the condition.

Mrs. Moore then conceded that medical reports submitted by doctors never disclosed or took into account her husband's drug abuse for his drug abuse was not disclosed to the doctors.

Mr. Moore testified on his own behalf. He conceded that with respect to his absenteeism, the documentation presented by PCTI depicting the days that they say he was not at work was accurate. He testified that, although the count of days that he was absent is accurate, the days that he was sick was as a result of treatment he received at PCTI. He indicated that he was being picked on because his wife had filed a law suit and filed complaints against the school.

Mr. Moore produced documentation that indicated during the earlier years of his employment and up until approximately 1996, his attendance had been excellent. A bus incident for which Mr. Moore was disciplined which occurred in 1996 seems to be the point that his relationship with the people at PCTI began to deteriorate and subsequently was reflected in his attendance. He felt that he was being picked on by his superiors at PCTI and that his request to be transferred to the day shift was denied despite the fact that he believed that he was entitled to the shift based on his seniority. This matter was in fact the subject of a grievance filed by Mr. Moore but was unsuccessful.

Mr. Moore conceded that his attendance got progressively worse between 1998 and 2001, and that between 2001 and 2004 it continued to get worse despite several written warnings and meetings.

FINDINGS OF FACT

Abraham Moore became a full-time custodian on May 15, 1992 and subsequently became tenured.

His initial duties encompassed being a bus driver responsible for transporting students to and from specific destinations. Sometime after 1996, Mr. Moore's responsibilities no longer included driving a bus but focused on janitorial duties.

Prior to July 1, 2002, Mr. Moore was entitled to fifteen vacation days, twelve sick days, three personal days and one birthday per school year. After July 1, 2002, Mr. Moore's vacation days increased to twenty.

Mr. Moore's testimony and that of his wife confirmed his attendance history contained in the certified tenure charges.

Between July 1, 1998 and June 30, 1999, Mr. Moore was out seventeen and one-half sick days, three days for funeral leave and three personal days.

Between July 1, 1999 and June 30, 2000, Mr. Moore took thirty-one and one-half sick days, four funeral days and three personal days.

Between July 1, 2000 and June 30, 2001, Mr. Moore was out thirteen and one-half sick days, six funeral days and three personal days.

Between July 1, 2001 and June 30, 2002, Mr. Moore was out twenty-six sick days, two funeral days and three personal days. In addition to the sick days, Mr. Moore was docked sixteen and one-half days for being absent without any sick time remaining.

In March 2003, Mr. Moore requested family medical leave pursuant to the Family and Medical Leave Act (FMLA) which leave commenced on March 10, 2003.

Prior to the leave commencing, for the time period between July 1, 2002 to March 9, 2003 Moore was out sick thirteen days, took two funeral days, three personal days and was docked eleven days.

On March 23, 2004, the Board voted to certify tenure charges to the Commissioner of Education. Between July 1, 2003 and June 30, 2004, Mr. Moore was docked fifty-six and one-half days. See R-84 in evidence.

Mr. Moore's attendance was exemplary for the first several years of his employment. In July 1998, Mr. Moore had accumulated fifty-three sick days. It was from this point on that Mr. Moore's attendance started to deteriorate and, according to his own testimony, got progressively worse.

There were many warnings to Mr. Moore concerning his attendance. These warnings came in the form of written commentaries to his evaluations, the first one coming in May 1999, followed by several more.

In addition to several written warnings, there were also several meetings at which point Mr. Moore was advised that his attendance was unacceptable.

On or about July 10, 2000, there was a meeting with Mr. Moore at which not only was his absenteeism discussed, but he was advised that his poor attendance was creating a hardship for his colleagues. This meeting was memorialized in a memo to Mr. Moore from Rich Giglio and marked in evidence as P-23.

There were several more meetings and several more written warnings.

On or about November 25, 2003, a certified letter was sent to Mr. Moore by Mr. Giglio setting forth parameters for any future absences and advising him that his attendance was having a direct impact on the rest of the custodial and maintenance staff.

Despite the warnings, Mr. Moore's attendance never improved.

Moore's answer to the tenure charges specifically reserved his legal arguments concerning what he contended was retaliation by PCTI as well as racial and workplace discrimination.

On or about November 3, 2004, the Honorable Ronald B. Sokalski, J.S.C. dismissed all of Mr. Moore's claims, including the contention that PCTI retaliated against him as a result of his wife's lawsuit and that they violated the law against discrimination (N.J.L.A.D.). Mr. Moore took an appeal of this dismissal and, on or about June 12, 2006, the Appellate Division upheld the dismissal of Moore's claims stating as follows:

> We have painstakingly reviewed the extensive record on appeal, including the multi-volume appendix submitted by plaintiff. . . .Plaintiff's allegations against the PCTI defendants of racial discrimination, harassment and retaliation under LAD and CEPA are completely lacking in evidential support. The record reflects that PCTI investigated plaintiff's complaints of discrimination, harassment and retaliation. The memoranda documenting those investigations indicate that the disputes between plaintiff and his supervisors were merely disagreements over work issues, such as performance, attendance and work assignments. In addition, the record reflects that PCTI held several meetings with plaintiff, attempting to

> resolve the issues he raised and to calm tensions between plaintiff and other members of the PCTI staff.
>
> Nor do plaintiff's claims of differential discipline have a sufficient factual basis to survive summary judgment. For example, those individuals to whom plaintiff compared himself with respect to the disciplinary action arising out of the 1996 football game incident were not accused of similar misconduct, insofar as they were not accused of insubordination and their infractions did not endanger the safety of the children. Moreover, PCTI had ample basis to pursue the termination action in 2002 based on plaintiff's unexcused, excessive absences from work. That the Board decided not to pursue the charges after it received plaintiff's untimely submitted medical documentation, which clearly inured to plaintiff's benefit, does not undermine its non-discriminatory motive.
>
> Additionally, several of plaintiff's claims, such as PCTI's failure to hire him in the maintenance department when he applied in 1993, his 1996 resignation as Transportation Coordinator, and PCTI's denial of shift changes in 1997 and in February 2000 are each discrete and isolated acts that are time-barred by the two-year statute of limitations under LAD.

Following the above decision, Mr. Moore filed a suit in the United States District Court reiterating for the most part the allegations contained in the State case. By order dated December 21, 2006, the Honorable Joseph A. Greenaway, Jr., U.S.D.J. dismissed all of Moore's claims.

THE LAW

N.J.S.A. 18A:6-10 states that ". . . no tenured employee in the public school system of the State shall be dismissed except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:17-3 specifically deals with janitors and states as follows:

> Every public school janitor of a school district shall, unless he is appointed for a affixed term hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation . . . except for neglect, misbehavior or other offense . . . .

The cases in which custodians have been terminated for excessive absenteeism reveal that only a minimal showing of effect on the district is sufficient to support dismissal under the standard established in Passaic Board of Education v. Vianni, 91 S.L.D. 2386, 2397. In State-Operated School District of Paterson v. Watson, 93 N.J.A.R. 2d (EDU) 362, the school district's statement that the absences "made it difficult to keep the building clean and further jeopardized the health and safety of the staff and student members of the school" sufficed without more. Id. at 366.

Chronic or excessive absenteeism may warrant removal even when the leave is taken for legitimate or health reasons. State-Operated School District of Jersey City v. Pellechio, 92 N.J.A.R. 2d (EDU) 269; In the Matter of Tenure Hearing of Patricia Marsden, OAL Docket No. EDU 1188-84 (August 26, 1985), aff'd., Comm'r. of Ed. (October 10, 1985). In re the Tenure Hearing of Meade - Stephens, 92 N.J.A.R. 2d (EDU) 515, aff'd., 93 N.J.A.R. 2d (EDU) 134, aff'd., No. A-3076-92 (App. Div. January 10, 1994), cert. denied, 137 N.J. 167, cert. denied, 513 U.S. 991, 115 S. Ct. 491, 130 L. Ed. 2d 403 (1994).

In the Matter of the Tenure Hearing of Joseph McDougall, 1975 S.L.D. 170, 178:

> A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties.

Repeated absences may make it difficult to keep the school clean and possibly jeopardize the health and safety of the school's students, faculty, and staff. State-Operated School District of Paterson v. Watson, 93 N.J.A.R. 2d (EDU) 362.

It is well settled that excessive absenteeism may constitute grounds for the removal or suspension of a tenured employee. In the Matter of the Tenure Hearing of Marcus Miller, School District of the City of Trenton, OAL Dkt. EDU 8409-86 (March 6, 1987), adopted, Comm'r. of Ed. (March 31, 1987).

In the Matter of the Tenure Hearing of David Riddick, 93 N.J.A.R. 2d (EDU) 345 (February 16, 1993) involved a custodian charged with excessive absenteeism, among other things. The Chief Administrative Law Judge, Jaynee LaVecchia, now a New Jersey Supreme Court Justice, stated the following:

> I agree that on this basis alone, Riddick should be dismissed from his position of custodian. The custodian's duty to his position is to be reliable as well as competent in the actual performance of his assigned tasks. Riddick simply was not reliable and that unreliability had a direct and negative impact on the competence of the custodial function for the night shift. As Milone testified, not knowing if Riddick would show for work, whether he would be late or not appear at all, and prevented Milone from effecting coverage for the night custodial shift. This uncertainty regarding Riddick prevented Milone from requesting overtime from a dayshift custodian or obtaining a replacement custodian by other means. As Milone and Katman testified, it resulted generally in the nightshift being short staffed due to Riddick's absences.
>
> When this occurs, a risk is run that the school will not be adequately cleaned and set up to receive students and staff for the next day. A complete job cannot be done if the custodians who do show up for work have to be frequently pooled to cover not only their own assigned areas but also the area of the custodian not at work. Obviously this is a matter of degree. Occasional absences are absorbed by a work group, be it the nightshift of custodians or any other group of employees, but Riddick's absences were so frequent that he is found to be unreliable as a working member of his particular unit. This jeopardized the quality of custodial services provided to the students and staff . . . where he was last assigned.

Now Justice LaVecchia concluded that petitioner had proven excessive absenteeism by a preponderance of the evidence and that dismissal was warranted. The Commissioner of Education, recognizing the role of a school custodian as an important one, concurred with the ALJ's recommendation. Also see State-Operated School District of Pasterson v. Watson, 93 N.J.A.R. 2d (EDU) 362 (March 4, 1993), exercising the same logic and reaching the same conclusion.

DISCUSSION

PCTI filed tenure charges against Abraham Moore contending that he was obsessively absent from his job as a custodian and these absences adversely affected the performance of the janitorial staff at PCTI and held a potential danger for the students attending the school.

Mr. Moore did not dispute his attendance records but alleged that PCTI was treating him unfairly, discriminating against him because of his race, retaliating against him because of lawsuits filed by his wife who had been an employee of PCTI and that PCTI failed to accommodate physical handicaps in the form of medical problems.

Mr. Moore has extensively litigated his retaliation claims, his discrimination claims, and PCTI's alleged failure to accommodate his medical problems. All of his claims have been rejected in Superior Court, the Appellate Division, and United States District Court. Both sides in this matter submitted documents, transcripts, and briefs, documentation that numbered into the thousands of pages. It appears that all of the documentation that had previously been filed and all of the litigation conducted in this matter was re-filed with the Office of Administrative Law. There is, however, no reason to reassess all of the arguments previously disposed of in other courts. In fact, the answer to the tenure charges specifically focused on the contention that Mr. Moore's absences were not excessive and in essence reserved all other arguments for disposition in his Superior Court suit.

What is not in dispute in this matter is that when Mr. Moore did appear to perform the duties of his job, there were few complaints about his performance and, in fact, some of the witnesses adverse to his absenteeism were positive about his job performance. Though there may be some credence to Mr. Moore's contention that PCTI was focusing on him because of lawsuits and complaints lodged by his wife, Mr. Moore provided PCTI with the ammunition to challenge his tenure by virtue of his progressively deteriorating attendance. Written warnings, verbal warnings and even a prior attempt to terminate him failed to result in any improvement in his attendance. Testimony from both Giglio and Antoniello confirmed the hardship suffered by the

janitorial staff and the difficulty in covering Moore during his absences. The duties of a custodian as contained in P-5 in evidence, including not only sweeping, washing, waxing and polishing but also cleaning bathrooms, lavatories, locker rooms and emptying wastebaskets, are clearly functions that if not properly attended to on a regular basis would, by application of common sense, lead to deleterious conditions.

Distressing aspects of Mr. Moore's attendance are reflected in the innumerable days he was absent one day at a time. It was not until late 2003 and early 2004 that Mr. Moore took extended leaves for medical reasons and family reasons. For the most part, his absences were rarely more than two or three consecutive days and mostly one day at a time. This type of attendance record is more stressful to a staff than extended, forewarned absences.

Mr. Moore was insistent that he never exceeded the number of days he believed he was entitled to during his employment. He unquestionably was of the opinion that sick days allotted at the start of a new year were in fact the equivalent of another series of vacation days. According to PCTI's calculations and the attendance records in evidence for the time period depicted in the tenure charges not including family leave and vacation time, Moore was absent 259 days.

A factor which cannot be overlooked in this matter is Mr. Moore's admission that during the course of his employment, at least the latter part of his employment, he struggled with a rather serious drug addiction.

In April 2006, when his hearing was about to commence at the OAL, Mr. Moore was granted an opportunity to address his drug addiction. This apparently was not the first time he attempted to overcome this problem but he was at this point admirably attempting to confront it.

PCTI continued to pay him between April 2006 and July 2006 despite the fact that it was Mr. Moore's conduct that was creating the delay in the disposition of his case. A motion argued and heard on October 6, 2006 resulted in an order suspending

PCTI's obligation to pay Mr. Moore his salary during the pendency of this case until a final decision is rendered.

Documents submitted by Mr. Moore, including doctors' reports, never referred to Mr. Moore's admitted addiction to illicit drugs. The testimony from Mr. Moore's wife indicated that he was in denial and she confirmed that his drug addiction probably had an adverse effect on his attendance.

Despite innumerable written warnings from PCTI in addition to several meetings at which Mr. Moore was forewarned that his attendance was creating severe problems, Mr. Moore admitted that his attendance got progressively worse up until his termination. The number of days that Mr. Moore was absent and the pattern of those days support the contention of PCTI that Mr. Moore was excessively absent and that his termination is warranted.

ORDER

It is **ORDERED** that as a result of Abraham Moore's excessive absenteeism, he is terminated from his employment PCTI .

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

AUG 30 2007
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 8/30/07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 4 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej/tbj/pb

APPENDIX

EXHIBITS

For Petitioner:

P-1 Letter from Remer to Moore forwarding Tenure Charges dated 3/5/04

P-2 Minutes of Board meeting from 3/23/04

P-3 Letter from Remer to Moore re: suspension w/o salary per Board dated 3/24/04

P-4 Letter from Remer to Librera forwarding tenure charges, etc. dated 3/24/04

P-5 Custodian job description

P-6 Custodial/Maintenance Agreement with Union for 1999-2000

P-7 Custodial/Maintenance Agreement with Union for 2000-2003

P-8 Custodial/Maintenance Agreement with Union for 2004-2007

P-9 Illness or Disability of Staff (4340)

P-10 Personal Illness and Injury (4340.4)

P-11 Performance evaluation of A. Moore dated 4/18/1997

P-12 Days out from July 1, 1998 to June 30, 2004

P-13 Performance evaluation of A. Moore dated 11/3/1997

P-14 Performance evaluation of A. Moore dated 3/25/1998

P-15 Attendance Conference report dated 5/14/1998

P-16 Performance evaluation of A. Moore dated 11/10/1998

P-17 Interoffice memo from Byrnes to Giglio re: A. Moore's refusal to sign his evaluation dated 11/23/1998

P-18 Letter from Giglio to Moore re: leaving after 6 hrs dated 5/14/1999

P-19 Performance evaluation of A. Moore dated 5/17/1999

P-20 Hand written note from A. Moore to Cox re: day position grievance dated 1/27/2000

P-21 Performance evaluation of A. Moore dated 5/3/2000

P-22 Interoffice memo from Antoniello to Moore re: meeting to discuss attendance 7/6/2000

P-23 Interoffice memo from Giglio to Moore re: outcome of attendance meeting dated 7/10/2000

P-24 Performance evaluation of A. Moore dated 11/21/2000

P-25 Attendance Conference report dated 1/31/2001

P-26 Performance evaluation of A. Moore dated 4/12/2001

P-27 Performance evaluation of A. Moore dated 12/03/2001

P-31 Interoffice memo from Antoniello to Giglio no call/no note and docked days dated 4/17/2002

P-32 Letter from Baker to Moore re: 5 days out w/o call or note is abandonment dated 4/18/2002

P-33 Interoffice memo from Antoniello to Giglio re: Moore being out due to stress dated 4/18/2002

P-34 Interoffice memo from Dieckmann to Giglio re: no show, no call of Moore dated 4/19/2002

P-35 Interoffice memo from Dieckmann to Giglio re: no show, no call of Moore dated 4/24/2002

P-36 Interoffice memo from Santiago re: daily attendance for custodial/maintenance 4/10/2002

P-37 Letter from Remer to Moore re: termination meeting dated 5/17/2002

P-38 Letter from Baker to Moore re: remaining vacation days dated 5/23/2002

P-39 Performance evaluation of A. Moore dated 11/1/2001 through 6/4/2002

P-40 Letter from Moore to Giglio re: shift change/seniority not clear wants to file grievance 1/30/2003

P-42 Letter from Baker to Moore re: unpaid family leave and remaining vacation days dated 6/19/2003

P-44 Confidential for Family and Medical Leave Act w/ expires 7/31/2003

P-45 Interoffice memo from Cox to Giglio re: Moore no show no call dated 8/26/2003

R-46 Interoffice memo from Cox to Moore re: no call warning dated 8/28/2003

P-50 Interoffice memo from Giglio to Baker, MNJ re meeting w/ Moore cancelled – out sick dated 11/11/2003

P-51 Letter from Giglio to Moore re: reprimand b/c attendance dated 11/25/2003

P-52 Letter from Giglio to Moore re: abuse of sick leave policy dated 12/2/2003

P-53 Letter from Giglio to Moore re: sick days and meeting to discuss dated 12/4/2003

P-54 Letter from Baker to Moore re: attendance meeting and not eligible for FMLA dated 12/ 15/2003

P-55 Memo from MNJ to file re: Moore's attendance problems and meeting dated 12/16/2003

P-56 Interoffice memo from Giglio to Moore re: attendance problems and meeting dated 12/16/2003

P-57 Letter from Giglio to Moore re: rescind of suspension due to receipt of Dr's note dated 1/30/2004

R-58 Letter from Moore to Baker requesting paperwork for filing FMLA dated 2/9/2004

P-59 Letter from Baker to Moore reiterating that he was not eligible for FMLA dated 2/13/2004

P-103 Letter from Reichman of Unfair Practices to MPG/Friedman and Moore re: unfair practice charges dated 5/11/2001

P-126 Moore's responses to our request to admit dated 8/4/2005
Our responses to Moore's request to admit dated 7/6/2004

P-144 Summary of findings of Dr. Lewko including positive for cocaine dated 1/10/2004

P-146 Letter from Krisa to Lobosco re: disability and current medical condition dated 3/17/2004

P-148 Office notes from Dr. Jasper dated 12/16/2004

P-149 Report of Dr. Nangia stating no muscle weakness dated 4/29/2005

P-151 Letter from Moore to Dunnigan re: removal from case dated 3/30/2005

For Respondent:

R-1 Letter from Remer to Mr. Moore re: Statement of Tenure Charges and Certification of Evidence Under Oath dated March 5, 2004

R-2 Letter from Dr. Krisa to Ms. Lobosco regarding Mr. Moore's current medical conditions and period of disability dated March 17, 2004

R-3 Letter from Remer to Moore re: suspension letter w/ enclosure of documents (1) Tenure Charges, (2) Statement of Evidence and (3) Certification of Determination dated March 24, 2004

R-4 Letter from Dunnigan to Commissioner, Librera, re: opposition to the charges w/ enclosure of documents (1) Certification of Moore w/ Exhibits A-C and (2) Certificate of Service dated May 6, 2004

R-5 Letter brief from Dunnigan to Judge Weiss re: motion to limit discovery and extend time and Order and Certificate of Service dated July 19, 2004

R-6 Copy of Exhibit R-4

R-7 Letter from Remer to Dr. Librera re: Tenure Charges w/ enclosure documents (1) Tenure Charges, (2) Statement of Evidence Under Oath, (3) Certification of Determination and (4) Proof of Service dated March 24, 2004

R-8 Affidavit of Abraham J. Moore, dated April 7, 2006

R-9 Inter-Office Memo from Antoniello to Giglio re: Moore's follow-up on sick days, no call absences and waiting to receive doctor's letter about his absences dated April 17, 2002

R-10 Letter from Dr. Elrafei stating Moore's disability and return date to work dated April 17, 2002

R-11 Copy of Exhibit R-10

R-12 Letter from Baker to Moore re: five consecutive days absence without notice or explanation dated April 18, 2002

R-13 Memo from Tonda L. Carter, payroll dept., to Rich re: delivery of paycheck for Moore dated April 18, 2002

R-14 Inter-Office Memorandum from Frederick Dieckmann, Maintenance Office, to Giglio re: Moore's no call absences and no doctor's letter about his absences dated April 19, 2002

R-15 Letter from Mashel to Lobosco objection to Moore's termination dated April 23, 2002

R-16 Copy of Exhibit R-15

R-17 Copy of Exhibit R-15 & R-16

R-18 Inter-Office Memorandum from Dieckmann to Giglio re: Moore's five working days passed no call, no note from doctor and then delivery of his note via co-worker, Errol Griffiths dated April 24, 2002

R-19 Copy of Exhibit R-18 (*with a written remark*, attempt to terminate)

R-20 Letter from Baker to Moore termination of employment w/enclosed check representing payment of amount due and owing also accumulated vacation leave and overtime less failed days to report to work dated May 7, 2002

R-21 Certification of Abraham Moore dated May 6, 2004

R-22 Letter from Baker to Moore re: termination and check representing amount due with an attachment explaining paycheck, vacation days and overtime dated May 9, 2002

R-23 Letter from Dr. Elrafei stating treatment of severe depression and return date to work and reason why letter did not go out due to technical problems dated May 16, 2002

R-24 Letter from Dr. Elrafei stating medically cleared to return to work dated May 20, 2002

R-25

R-26 Total attendance record 1998 to present

R-27 Documented attendance time dated July 1, 1998 – June 30, 1999

R-28 Attendance sheet reports dated July 1, 1998 to June 30, 1999

R-29 Leave of absence request form dated August 14, 1998

R-30 Leave of absence request form dated September 8, 1998

R-31 Leave of absence request form dated December 14, 1998

R-32

R-33 Medical note from Dr. Drillings dated September 16, 1998

R-34 St. Joseph's Wayne Emergency Dept. restriction for light duty dated November 6, 2001

R-35 Leave of absence request dated April 27, 1999

R-36 Medical report from Wayne General hospital dated June 14, 1999

R-37 Documented attendance time dated July 1, 1999 – June 30, 2000

R-38 Attendance sheet reports dated July 1, 1999 to June 30, 2000

R-39 Leave of absence request dated April 27, 1999

R-40 Leave of absence request dated September 17, 1999

R-41 Leave of absence request dated September 29, 1999

R-42 Leave of absence request dated December 15, 1999

R-43 Certificate to return to work dated March 8, 2000

R-44 Leave of absence request dated March 24, 2000

R-45 Leave of absence request dated June 1, 2000

R-46 Certificate to return to work dated June 23, 2000 and Certificate to return to work dated January 8, 2001

R-47 Documented attendance time dated July 1, 2000 – June 30, 2001

R-48 Attendance sheet reports dated July 1, 2000 – June 30, 2001

R-49 Leave of absence request dated October 20, 2000

R-50 Leave of absence request dated November 16, 2000

R-51 Attendance conference report dated January 31, 2001

R-52 Copy of Exhibit R-46

R-53 Leave of absence request dated March 12, 2001

R-54 Leave of absence request dated June 8, 2001

R-55 Documented attendance time dated July 1, 2001 – June 30, 2002

R-56 Attendance sheet reports dated July 1, 2001 to June 30, 2002

R-57 Leave of absence request dated July 20, 2001

R-58 Medical excused notes for 10/17 & 10/18/01 dated October 18, 2001

R-59 Letter from Dr. Elrafei stating Moore's disability effective April 3 through expected return date May 20, 2002 dated April 17, 2002

R-60 Letter from Mashel to Lobosco re: Moore's response to Ruby Baker's letter of April 18, 2002 objecting his termination being recommended to the BOE dated April 23, 2002

R-61 Copy of Exhibit R-23

R-62 Copy of Exhibit R-24

R-63 Leave of absence request dated July 17, 2002

R-64 Documented attendance time dated July 2, 2002 - June 30, 2003 & July 1, 2002 – December 31, 2002

R-65 Attendance sheet reports dated July 1, 2002 to June 30, 2003

R-66

R-67 Four medical notes dated 2-24-03, 10-18-01, 3-10-03 and 2-5-98

R-68 Memo from Moore to Antoniello, Faulkner, Cox, Byrnes and Torres re: vacation time for funeral on November 4, 2002 dated November 1, 2002

R-69 Dr. Krisa medical note for excused two weeks dated February 24, 2003

R-70 Dr. Krisa medical note requiring four more weeks due to severe depression dated March 10, 2003

R-71 Medical note from Dr. Jung Du Lee anesthesiology/pain management

R-72 Medical notes from Dr. Mayer dated 10-12-02 and Dr. Jasper dated April 10

R-73 Application for disability benefits dated April 17, 2002

R-74 Letter from Baker to Moore re: Family and Medical Leave dated March 13, 2003

R-75 Certification of Health Care Provider form dated March 26, 2003

R-76

R-77 Memo from Moore to Baker re: sick leave dated April 4, 2003

R-78 Letter from Dr. Krisa to Ms. Burke re: Moore's evaluation dated May 23, 2003

R-79 Medical note from Dr. Jasper dated June 13, 2003

R-80 Letter from Baker to Moore re: applying vacation time dated June 16, 2003

R-81 Letter from Baker to Moore re: applying vacation time dated June 19, 2003

R-82 Memo from the desk of Giglio to Ruby re: Moore's vacation time dated June 25, 2003

R-83 Medical notes from Dr. Jasper dated May 27, 2003 and June 27, 2003

R-84 Documented attendance time dated July 1, 2003 – June 30, 2004

R-85 Attendance sheet reports dated July 1, 2003 – June 30, 2004

R-86 Medical note from Dr. Krisa dated September 10, 2003

R-87

R-88 Medical note from Dr. Krisa dated December 1, 2003

R-89 Letter from Baker to Moore re: attendance meeting dated December 15, 2003

R-90 Copy of Exhibit R-88

R-91 Medical note from Dr. Krisa dated December 18, 2003

R-92 Medical note from Dr. Krisa dated December 5, 2003

R-93 Medical note from Dr. Krisa dated January 23, 2004

R-94 Letter from Baker to Moore re: failure to report to work, show medical documentation and abuse of sick days dated January 27, 2004

R-95 Civil Action Certification dated March 15, 2004

R-96 Memo from Moore to Baker re: forms for FML Act and being suspended dated February 9, 2004

R-97 Medical note from Dr. Krisa dated February 24, 2003

R-98 Medical note from Dr. Krisa dated February 20, 2004

R-99 Tenure charges for entitlement days before 7-1-02 and after 7-1-02

R-100 Entitlement list for school year 1993 - 2003

R-101 Personnel performance evaluations dated October 26, 1992

R-102 Personnel performance evaluations dated January 20, 1993

R-103 Personnel performance evaluations dated March 30, 1993

R-104 Personnel performance evaluations dated October 25, 1993

R-105 Personnel performance evaluations dated February 14, 1994

R-106 Personnel performance evaluations dated March 23, 1994

R-107

R-108

R-109 Personnel performance evaluations dated October 20, 1994

R-110 Personnel performance evaluations dated March 15, 1995

R-111 Personnel performance evaluations dated October 15, 1995

R-112 Personnel performance evaluations dated March 20, 1996

R-113 Personnel performance evaluations dated October 30, 1996

R-114 Personnel performance evaluations dated April 18, 1997

R-115 Personnel performance evaluations dated November 3, 1997

R-116 Personnel performance evaluations dated March 25, 1998

R-117 Personnel performance evaluations dated May 17, 1999

R-118 Personnel performance evaluations dated May 3, 2000

R-119 Personnel performance evaluations dated November 21, 2000

R-120 Personnel performance evaluations dated December 3, 2001

R-121 Personnel performance evaluations dated November 1, 2001 thru June 4, 2002

R-122 Social Security Statement and Earnings Record dated July 18, 2005

R-123 Personnel payroll salary information for year 1992 – 2006

R-124 Attendance for Kenny Krattiger from 1998 to present 1998 – 2006

R-125 Attendance sheet reports dated July 1, 1998 – June 30, 2006

R-126 Indictment Order dated January 5, 2005

R-127 Letter from Lobosco to Krattiger re: suspension w/pay dated April 9, 2003

R-128 Letter from Remer to Krattiger re: suspension w/pay continued dated May 2, 2003

R-129 Letter from Remer to Krattiger re: unanimous vote to continue suspension w/ pay dated May 29, 2003

R-130 Board meeting minutes dated May 27, 2003

R-131 Letter from Remer to Krattiger re: board meeting, having received notice of indictment by Sussex County Grand Jury, voted to continue suspension w/out pay dated September 24, 2003

R-132 Board meeting minutes dated September 23, 2004

R-133 Letter from Koch, Assistant Sussex County Prosecutor, to Johnson re: indicted by the Grand Jury w/ enclosure of indictment dated September 15, 2003

R-134 Total attendance record for Hayes from 1998 – 2006

R-135 Attendance sheet reports dated July 1, 1998 to June 30, 2006

R-136 Total attendance record for Black dated 1998 – 2006

R-137 Attendance sheet reports dated July 1, 1998 to June 30, 2006

R-138 Total attendance record for Domicoli dated 1998 – 2006

R-139 Attendance sheet reports dated July 1, 1998 to June 30, 2006

R-140 Interoffice memorandum from Giglio to Moore re: refusal to work, punch out early and required to attend meeting w/union rep. dated September 30, 1996

R-141 Memo from Antoniello to Moore re: job/duty shift change

R-142 Personnel performance evaluations dated October 30, 1996

R-143 Deposition

R-144 Interoffice memorandum from Baker to Moore re: jury duty and possible docked pay for when jury duty service has ended dated November 19, 2001

R-145 Interoffice memorandum from Byrnes to Antoniello re: Moore not being at his assigned section dated April 22, 1997

R-146 Interoffice memorandum from Torres to Antoniello re: Moore's wondering off from his assigned area and warned of disciplinary action to take place next dated May 6, 1997

R-147 Interoffice memorandum from Giglio to Antoniello re: Moore was observed out of his section and being sent a warning dated March 9, 1998

R-148 Memo from Torres to Antoniello re: Moore's accident at work, unable to fill out accident report due to pain dated July 22, 1998

R-149 Personnel performance evaluations dated November 10, 1998

R-150 Interoffice memorandum from Byrnes to Giglio re: evaluation of Moore custodial duties

R-151 Interoffice memorandum from Giglio to Lobosco re: Moore's reassigning bus routes w/out permission

R-152 Interoffice memorandum from Cox to Giglio re: Moore's reason why he did not do his bus run and on attending board meeting dated November 24, 1999

R-153 Interoffice memorandum from Giglio to Moore re: letter regarding racial profiling dated October 23, 2000

R-154 Interoffice memorandum from Byrnes to Antoniello re: Moore's punching in earlier then scheduled morning field trip dated February 13, 2001

R-155 Interoffice memorandum from Antoniello to Giglio re: early punch in and to follow procedure before pursuing matter dated February 13, 2001

R-156 Interoffice memorandum from Phillips to Antoniello re: Moore's directed to punch in one hour before scheduled trip not two dated February 13, 2001

R-157 Copy of Exhibit R-9

R-158 Interoffice memorandum from Antoniello to Giglio re: Moore's second follow up regarding doctor's medical note dated April 18, 2002

R-159 Copy of Exhibit R-9

R-160 Copy of Exhibit R-19

R-161 Handwritten letter from Moore to Lobosco re: harassment and retaliation dated September 24, 1998

R-162 Handwritten letter from Moore to Byrnes re: harassment and retaliation dated January 5, 1999

R-163 Handwritten letter from Moore to Lobosco re: still being harassed dated March 19, 1999

R-164 Handwritten letter from Moore to Faulkner re: harassment and retaliation dated March 13, 2000

R-165 Handwritten letter from Moore to Lobosco re: racial profiling dated October 13, 2000

R-166 Handwritten letter from Moore to Lobosco re: harassment dated November 2, 2000

R-167 Deposition of Giglio direct

R-168 Interoffice memorandum from Antoniello to Moore re: rescinding reprimand dated November 9, 1998

R-169 Interoffice memorandum from Byrnes to Moore re: rescinding written warning dated January 22, 1999

R-170 Memo from Dieckmann to Tonda Carter re: Moore's reimbursement for ½ day docked dated January 8, 2004

R-171 Interoffice memorandum from Giglio to Moore re: no medical documentation three days suspension dated January 7, 2004

R-172 Letter from Moore to Lobosco requesting a change in shift hours dated July 30, 2001

R-173 Memorandum from Lobosco to Moore re: response for change in shift dated July 31, 2001

R-174 Deposition of Lobosco direct

R-175 Letter from Stacey Frabel, Family Service Specialist II, (DYFS) requesting change of shift hours for Moore dated June 27, 2000

R-176 Medical letter from Dr. Elrafei requesting changing of shift hours for Moore dated October 3, 2001

R-177 DYFS employment reference for Moore dated August 2, 2001

R-178 Memorandum from Moore to Antoniello re: request for reassignment as a bus driver dated December 12, 1997

R-179 Memorandum from Antoniello to Giglio re: Moore's request for reassignment, no changes until arbitration hearings are concluded dated December 15, 1997

R-180 Interoffice memorandum from Faulkner to Moore re: shift and schedule change dated April 13, 1998

R-181 Interoffice memorandum from Krattiger to Antoniello re: stage I grievance, dated January 7, 1999

R-182 Handwritten memo from Moore to Cox re: day position grievance dated January 27, 2000

R-183 Handwritten memo from Moore to Cox re: shift change dated may 13, 1999

R-184 Copy of Exhibit R-141

R-185 Memorandum from Krattiger to Giglio re: grievance level two dated March 16, 2000

R-186 Interoffice memorandum from Cox to Moore re: shift change

R-187 Interoffice memorandum from Cox to Moore re: schedule change effective May 8, 2000 dated April 20, 2000

R-188 Letter from Giglio to Moore stating to rescind the three days' suspension, abuse of the school's leave provisions and exhausting sick days dated January 30, 2006

R-189 Handwritten memo from Moore to Cox re: grievance changing of shift dated May 2, 2000

R-190 Interoffice memorandum from Cox to Moore re: change of bus driver hours dated June 1, 2000

R-191 Interoffice memorandum from Cox to Moore schedule change dated August 16, 2000

R-192 Handwritten memo re: grievance for hiring part timers on day shifts dated November 1, 2000

R-193 Interoffice memorandum from Cox to Moore re: schedule change dated February 16, 2001

R-194 Handwritten memo from Moore to Cox re: grievance for day shift position dated February 21, 2001

R-195 Memo from Moore to Krattiger re: grievance for day shift position dated March 1, 2001

R-196

R-197 Memo from Moore to Giglio re: grievance, level two position dated March 1, 2001

R-198 Interoffice memorandum from Giglio to Moore re: response to grievance, level two dated March 12, 2001

R-199 Letter from Martha Tedesco, Home Finder, re: seeking information in order for consideration as a foster parent dated July 9, 2001

R-200 Privileged and confidential form to Moore and his wife Sandra Moore

R-201 Interoffice memorandum from Cox to Moore re: schedule change dated September 6, 2001

R-202 Memo from Moore to Lobosco re: shift change twice a week dated January 8, 2002

R-203 Letter from Linda Closs, trainer, to Mr. and Mrs. Moore re: group training for foster parents

R-204 Letter from Gerber & Samson to Lobosco re: temporary shift change dated January 11, 2002

R-205 Memorandum from Lobosco to Moore re: change in shift request dated January 17, 2002

R-206 Letter from Moore to Cox re: shift grievance dated January 21, 2003

R-207 Letter from Cox to Moore re: no basis for shift change grievance dated January 28, 2003

R-208 Letter from Moore to Giglio re: shift change process dated January 30, 2003

R-209 Letter from Giglio to Moore agrees with Cox's letter dated February 3, 2003

R-210 Letter from Carol Pierce, NJEA Field Representative, to Moore subj. grievance for day shift position dated February 4, 2003

R-211 Memo from Moore to Reamer, board member, re: day shift grievance dated February 11, 2003

R-212 Letter from Pierce to Moore subj. board meeting on grievance dated April 3, 2003

R-213 Letter from Remer to Moore re: level three grievance – day shift position dated April 16, 2003

R-214 Memo from Watson to Moore level two grievance for doctor documentation dated January 27, 2004

R-215 Medical note from Dr. Krisa dated April 4, 2004

R-216 Letter from Eric L. Harrison, Esq. to Paula A. Garrick, Esq. discovery responses dated May 17, 2004

R-217 Letter Peter Crain, M.D., to William J. Scherman, Esq. re: Moore's evaluation and diagnosis dated July 30, 2004

R-218 Medical rule forms dated May 5, 2006

R-219 Instruction on disease of addiction

R-220 Inspirational reading sheet

R-221 Certification of Diana C. Lobosco dated January 20, 2006

R-222 Disposition of Giglio direct

R-223 Disposition of Lobosco direct

R-224 Letter from Moore to William L. Librera, Commissioner re: request to return to work dated March 2, 2004

R-225 Disposition of Lobosco direct

R-226 Disposition of Antoniello direct

R-227 Disposition of Giglio direct

R-228 Disposition

R-229 Disposition of Faulkner direct

R-230 Disposition

R-231 Disposition of Giglio direct

R-232 Disposition Lobosco direct

R-233 Memo from Moore to Lobosco re: hostile work environment dated July 31, 2003

R-234 Disposition

R-235 Transcript of disposition

R-236 Disposition

R-237 Memo of seniority list

R-238 Memo of bad attendance

R-239 Memo of racial discrimination and bad attendance

R-240 Memo on shift changes

R-241 Answers to interrogatory numbers eight and forty nine

R-242 Letter from Gary Ludwig, Acting Program Manager, to Lobosco stating a complaint concerning safety and health hazards, stamp date May, 1997

R-243 Letter from Lisa James-Beaver, Executive Director, to Sandra Moore subj. decision from School Ethics Commission dated July 2, 1999

R-244 Letter brief from Mashel to Judge Dumont re: discrimination claims dated January 22, 2002

R-245 Newspaper article on bias case for Sandra Moore dated April 10, 2002

R-246 Complaint and jury demand dated December 14, 2002

460-07

#460-07L

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

November 29, 2007

David Nash, Esq.
New Jersey Principals and Supervisors Association
12 Centre Drive
Monroe Township., NJ 08831-1564

Philipp Duvilla, Esq.
39 South Broad Street
Woodbury, NJ 08096

Dear Counsel:

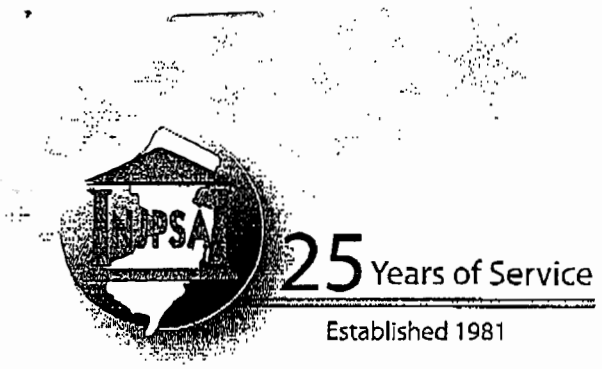
I have reviewed the Petition and Answer filed in the matter of *Lucia Pollino v. Board of Education of the Borough of Paulsboro, Gloucester County,* Agency Dkt. No. 208-8/07, as well as petitioner's November 20, 2007 letter indicating her desire to withdraw the appeal without further proceedings.

Upon such review, I approve the withdrawal and accordingly dismiss the petition.

Sincerely,

Lucille E. Davy
Commissioner

c: County Superintendent
Jones Addo



CONTROVERSIES & DISPUTES
2007 NOV 20 AM 11:56

November 20, 2007

Telefax and First Class Mail

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
NJ Department of Education
P.O. Box 500
Trenton, New Jersey 08625 0500

Re: Lucia Pollino v. Paulsboro Board of Education
Agency Dkt. No. 208-8/07

Dear Ms. Duncan:

The parties in the above captioned matter have resolved their differences. Accordingly, petitioner hereby requests that the petition be withdrawn.

Thank you for your attention to this matter.

Sincerely,

David Nash, Esq.
Attorney for Petitioner

DN/lm
cc: Philipp Duvilla, Esq.
Lucia Pollino

New Jersey Principals and Supervisors Association
12 Centre Drive • Monroe Township, New Jersey 08831-1564
Tel.: 609-860-1200 Fax.: 609-860-9999 E-Mail: NJPSA@aol.com Web: http://www.njpsa.org

458-07

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM THOMAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF PLAINFIELD, UNION COUNTY.	:	
	:	

SYNOPSIS

Petitioning District filed tenure charges of conduct unbecoming, incompetence, and other just cause against William Thomas, a vice principal at the Washington Community School, and sought his removal from tenured employment following his arrest and indictment on criminal charges alleging possession of cocaine and drug paraphernalia, and subsequent completion of a pre-trial intervention program (PTI). A hearing was held at the OAL, but no testimony or evidence was entered into the record aside from the contents of the sworn statement of evidence which accompanied the tenure charges; the facts before the Commissioner were those jointly stipulated by the parties.

The ALJ found that the type of criminal conduct that respondent was alleged to have engaged in is clearly conduct unbecoming, and respondent's completion of a PTI is tantamount to an admission of the allegations against him. The ALJ concluded that the petitioner had sustained its burden of proof, and ordered that respondent's appeal of the tenure charges against him be dismissed with prejudice.

Upon careful review and consideration, the Commissioner rejected the ALJ's conclusion that the respondent's agreement to participate in a PTI was an admission of the allegations against him, and found that the tenure charges in this matter have not been adjudicated. Consequently, the Commissioner remanded the matter to the OAL for a hearing on the facts underlying the tenure charges.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 26, 2007

OAL DKT. NO. EDU 5908-07
AGENCY DKT. NO. 133-5/07

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM THOMAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF PLAINFIELD, UNION COUNTY.	:	
	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the respondent's exceptions have been reviewed.

The facts before the Commissioner are exclusively those included in the stipulation jointly submitted by the parties, which stipulation is set forth in the Initial Decision at 2-3. There were no witnesses or evidence before the Administrative Law Judge (ALJ) at the OAL, other than the contents of the sworn statement of evidence which is required to accompany the tenure charges. *N.J.S.A.* 18A:6-11. That sworn statement itemized the criminal court pleadings served upon respondent and described the terms of the order that memorialized the pretrial intervention agreement between respondent and the prosecutor.

No testamentary or documentary evidence was provided – in the course of the OAL hearing – containing facts in support of the allegations in the tenure charges of unbecoming conduct, incompetence and other just cause. Nor was evidence, if any, presented during the criminal court proceedings, offered by petitioner in the OAL.

The ALJ correctly determined – based upon school law precedent – that the type of conduct alleged in the criminal pleadings filed against respondent easily falls under the rubric of 'conduct unbecoming.' On the other hand, the ALJ concluded that respondent's agreement to

participate in the pre-trial intervention program (PTI) was an admission of the allegations in the criminal complaint and indictment, or that it created an inference that respondent was guilty as charged. The Commissioner rejects this conclusion.

While the language of *N.J.S.A.* 2C:43-12 and the Guidelines to *R.* 3:28 might, at first blush, seem to create an inference that participants in PTI are conceding guilt, the statute and rules in their entirety – along with the relevant case law – hold otherwise.[1] As the ALJ himself stated: "Enrollment in PTI is not conditioned upon either an informal admission or entry of a plea of guilty." (Initial Decision at 6-7) *See, also N.J.S.A.* 2C:43-12(g); Guideline 4 to *R. 3:28.* Rather, PTI is an avenue for an individual "to earn a dismissal of the charges for social reasons and reasons of present and future behavior, legal guilt or innocence notwithstanding." *Ibid.*

Nor do the two cases upon which the ALJ relies support his position. In *Lindes v. Sutter, et al.,* 621 *F. Supp.* 1197 (1985), the plaintiff successfully completed a PTI program and then sued the defendants for malicious prosecution. The suit was dismissed because plaintiff's successful completion of a PTI was found not to be the equivalent of a verdict of not guilty. The ALJ cites to Federal District Court Judge Rodriguez' view, *Lindes, supra,* at 1200-1201, that the guidelines to *R.* 3:28 are more suggestive of guilt with amenability to rehabilitation, than of innocence. However, Judge Rodriguez' observation was not a holding. It was dictum designed to buttress his ruling that PTI completion does not constitute a disposition (of the original charges) in favor of the PTI participant.

In *Siciliano v. Board of Education of the Camden County Vocational-Technical School,* 93 *N.J.A.R.* 2d (EDU) 94 – the other case on which the ALJ in this matter relies – a

[1] *N.J.A.C.* 2C:43-12a lists the five purposes of PTI supervisory treatment in the disjunctive; subsection (4) articulates criminal calendar relief and allocation of criminal justice resources as a separate reason for utilization of PTI. Thus, the reason for PTI can be related more to the severity of the charges than to the particular facts in a given case.

successful PTI participant sought reinstatement to his employment, with back pay. The Commissioner of Education adopted the Initial Decision denying the former school employee's petition, stating: "the Commissioner concurs with the ALJ that petitioner is entitled to neither back pay nor a new contract as a result of the criminal indictment against him being dismissed through completion of a pre-trial intervention program." *Ibid.*

The ALJ in *Siciliano* had correctly cited to *R.* 3:28(c)1 for the principle that a post-PTI dismissal of a complaint or indictment signifies only that the matter has been "adjusted" – not that the participant was innocent of the charges brought against him or her. However, the *Siciliano* ALJ opined further – incorrectly – that PTI was "only applicable if the criminal defendant committed some illicit conduct, otherwise he or she would not need rehabilitation or correction." *Id.* at 5. Notwithstanding the fact that the Commissioner in *Siciliano* adopted the Initial Decision generally "for the reasons expressed therein," the Commissioner did not specifically endorse the ALJ's erroneous supposition that all PTI participants must necessarily have committed the conduct with which they are charged. Such an endorsement would have directly contradicted the mandate of *N.J.S.A.* 2C:43-12(g) and the fourth guideline to *R.* 3:28, *i.e.,* that PTI enrollment shall not be conditioned upon admissions or guilty pleas.

Respondent urges that the Commissioner should be guided by the decision of the Appellate Division in *In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak,* A-3298-87T7 (App. Div. 1989). While *Pawlak* appears to be an unpublished decision and, consequently, non-precedential, the Commissioner finds it apposite and persuasive.

Pawlak, a tenured teacher, was indicted in 1985 on charges of improper sexual behavior toward young students. He pled not guilty and then entered into a PTI agreement that

did not require him to relinquish his teaching certificates,[2] which he wished to retain as a credential for employment involving children's books or textbooks. He successfully completed the PTI program and the charges against him were dismissed/adjusted.

The Board of Examiners of the New Jersey Department of Education petitioned to revoke Pawlak's certificates, arguing that the PTI agreement itself was just cause for revocation. The Appellate Division rejected this argument – as had the Administrative Law Judge who initially heard the case – because it required the assumption that the accusations in the indictment against Pawlak were true, despite the fact that admission to PTI does not require admissions of guilt, *Pawlak, supra,* at 10.[3]

The Appellate Division also addressed the fact that the conditions of Pawlak's PTI program did not include a requirement that his teaching certificates be revoked. This set his case apart from such prior cases as, for instance, *In the Matter of the Tenure Hearing of Michael Colucci, Board of Education of the Borough of Woodridge, Bergen County,* 96 *N.J.A.R.* 2d (EDU) 793 at 4-5, where mandatory resignations from the employing school districts were included as conditions of the PTI agreements. Thus, the Appellate Division determined that it would be unfair to revoke Pawlak's license unless a separate hearing were provided to examine the facts and law pertaining to such a revocation. Respondent points to the parallel between *Pawlak* and the present case, where no hearing took place to adjudicate the facts underlying respondent's alleged unbecoming conduct.

In point of fact, it is not necessary to hearken back to 1989 for guidance in this matter. The more recent case of *In the Matter of the Tenure Hearing of Thomas Wachendorf, New Jersey State Department of Corrections, Mountainview Correctional Facility,* decided by

[2] He did agree, however, to permanently refrain from teaching in New Jersey.
[3] As in the present case, there had been no hearing on the facts of the substantive tenure charges against Pawlak. *Pawlak* at 8.

the Commissioner July 14, 2005, *aff'd* State Board February 1, 2006, *aff'd.* Appellate Division, A-3635-05T3, July 3, 2007, provides the principles necessary to resolve the controversy.

Wachendorf – a long-time teacher in a correctional facility, with a good employment record – was arrested, and charged with eluding and resisting arrest and obstruction of justice, when he ignored requests by the police to pull his vehicle over and then resisted arrest in the driveway of his home. He entered a PTI program which he completed on March 3, 2005, resulting in the dismissal of the charges. Tenure charges were filed against Wachendorf, alleging that the behavior he exhibited in the course of the incident – for which he was arrested and charged – constituted unbecoming conduct. A hearing on the facts was conducted in the OAL and the ALJ concluded that the charge of unbecoming conduct was sustainable.

The Commissioner, in adopting the Initial Decision of the OAL, found that the criminal justice system outcome of the criminal charges which formed the basis of Count 1 of the tenure charges against Wachendorf was wholly irrelevant:

> It is well settled that diversion or dismissal of criminal charges has no impact whatsoever on a finding of unbecoming conduct in a tenure matter as to the incident(s) underlying those charges or the imposition of an appropriate penalty. *In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville,* 1978 *S.L.D.* 526, supplemental decision 1979 *S.L.D.* 153, aff'd State Board of Education, 1979 *S.L.D.* 155; *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph,* 1980 *S.L.D.* 721, *aff'd* State Board, 1980 *S.L.D.* 728, *aff'd* App. Div., 1981 *S.L.D.* 1537; *In the Matter of the Tenure Hearing of R. Scott McIntyre, Hunterdon-Voorhees Regional School District,* 96 *N.J.A.R.* 2d (EDU) 726. Such is the case because of the fundamental differences in the purpose and scope of these adjudicating forums.
>
> *Wachendorf, supra,* at 5.

As observed by the Commissioner in *Dusel, supra* at 531:

> The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter, but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. (Emphasis added.)

The touchstone of a charge of unbecoming conduct is fitness to discharge the duties and functions of one's office or position. *See Laba v. Newark Board of* Education, 23 *N.J.* 364 (1957); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), *certif.* denied 65 *N.J.* 292 (1974). Thus, the focus of the inquiry in this tenure matter is not the disposition of the criminal charges but, rather, whether respondent exhibited behavior underlying those charges which amounts to unbecoming conduct. *Wachendorf* at 6.

As always, the district bears the burden of proving tenure charges by a preponderance of the competent, relevant and credible evidence. *In re Tenure Hearing of Grossman, supra* at 22-23. In the present case, by limiting its proofs in the OAL to presentation of the criminal pleadings and a description of the terms of respondent's PTI agreement, petitioner has omitted to offer competent evidence concerning the behavior that was alleged to have served as the basis for the tenure charges. Such evidence could have, for example, been adduced through witnesses to the arrest or the incident precipitating the arrest.

In light of the foregoing, the Commissioner finds that the tenure charges have not been adjudicated. This matter is consequently remanded to the OAL for a hearing on the facts underlying the tenure charges of unbecoming conduct, incompetence and other just cause.

Any decision on the tenure charges shall address the relief requested by respondent in his post-hearing brief.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/07

Date of Mailing: Faxed 11/26/07

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05908-07

AGENCY DKT. NO. 133-5/07

IN THE MATTER OF THE TENURE HEARING OF WILLIAM THOMAS, SCHOOL DISTRICT OF THE CITY OF PLAINFIELD, UNION COUNTY

Willie L. Parker, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

Sanford R. Oxfeld, Esq., for respondent (Oxfeld Cohen, attorneys)

Record Closed: September 17, 2007 Decided: October 11, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

STATEMENT OF THE CASE

Petitioner, the School District of the City of Plainfield, Union County (District), brought charges of unbecoming conduct, incompetence and other just cause against respondent, William Thomas, a certificated and tenured employee holding the position of vice principal at the Washington School. Petitioner contended that because a criminal complaint had been issued against respondent alleging possession of a controlled dangerous substance, namely, cocaine, while in a public park, together with a companion complaint for possession of drug paraphernalia, and his subsequent indictment by a grand jury and entry into, and completion of, a pre-trial intervention program, he should be removed from his tenured position. N.J.S.A. 18A:6-10.

PROCEDURAL HISTORY

On May 16, 2007, the District filed the following with the Department of Education (Department): a Certificate of Determination for filing of tenure charges; the District's sworn tenure charges, and a sworn Statement of Evidence in support of those charges, all in compliance with N.J.S.A. 18A:6-9, 6-11, and N.J.A.C. 6:24-5.2. The District's Certification of Service was, however, filed on May 21, 2007. On June 1, 2007, the respondent's answer was filed with the Department.

The Department then transmitted this matter to the Office of Administrative Law (OAL) where it was received on June 7, 2007, for hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b). The hearing took place on September 6, 2007 and the record closed on September 17, 2007 upon the receipt of post hearing briefs.

FINDINGS OF FACT

The parties entered into a joint stipulation of facts (Exhibit J-1) and, accordingly I **FIND** the following **FACTS**:

1. Respondent possesses a certification in the following area: Elementary, Mathematics K-12, Supervisors, Principals, and Chief School Administrator (Superintendent).

2. He has a Bachelors' Degree in Mathematics and Chemistry, a Masters' Degree in Administration and Supervision. In addition, W.T. has all the credits necessary for his Ed. D, Educational Leadership. However, he has not yet defended his dissertation.

3. He began employment as a teacher in 1993 in the Newark Public Schools as a high school mathematics teacher. In 1996, he was promoted to the administrative position of Staff Developer in Mathematics in the Newark School District. He continued to work in Newark until September 1998 when he joined the Plainfield School District as a Vice-Principal at the High School. Two years later in 2000, the District honored his request and

he became Vice-Principal at Cedarbrook Elementary School. In November 2003, he became the Acting Principal of the Washington Community School, an elementary school in Plainfield. For personal reasons, respondent. took a leave of absence, which was effective May 1, 2004.

4. On May 4, 2004, respondent was issued two summonses [complaints] by the Union County Police Department. The first was for possession of a controlled dangerous substance, namely cocaine, in Greenbrook Park, Plainfield, New Jersey. The second was for possession of drug paraphernalia at the same time and place, the paraphernalia being a clear plastic tube commonly used to inhale CDS.

5. On December 9, 2004, he was indicted by a Union County Grand Jury for possession of a controlled dangerous substance on May 4, 2004 in the City of Plainfield, a third degree offense.

6. On March 16, 2005, in lieu of a trial or guilty plea, respondent was accepted into a Pretrial Intervention, Supervisory Treatment Program (PTI). The terms of his acceptance into PTI were that the program would be for a period of twenty-four months, W.T. had to perform sixty hours of community service, undergo random drug testing, complete a substance abuse treatment program and pay certain fees associated with entry into PTI.

7. He completed PTI on March 16, 2007.

8. The Plainfield District of Education certified tenure charges against respondent to the Commissioner of Education on May 16, 2007. Immediately upon learning of his completion of PTI, the Plainfield Superintendent of Schools began the tenure process for W.T.

No witnesses testified on behalf of either party.

LEGAL ANALYSIS AND CONCLUSION

The issue to be decided is whether the District has just cause to remove respondent because of his arrest, indictment and entry into, and completing, a PTI program.

In tenure cases, the District bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Tenure protects educators[1] from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Board of Education, 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J Super. 215, 218 (App. Div. 1949). Accordingly, N.J.S.A. 18A:6-10 provides that no tenured person shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause."

One of the charges brought by the District is unbecoming conduct which has been broadly defined to included any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Hartmann v Police Department of Ridgewood, 258 N.J Super. 32, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure hearing of Grossman, 127 N.J Super. 13, 29 (App. Div. 1974), certif denied, 65 N.J. 292 (1974).

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[1] Respondent is an educator which term is defined as "a person . . . that educates, esp. a teacher, principal, or other person involved in planning or directing education." The Random House College Dictionary 420 (Revised Edition 1984). Therefore, references to the cited high standard of conduct shall apply to all educators, including teachers, principals and vice principals.

Educators are held to certain prescribed standards of conduct because of the public trust placed in their positions. In that regard, the Commissioner has stated that:

> [T]hey are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment . . . Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., Camden County, 1972 S.L.D. 302.

See also School District of the Township of Parsippany-Troy Hills v. Hess, 97 N.J.A.R. 2d (EDU) 34, in which it was stated that:

> In determining the appropriateness of . . . conduct, the Commissioner of Education has often stressed '. . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and must exercise a high degree of exemplary behavior.'
>
> [Id. at 51 (citing, In re Tyler, 12 N.J.A.R. 297).]

Again, in In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97, the Commissioner stated:

> Teachers [and educators] are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by their teachers, but what they see, hear, experience, and learn about their teacher. When a teacher violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.
>
> Id. at 98-99.

Here respondent entered into, and completed, a PTI program. He argues that the issuance of a complaint, the return of an indictment and his entry into and completion of PTI do not warrant his removal. In order to determine the merits of his

argument, particularly as it relates to PTI, a brief discussion of PTI is necessary to understand its process and its impact, if any, upon respondent.

PTI is a statewide program governed by N.J.S.A. 2C:43-12 which provides supervisory treatment to those persons who had not previously been convicted of any criminal offense under the laws of this or any other state or the laws of the United States. Such supervisory treatment would:

> (1) Provide applicants, on an equal basis, with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision, when such services or supervision can reasonably be expected to deter future criminal behavior by an applicant, and when there is apparent causal connection between the offense charged and the rehabilitative or supervisory need, without which cause both the alleged offense and the need to prosecute might not have occurred; or
> (2) Provide an alternative to prosecution for applicants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct; or
> (3) Provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses, other than defendants who were public officers or employees charged with offenses that involved or touched their office or employment; or
> (4) Provide assistance to criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems; or
> (5) Provide deterrence of future criminal or disorderly behavior by an applicant in a program of supervisory treatment.
>
> Id.

The terms and duration of supervisory treatment are memorialized by a written agreement signed by the prosecutor and the participant. N.J.S.A. 2C:43-13. Upon the satisfactory completion of the supervisory treatment, and with the consent of the prosecutor, the complaint, indictment or accusation against the participant may be dismissed with prejudice.[2] Id. Enrollment in PTI is not conditioned upon either an

[2] Neither the District nor respondent provided any proof or stipulation that the charges brought against respondent were dismissed, only that respondent completed PTI. Since the District, which has the burden of proof, failed to offer any proofs to the contrary, it will be inferred that all charges were ultimately dismissed by the prosecutor after respondent completed PTI.

informal admission or entry of a plea of guilty. N.J.S.A. 2C:43-12(g); N.J. Court Rules Part III, Guideline 4.

N.J. Court Rules, Part III, Guideline 1 specifically provides:

> The purposes of pretrial intervention are:
>
> (a) To provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services, when such services can reasonably be expected to deter future criminal behavior by the defendant, and when there is an apparent causal connection between the offense charged and the rehabilitative need, without which cause both the alleged offense and the need to prosecute might not have occurred. (Emphasis added.)
>
> (b) To provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct.
>
> (c) To provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses.
>
> (d) To assist in the relief of presently overburdened criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems.
>
> (e) To deter future criminal or disorderly behavior by a defendant/participant in pretrial intervention.

N.J. Court Rules, Part III, Guideline 2 provides:

> Eligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur. Any defendant accused of crime shall be eligible for admission into a PTI program. When the application indicates factors which would ordinarily lead to exclusion under the guidelines established hereinafter, the applicant nevertheless shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the defendant's amenability to the rehabilitative process, showing compelling reasons justifying the defendant's admission, and establishing that a decision

> against enrollment would be arbitrary and unreasonable. (Emphasis added.)

All educators must exercise "a high degree of exemplary behavior." School District of the Township of Parsippany-Troy Hills, supra. Under the facts presented here and the legal principles cited above, respondent, after his arrest and indictment entered into and completed a PTI program. It is not his arrest or indictment which gives rise to conduct unbecoming since they are nothing more than allegations of criminal behavior. See United States v. Schanerman, 150 Fed. Rep. (2d) 941 (1945); see also State v. D'Orio, 136 N.J.L. 204 (E. & A. 1947). However, his entry into and completion of PTI presents a different situation. This program lasted for twenty-four months, required payment of certain fees, performance of sixty hours of community service, random drug testing, and completion of a substance abuse treatment program, all in conjunction with "defendant's amenability to the rehabilitative process." Guideline 2.

In the matter of Lindes v. Sutter, et al., 621 F. Supp. 1197, 1200-1201 (1985), plaintiff entered and completed PTI. Thereafter, the criminal charges against him were dismissed. He then brought suit for malicious prosecution and for damages against the police officers and others involved in the criminal investigation which led to his arrest and indictment, which resulted in the termination of his employment. In reaching his decision denying plaintiff relief, the Honorable Joseph H. Rodriguez, U.S.D.C. stated:

> Rule 3:28 of the New Jersey Court Rules, which sets forth the "guidelines" for operation of P.T.I. programs, does not indicate that a successful P.T.I. participant is innocent of the crimes alleged. In fact the opposite conclusion can be drawn from the guidelines. For example, although Guideline 4 makes it clear that admission of guilt is not a condition of P.T.I., Guideline 2 stresses that eligibility for P.T.I. should be based on a demonstration of "sufficient effort to effect necessary behavioral change" and a showing that "future criminal behavior will not occur." If anything, these factors imply "guilt with amenability to rehabilitation," not innocence.
>
> Sutter supra, pgs. 1200-1201.

While Lindes involved different circumstances than presented here, nevertheless, the court concluded that completion of PTI does not mean innocence, but amenability to rehabilitation.

In Siciliano v. Board of Education of the Camden County Vocational-Technical School, 93 N.J.A.R. 2d (EDU) 94, appellant entered into and completed PTI whereupon the charges pending against him (conspiracy and making threats to a student in order to protect the Invisible Empire, Knights of the Ku Klux Klan) were dismissed. Siciliano then sought back pay and reinstatement to his employment. In denying the relief sought, the Acting Commissioner of Education adopted the initial decision of the Honorable Edgar Holmes, ALJ, in which he stated:

> The dismissal of a criminal indictment as a result of entering PTI is not a determination that the individual was not guilty of the conduct complained of; only that the matter was "adjusted." R. 3:28 (c) (1). A note to R. 3:28 points out that "A defendant's consideration for admission (to PTI) must be measured according to his/her amenability to correction, responsiveness to rehabilitation and the nature of the offense." In other words PTI is only applicable if the criminal defendant committed some illicit conduct, otherwise he or she would not need correction or rehabilitation

While appellant can enjoy the fruits of his completion of PTI in the avoidance of a criminal conviction, nevertheless, his participation in PTI, which arose directly out of his arrest and indictment on the charge of possession of a CDS, collided with the "high degree of exemplary behavior" required of all educators, as set forth in Parsippany-Troy Hills, supra. Therefore, I **CONCLUDE** that petitioner has sustained its burden of proof.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the appeal filed by respondent in the within matter be and is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-11-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 10/11/07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OCT 11 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

None

Exhibits

Joint:

J-1 Stipulation of Facts

For Petitioner:

B-1(a) Sworn Tenure Charges
B-1(b) Statement of Evidence
B-2 Complaint for Possession of a Controlled Dangerous Substance (Cocaine)
B-3 Complaint for Possession of Drug Paraphernalia
B-4 Indictment #04-12-01455I

For Respondent:

A-1 Pretrial Intervention Program documentation

462-07

OAL DKT. NO. EDU 3042-07
AGENCY DKT. NO. 2-1/07

VOYA (WANDA) SCHOFFSTALL,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed "Confidential Agreement," and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner deems the parties' settlement acceptable under the circumstances and approves their written agreement. In so doing, however, the Commissioner notes, with respect to the settlement's designation as "confidential," that: 1) Pursuant to *N.J.A.C.* 1:1-14.1(a), records of all contested case hearings are open for public inspection unless, for good cause shown, the Administrative Law Judge orders sealing of the record, or any part thereof; and 2) the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Additionally, the Commissioner cautions that agreement between the parties (at Term No. 8) to "submit to arbitration any dispute [arising under the settlement]" does not relieve them of their obligation to pursue complaints in an appropriate forum of law.

Accordingly, with the understanding set forth above, the Commissioner adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/07

Date of Mailing: 12/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3042-07

AGENCY DKT. NO. 2-1/07

VOYA (WANDA) SCHOFFSTALL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky & Hunter, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, LLC, attorneys)

Record Closed: October 12, 2007 Decided: October 17, 2007

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law ("OAL") from the Department of Education on March 1, 2007, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After numerous settlement discussions, a settlement was reached. The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the

terms thereof as well as the Board Resolution approving the settlement, which are attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 17, 2007
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency:

OCT 22 2007
DATE

10-22-07
Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

CONFIDENTIAL AGREEMENT
between the
ELIZABETH BOARD OF EDUCATION
and
VOYA (WANDA) SCHOFFSTALL

RECEIVED
2007 OCT 12 P 4:47
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The Elizabeth Board of Education (Board) and Voya (Wanda) Schoffstall (VS) hereby mutually agree to the following terms and conditions to settle and resolve all issues between them regarding the employment status of VS.

1. VS shall remain on administrative leave with pay until mid March 2008 provided that she promptly files for twenty-five (25) year service retirement, no later than May 31, 2008. The retirement papers shall set forth a retirement date of October 1, 2008.

2. From mid March 2008, through and until September 30, 2008, VS shall utilize all accrued leave, including sick, vacation and personal and family illness days.

3. VS shall submit an irrevocable letter of retirement to the Board's Labor Attorney, with the effective date of October 1, 2008, upon execution of this Agreement. This letter shall be held in escrow until the September 2008 Board Meeting when it shall be accepted and approved.

4. All benefits shall be continued through and including September 30, 2008.

5. In consideration for the above terms, the Board shall restore VS's '07-'08 salary increment. Retroactive monies for the period July 1, 2007 through the date when this Agreement has been approved by the Board shall be paid in a separate check to VS. VS will be paid at the Admin. III secretary salary rate.

6. For and in consideration of the restoration of her '07-'08 increment, VS and her heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or

future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which VS ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter up to and including the date of the execution of this Agreement.

7. Without limiting the generality of the foregoing, VS hereby releases and discharges the Board from:

(i) any and all claims relating to VS's employment relationship with the Board including the terms and conditions of such relationship and the benefits related to such relationship and/or the severing of that relationship;

(ii) any and all claims of employment discrimination and/or retaliation under any federal, state or local statute or ordinance, including without limitation, any and all claims under Title VII of the Civil Rights Act of 1964; the Equal Pay Act; the Americans with Disabilities Act; 42 U.S.C. § 1981; the Age Discrimination in Employment Act; the Employee Retirement Income Security Act ("ERISA"); the Family and Medical Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; The New Jersey Employer Employee Relations Act, the Fair Labor Standards Act, New Jersey Wage and Hour Law, Civil Rights Act of 1866, 42 U.S.C. §1983, New Jersey Education

Law (Titles 18A and 6A), The New Jersey Administrative Code and and any other statute, rule, or regulation relating to employment;

(iii) any and all further claims for wrongful or constructive discharge, personal injury, unemployment compensation benefits, compensatory or punitive damages, intentional and/or negligent infliction of emotional distress, violation of public policy, breach of employment contract (whether oral or written, express or implied) and/or breach of the implied covenant of good faith and fair dealing;

(iv) any and all claims for attorney's fees, costs, disbursements and the like.

8. VS and the Board agree that this Agreement will be governed by the laws of the State of New Jersey and the parties will submit to arbitration any dispute that may arise hereunder.

9. VS agrees that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims or rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties. If any such provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

10. VS agrees that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

11. This Agreement sets forth the entire terms between VS and the Elizabeth Board of Education, and fully supersedes any and all prior Agreements or understanding between them pertaining to the subject matter thereof, if any.

12. VS further agrees to the following:

(a) I agree and acknowledge that I was represented by and consulted with counsel of my choosing throughout the negotiation and execution of this Agreement. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement before signing it.

(b) I agree and acknowledge that I have the right to reflect upon this Agreement for a period of twenty-one (21) days before executing it, and will have an additional period of seven (7) days after executing the Agreement to revoke it under the terms of the Older Worker Benefit Protection Act. I have seven (7) days after I sign this Agreement to revoke it under the terms of the Older Worker Benefit Protection Act by notifying in writing: Karen A. Murray, Esq., of THE MURRAY LAW FIRM, LLC, 3 Revmont Drive, Suite 318, Shrewsbury, N.J. 07702 and Stephen B. Hunter, Esquire, DETSKY & HUNTER, LLC, 33 North Bridge Street, Somerville, New Jersey 08876.

(c) I understand and acknowledge that if I sign this Agreement prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

(d). This Agreement shall not be effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the Older Worker Benefit Protection Act.

13. By signing this Agreement, VS acknowledges:

i. I HAVE READ THIS AGREEMENT COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT.

iii. I HAVE CONSULTED WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT TO EXPLAIN THIS AGREEMENT AND ITS CONSEQUENCES.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT.

vii. I HAVE SIGNED THIS AGREEMENT VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

FOR THE BOARD

Karen Murray

KAREN A. MURRAY, ESQ.
Date: 9/21/07

Voya (Wanda) Schoffstall

VOYA (WANDA) SCHOFFSTALL
Date: 9/17/07

Stephen B. Hunter

STEPHEN B. HUNTER, ESQ.
Date: 10/4/07

C
O
P
Y

BOARD OF EDUCATION

RESOLUTION

WHEREAS, counsel for the Elizabeth Board of Education and the Elizabeth Education Association, have negotiated a resolution of a dispute/grievance concerning Voya Schoffstall; and,

WHEREAS, in the interest of cost efficiency and judicial economy, the parties have agreed to resolve the above-referenced matter, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

463-07

#463-07

OAL DKT. NO. EDU 955-07
AGENCY DKT. NO. 9-1/07

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.H. on behalf of minor children, S.M. and M.M., and BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT, SALEM COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) and the Stipulation of Settlement (Stipulation) have been reviewed.

Upon review, the Commissioner notes that one of the two named respondents has not executed the Stipulation and, thus, the controversy is not fully resolved. Accordingly, the matter is remanded to the Office of Administrative Law (OAL) for further proceedings.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 11/30/07

Date of Mailing: 12/03/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 955-07
AGENCY DKT. NO. 9-1/07

BOARD OF EDUCATION OF GLOUCESTER CITY, CAMDEN COUNTY,
Petitioner,
v.
M.H., ON BEHALF OF MINOR CHILDREN, S.M. AND M.M. AND BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT,

---

Leonard J. Wood, Esq., for petitioner (Wade, Long, Wood & Kennedy, attorneys)

M.H., respondent, pro se

Jonathan J. Garbini, Esq., for respondent, Board of Education of Penns Grove-Carneys Point

Record Closed: October 9, 2007 Decided: October 11, 2007

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 1, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 11, 2007
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

OCT 22 2007

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WADE, LONG, WOOD & KENNEDY, LLC
By: Leonard J. Wood, Esquire
1250 Chews Landing Road
Laurel Springs, NJ 08021
(856) 346-2800
Attorneys for Petitioner

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2007 OCT -9 P 3:16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

GLOUCESTER CITY
BOARD OF EDUCATION

Petitioner

vs.

MATTHEW HIMES, PARENT AND
GUARDIAN OF S.M. AND M.M.,
MINORS, AND PENNS GROVE-
CARNEY'S POINT SCHOOL DISTRICT

Respondents

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU 955-07
Agency Ref. No. 9-1/07

STIPULATION OF SETTLEMENT

THIS MATTER having been amicably resolved between the parties, it is hereby stipulated and agreed as follows:

1. That the children of the respondent, M.H., namely, S.M. and M.M., are not homeless as contemplated by N.J.A.C. 6A: 17-2.3; and

2. Further that Penns Grove-Carney's Point Regional School District shall bear the full responsibility of the education of S.M. and M.M.; and

3. Further that the petitioner, Board of Education of Gloucester City, Camden County, New Jersey, shall have no financial or other responsibility to provide education for S.M. and M.M.; and

4. The above Stipulation of Settlement represents the full and complete resolution of the outstanding issues in this matter. The undersigned affixed their consents on behalf of their respective clients.

JONATHAN J. GARBINI, ESQUIRE
Attorney for Penns Grove-Carney's Point School District

LEONARD J. WOOD, ESQUIRE
Attorney for Gloucester City Board of Education

464-07

OAL DKT. NO. EDU 2601-07
AGENCY DKT. NO. 74-3/07

F.R.D., ON BEHALF OF MINOR CHILDREN, J.D. AND J.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/30/07
Date of Mailing: 12/03/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2601-07
AGENCY DKT. NO. 74-3/07

F.R.D. ON BEHALF OF MINOR CHILDREN, J.D. AND J.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
Respondent.

Mario A. Iavicoli, Esq., for petitioner

Robert DeSanto, Esq., for respondent (Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys)

Record Closed: September 28, 2007 Decided: October 1, 2007

BEFORE **EDGAR R. HOLMES,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on April 23, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 1, 2007
DATE

EDGAR R. HOLMES, ALJ, T/A

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

OCT 18 2007

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

MARIO A. IAVICOLI
Attorney at Law
43 Kings Highway West
Haddonfield, NJ 08033
(856) 429-0201
Attorney for F.R.D., on behalf of minor children, J.D. & J.S., Petitioner

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2007 SEP 28 A 11:47
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

F.R.D. on behalf of minor children J.D. & J.S.,	:	OAL DOCKET NO: EDVOS 02601 2007S
Petitioner,	:	(Agency Ref. No. 74-3/07)
vs.		SUBPOENA
BOARD OF EDUCATION OF CITY of VINELAND, COUNTY OF CUMBERLAND,	:	
		STIPULATION OF SETTLEMENT
Respondent.	:	

The parties herein by way of Stipulation of Settlement say:

1. The Board of Education of the City of Vineland, Cumberland County (hereafter Respondent) has withdrawn its opposition to the Appeal filed by F.D.R., On Behalf of Minor Children, J.D. and J.S., (hereafter Petitioner) regarding petitioner's domicile in the City of Vineland for the 2006-2007 academic school year.

2. The Respondent will vacate, and cause to have no effect, the Respondent's determination of the Petitioner's domicile in the City of Vineland for the 2006-2007 academic school year.

3. The Respondent's withdrawal of its opposition to Petitioner's Appeal shall not operate as a waiver with respect to any residency issues in the future academic school years.

4. The Petitioner is not liable for the payment of any moneys to the respondent for the 2006-2007 school year.

The parties herein agree and intend to be bound by the terms of this Stipulation of Settlement by knowingly and voluntarily placing their signatures below:

Dated: 8/30/07

MARIO A. IAVICOLI, for
Petitioner, F.R.D.

Dated: 9-5-07 BY:

ROBERT A. DE SANTO, ESQUIRE
for Respondent, Vineland Board of Education

I, F.R.D., have read this Stipulation of Settlement and understand its terms and conditions. My attorney has answered all of my questions regarding this Stipulation of Settlement.

Dated: 9/22/07 Francesca R. DiRisciando
F.R.D., Petitioner

465-07

OAL DKT. NO. EDU 6683-07
AGENCY DKT. NO. 216-8/07

NANCY M. BRETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PALMYRA, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Administrative Law Judge's order on the motion for emergent relief, and the letter dated October 18, 2007, from petitioner withdrawing both her petition and her application for emergent relief have been reviewed.[1]

The Commissioner notes that the Office of Administrative Law denied petitioner's application for emergent relief for reasons with which the Commissioner concurs. Nonetheless, the Commissioner dismisses the application as moot, in light of petitioner's withdrawal of the petition.

IT IS SO ORDERED.[2]

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/30/07

Date of Mailing: 12/03/07

[1] The OAL returned the petition on October 29, 2007 and the Commissioner approved withdrawal of same on October 30, 2007.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

RECEIVED
CONTROVERSIES
& DISPUTES
2007 OCT 26 AM 10:59

Nancy Brett
627 New Jersey Avenue
Palmyra, NJ 08065

October 18, 2007

Kathleen Duncan, Director
New Jersey Department of Education
Bureau of Controversies and Disputes
PO Box 500
Trenton, NJ 08625
Re: AGY DKT# 216-8/07

Dear Director Kathleen Duncan:

I, Nancy Brett, Petitioner in AGY DKT# 216-8/07, would like to withdraw my underlying petition and application for emergent relief against Palmyra Board of Education, Respondent.

Sincerely,

Nancy M. Brett
Petitioner

C: Joseph F. Betley, Capehart & Scatchard

466-07

N.B., on behalf of minor child, D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of Union Township – contested respondent's determination that her son, D.B., was not entitled to a free public education in Union Township schools. Respondent Board counterclaimed for tuition for the period of alleged ineligible attendance during the 2003-2004 and 2004-2005 school years.

The ALJ found that petitioner presented credible evidence and testimony to support her domicile and residence in Union Township, and concluded that petitioner has satisfied the residency requirements pursuant to *N.J.A.C.* 18A:38-1. Accordingly, the ALJ granted petitioner's appeal, and dismissed the respondent's claim for payment of tuition.

Upon an independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that the credibility determinations of the ALJ were accorded due deference in reaching this decision. The Commissioner ordered the respondent Board to continue to admit D.B. free of charge, so long as there is no change in circumstances that would alter his entitlement.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 3, 2007

OAL DKT. NO. EDU 11304-04
AGENCY DKT. NO. 330-9/04

N.B., on behalf of minor child, D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record – and according due deference to the Administrative Law Judge's (ALJ) credibility determinations[1] – the Commissioner concurs with the ALJ that N.B. has sustained her burden of establishing that she was a domiciliary of Union Township during the period at issue here, thereby entitling her child, D.B., to a free public education in the District's schools.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue to admit D.B. into its public school system, free of charge, so long as there is no change in circumstances that would alter his entitlement.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/07
Date of Mailing: 12/03/07

[1] The Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner provides no cause for modification or rejection in this regard.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11304-04
AGENCY DKT. NO. 330-9/04

N.B. ON BEHALF OF MINOR CHILD D.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

Arnold L. Simon, Esq., for petitioner

John P. Harrington, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: July 17, 2007 Decided: October 18, 2007

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner N.B. on behalf of her son D.B. challenges the determination of the Union Township Board of Education (Board) to remove D.B. from enrollment because he is not a resident of the school district. The Board counterclaimed for tuition for the period of ineligible attendance.

On October 26, 2004, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on January 19, 2006. Due to an inadvertent oversight I notified the parties on July 17, 2007, that the office file was incomplete. The parties resubmitted posthearing briefs and the record closed on July 17, 2007. Based on the administrative law judge's voluminous caseload and due to an inadvertent failure to timely request an extension, a forty-five-day extension of time to complete the initial decision was requested nunc pro tunc. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

ISSUE

The issue in this case is whether D.B. is eligible to attend the Union Township School District free of charge in accordance with N.J.S.A. 18A:38-1.

EVIDENCE AND FINDINGS OF FACT

In 2001 N.B. moved to Union Township, N.J from Newark, N.J., where she resided with her mother and extended family. She enrolled her son, D.B., in Washington Elementary School. From 2001 to October 2003 N.B. and D.B. resided on H. Avenue. From October 2003 to January 2004 they resided with a friend on T. Street. Since January 2004, N.B. and D.B. have resided as tenants on V. Street. Petitioner's cousin, R.B., often spends the night and cares for D.B. while his mother works or attends school.

Petitioner produced several documents that listed the V. Street address. These included a driver's license (P-1), a letter from the landlord (P-2), photocopies of bank checks (P-3; P-4; P-5), PSE&G service bills (P-8a), a Comcast service bill (P-8b), a Fleet Bank statement of account (P-8c, d), a rent receipt (P-8e), a United States Postal Service address change form (P-8j), and an automobile insurance identification card (P-

8k). There is also a property tax relief document from the New Jersey Department of the Treasury showing N.B.'s V. Street address (P-8).

N.B. testified that she is a single parent and is employed as an administrative assistant at Morgan Stanley in Morristown. While employed full time, she also was enrolled in a Certified Shorthand Reporter program at a school in Fairfield. She attended class after work on Monday, Tuesday and Thursday from 5:45 p.m. to 10:30 p.m. Petitioner's schedule required her to leave home early and return late at night. Often, petitioner would not arrive home until after 11:00 p.m. Her sister D. took D.B. to and from school. Petitioner's sister testified that she would take D.B. to the family home in Newark. Both N.B. and D. acknowledged that D.B. often stayed at his grandmother's home on weekends or overnight.

In December 2003 and January 2004 James Ford, investigator for the Board, conducted an investigation to determine D.B.'s residence. Respondent presented Ford's investigative report (R-1). The report reflects "several" surveillances of the T. Street address on December 15, 16, 17, 18, and 22, 2003, and January 5 and 6, 2004. Ford reported that D.B. "was always dropped off at the multi-family dwelling" around 7:25 a.m. D.B. would "exit" the T. Street house at 8:00 a.m. and take the school bus. D.B. told unidentified school personnel that he "spent the weekend at his grandmother's in Newark." R-1. On January 6, 2004, Ford observed N.B. drive D.B. to the T. Street address at 7:30 a.m., where D.B. boarded the school bus at 8:00 a.m. The postman claimed that he never delivered mail to N.B. at the T. Street address. Further, unidentified "neighbors" told Ford that N.B. "never lived there." R-1. Ford concluded that D.B. was not eligible to attend Union schools in December 2003 and January 2004.

Respondent presented the testimony of Anthony Martino, investigator for the Board. Martino conducted a surveillance of the V. Street address. On Tuesday, March 23, 2004, at approximately 3:15 p.m. Martino observed a woman driving a vehicle registered to N.B. The woman drove to the V. Street address, picked up D.B. from the house, and drove him to a house in Newark. Martino returned to the V. Street apartment later that evening, between 7:00 p.m. and 7:30 p.m., and observed no lights

in the second-floor apartment. He rang the doorbell, but nobody answered the door. On March 24, 2004, at approximately 7:40 a.m. he observed N.B. dropping D.B. off at the V. Street apartment. The school bus picked D.B. up at approximately 8:15 a.m. After school, the school bus dropped D.B. off, and the child waited in the apartment on V. Street until N.B. arrived at approximately 3:40 p.m., picked him up, and drove him to a house in Newark. Martino conducted similar surveillances with the same results on March 25 and 26, 2004. Each night between 7:00 p.m. and 7:30 p.m. he checked the V. Street apartment and observed no sign of any persons in the apartment. On January 17 and 18, 2006, Martino surveilled the V. Street apartment from approximately 7:00 a.m. to 8:15 a.m. D.B. did not depart from the building or board the school bus. However, the school confirmed D.B.'s attendance on January 17 and 18, 2006.

Richard Brownbridge, investigator for the Board, testified concerning his surveillance and report (R-3). He testified that his surveillance of the V. Street residence on September 13, 17, 18, and 19, 2004, revealed no evidence that petitioner resided at that address. Two electric meters attached to the building showed minimal usage. N.B.'s blue Nissan was not parked on the property or on "surrounding streets." R-3. On September 21, 2004, Brownbridge surveilled the H. Avenue building and found no evidence of petitioner's residency. On September 28, 2004, Brownbridge surveilled the V. Street address. Petitioner's car was parked at the intersection. "The vehicle's glass was covered with dew and the engine and exhaust was cold to the touch, giving rise to the presumption that the vehicle had been parked at this location overnight." R-3. During Brownbridge's surveillance on October 14, 2004, a person exited an apartment across the street from the V. Street address and questioned Brownbridge about his presence on the street. Immediately thereafter, "the neighbor went directly to [petitioner's apartment] to alert her of the investigator's presence." Brownbridge observed N.B. in front of the V. Street address once. He reported, "At this juncture the whereabouts of [D.B.] has not been determined. His current location of residency has not been determined . . . . In view of the information supplied in this report it is the recommendation of this investigator that the Division of Youth and Family Services . . .

be contacted and requested to investigate the welfare of [D.B.], his current residency and his attendance at school." R-3.

Respondent requests tuition payment for the periods of ineligible attendance, December 15, 2003, to May 10, 2004, and September 20, 2004, to October 14, 2004. The affidavit from Karen M. Dunn, the respondent's business administrator, states that tuition for Washington School for school year 2003-2004 was calculated at $8,301 ($46.12 per diem). For school year 2004-2005, tuition was calculated at $8,883 ($49.35 per diem). R-4.

Based on the whole of the record, I **FIND** petitioner N.B. to be a credible witness and, thus, I **FIND** her testimony believable. I **FIND** that petitioner and her son D.B. are domiciled in Union Township and that they were domiciled in Union Township during the periods for which the Board seeks tuition payments. I **FIND** that D.B. often spent the night with his grandmother and aunt in their homes while his mother was working and attending school at night.

LEGAL DISCUSSION AND CONCLUSIONS

The applicable statute, N.J.S.A. 18A:38-1, states:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant,

> or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Petitioner bears the burden of proving domicile within the school district under N.J.S.A. 18A:38-1. The domicile of a minor child follows that of his parents. See V.R. on behalf of A.R. v. Bd. of Educ. of Hamburg, 2 N.J.A.R. 283, 286 (Dep't of Educ. 1980).

Petitioner maintains that it is reasonable that she, like any good mother, seek help with child care, especially from her family. Indeed, considering her status as a single parent, and her heavy schedule "holding down" a full-time job while attending school three nights per week, it is also reasonable that D.B. spend nights at his grandmother's house, which is a short distance from his school. While N.B. attended school after working all day, a relative picked-up D.B. and took him to the family's home on T. Terrace.

Some nights N.B. would be too tired to pick-up D.B. and take him to their home. Thus, they slept at the family's home and in the morning before school went to their apartment. Petitioner further claimed that none of the respondent's investigators entered or observed the inside of her V. Street residence. A simple home visit would have disclosed what was in the apartment. Moreover, utility bills and bank statements showed that she resided at the V. Street apartment.

The Board acknowledged that D.B. has been enrolled in the Union Township public schools since September 2001, and currently attends fifth grade in the Union Township School District. The Board disputes, however, that N.B. and D.B. lived on H. Avenue as renters from 2001 to October 2003. The Board further disputes that petitioner and her son lived with a friend on T. Street from October 2003 to January 2004.

Respondent makes particular note that N.B. never presented evidence to verify her employment or salary at Morgan Stanley. Although petitioner presented checks showing rent payments for March and April 2004, she presented no current statement from her landlord, or from any other resident of Union Township, to corroborate her domicile in the township.

Respondent further argues that D.B.'s domicile has been the subject of three residency investigations by the Board. Two of the Board's investigators testified at the hearing about their surveillance. Thus, respondent submits that petitioner failed to carry her burden for the periods specified above.

I have considered carefully the evidence and arguments presented by the parties. Three investigators observed D.B. arriving at the V. Street address before school and leaving the site after school. The investigators did not reveal the identities of persons interviewed. The third investigator implied that D.B. might be in danger and thus, recommended to the Board that it report petitioner to the Division of Youth and Family Services for investigation. There is no evidence that the Board took the agreed with the investigator on this issue. On the other hand, I am persuaded by the credible evidence presented by N.B. and her sister D. that petitioner relied on her family to help her take care of D.B. while she worked and attended classes three nights per week. The relatives whom she trusted included the child's grandmother and his aunt. This arrangement was the safest, most reasonable and perhaps best financially responsible option for N.B. Petitioner provided sufficient evidence to support domicile and residence in the Union Township School District. P-2; P-3; P-4; P-5; P-8. The domicile of a minor child follows that of his parents. See V.R., supra, 2 N.J.A.R. at 286.

I **CONCLUDE** that petitioner has satisfied the residency requirements pursuant to N.J.A.C. 18A:38-1. Therefore, I **CONCLUDE** that petitioner is not liable to the District for tuition.

ORDER

I **ORDER** that the petition to permit D.B. to attend school in the Union Township School District is **GRANTED**.

I **ORDER** that the District's claim for payment of tuition is **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 18, 2007
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 10-19-07

Mailed to Parties:

OCT 22 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

da

468-07

OAL DKT. NO. EDU 4793-07
AGENCY DKT. NO. 153-6/07

C.M., on behalf of minor child, D.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed settlement agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/06/07

Date of Mailing: 12/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4793-07

AGENCY DKT. NO. 153-6/07

C.M. ON BEHALF OF MINOR CHILD,

D.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF HAMILTON, MERCER COUNTY,

Respondent.

C.M., petitioner, pro se

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: November 1, 2007 Decided: November 2, 2007

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 29, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 2, 2007
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Date Received at Agency:

Mailed to Parties:
Lisa Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 7 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

C.M. 0/6/0 D.K.

V.

Bd of Ed of
Hamilton Tp.

Agency DK N. 153-6/07

The parties agree as follows on November 1, 2007, as follows:

1. D.K. shall continue at the Thomas Rubino Academy for the 2007-2008 school year.
2. D.K. may apply for re-admission to the Hamilton Twp. School District for the 2008-2009 school year by requesting a hearing before the Board of Education of the Hamilton Tp. School District.
3. D.K. ~~may~~ be readmitted after review of his school record at the Rubino Academy by the Board of Education of Hamilton Tp.

Carmen Myers
CARMEN MYERS

Dennis M. DeSanty
Attorney for the
Respondent

469-07

OAL DKT. NO. EDU 3450-07
AGENCY DKT. NO. 13-1/07

A.S. AND B.S., ON BEHALF OF MINOR CHILD, M.F.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Mutual Dismissal, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/06/07

Date of Mailing: 12/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03450-07

AGENCY DOCKET NO. 13-1/07

A.S. & B.S. ON BEHALF OFM.F.,

Petitioner,

v.

MORRIS HILLS REGIONAL DISTRICT BOARD OF EDUCATION,

Respondent.

Mark Wenczel, Esq. for petitioner
(*Gaccione Pomaco & Malanga*)

Joanne Butler, Esq., for respondent
(*Schenck, Price, Smith & King*)

Record Closed: October 24, 2007 Decided: November 15, 2007

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 22, 2007, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on April 10, 2007 at which time the parties advised that the matter was settled. On October 10, 2007 with no settlement received, the undersigned sent out correspondence requesting the status of the settlement and also requesting to receive the fully executed settlement no later than

October 31, 2007. On October 24, 2007 the undersigned received the fully executed settlement, dismissal and an original certified extract of the minutes from the Board meeting, and the record closed that day.

Having reviewed the contents of the attached Stipulation of Settlement, Dismissal and Certified extract of the minutes, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 15, 2007
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 11-17-07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 19 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
Morris Hills Regional School District

A.S. and B.S. o/b/o M.F. Petitioners, v. MORRIS HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, MORRIS COUNTY, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 13-1/07 **Stipulation of Settlement and Mutual Dismissal**

Petitioners Arthur Santo and Barbara Santo (hereinafter "Petitioners") and Respondent/Counterclaimant Morris Hills Regional District Board of Education (hereinafter "Board" or "District"), herein stipulate and agree as follows:

1. The Student, M.F., will be permitted to attend District schools for such time as she remains domiciled in the School District, which domicile is currently based upon the February 17, 2007 Custody Order granting joint residential custody of M.F. to Barbara Santo, a Petitioner herein who is domiciled in the District, and Susan Kunkel, who is not a party herein but who is domiciled in the District.

2. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

3. The parties waive any and all claims which were or could have been asserted in the within action or any other action arising out of the residency claims made in the Petition (Agency Ref. No. of 13-1/07) herein, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising

out of or related to these claims.

4. As a result of the foregoing, Petitioners Arthur Santo and Barbara Santo withdraw their Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Arthur Santo — Date 4-19-07

By: Manuel E Deus — Date 5/21/07
MORRIS HILLS REGIONAL
DISTRICT BOARD OF EDUCATION

Barbara Santo — Date 4-1907

Barbara Santo — Date

00890701

EXTRACT FROM THE MINUTES OF A REGULAR
BOARD OF EDUCATION MEETING OF THE
MORRIS HILLS REGIONAL DISTRICT
OF ROCKAWAY, NJ, AS RECORDED IN THE OFFICIAL MINUTES BOOK

The Board of Education of the Morris Hills Regional District of Rockaway, in the County of Morris, New Jersey, convened in Regular Session on Monday, May 21, 2007, at 7:45 p.m. in the Board Conference Room at Morris Knolls High School in Denville, New Jersey.

The following members were **present:** Thomas Greulich, President, Michael Collins, Debra Erwine, Paula Gilbert, Kalman N. Kolis, Steven Kovacs, Samuel Parsons, James J. Ross (8:20 p.m.) , and E. James Soltys.

The following resolution was offered by Mr. Collins and seconded by Mrs. Erwine and adopted by the Board of Education on a roll call vote:

RESOLVED: Recommend authorization to accept the attached Stipulation of Settlement and Mutual Dismissal agreement. (Attachment)

All present voting yes – Motion Carried

STATE OF NEW JERSEY)
) ss
COUNTY OF MORRIS)

I, Manuel E. Deus, Board Secretary of the Morris Hills Regional District Board of Education in the County of Morris, State of New Jersey, hereby certify that the attached extract of the minutes of the meeting of the Board of Education, of said district, duly called and held on May 21, 2007, have been compared by me with the original minutes as officially recorded in my office in the official minutes book of said Morris Hills Regional District Board of Education and is a true and complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said minutes. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education on this seventeenth day of October 2007.

Manuel E. Deus
Board Secretary

(seal)

#470-07

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JOHN A. BLEVIS,	:	
RESPONDENT.	:	

SYNOPSIS

The Petitioning school district requested that the Commissioner compel respondent – a tenured science teacher employed by the district – to submit to a psychiatric and physical examination after he exhibited behavior indicative of a deviation from normal physical and mental health. *N.J.S.A.* 18A:16-2. Respondent denied that he posed any danger to the health or welfare of students or staff in the district.

The ALJ found that: there was ample and credible testimony and evidence that respondent has acted in an irrational and threatening manner toward fellow teachers and his supervisor; this unusual behavior has increased over the past few years; and respondent's behavior during a staff workshop, in which he refused to consider modifications to the science curriculum to accommodate the needs of mainstreamed special education students, was inappropriate and had a negative impact on his students. The ALJ concluded that the determination of the Board to require a physical and psychiatric examination was reasonable and necessary to insure the safety and well being of students and staff in the district.

After careful and independent review of the ALJ's findings of fact and the entire record in this matter, the Commissioner adopted the Initial Decision as the final decision, with supplementation. The Commissioner noted that: *N.J.S.A.* 18A:16-2 does not require petitioner to show that respondent's behavior is specifically directed at, or affecting, the students as opposed to the staff; the weight of competent evidence depicts a level of hostility, belligerence and lack of control on the part of respondent that arguably exceeds the bounds of normal mental health; it is therefore not unreasonable for petitioner to seek an evaluation of respondent in order to ascertain whether his antagonism and poor control might spill over to the classroom. In point of fact, the record showed that respondent's antagonism led to miscommunication about student exams and inadequate instruction to special education students. Accordingly, the Commissioner directed respondent to submit to a psychiatric evaluation and physical examination.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 5, 2007

OAL DKT. NO. EDU 1711-07
AGENCY DKT. NO. 29-1/07

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JOHN A. BLEVIS,	:	
RESPONDENT.	:	

The record, including hearing transcripts and exhibits, the Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions and petitioner's reply thereto have been reviewed. Based upon the Administrative Law Judge's (ALJ) findings of fact, the Commissioner adopts the Initial Decision as the final decision in this case.

The ALJ's findings reveal that respondent began his employment with petitioner in 1986, and has sound academic qualifications. During the past three or four years of his employment, relations between respondent and petitioner's staff have deteriorated. Respondent has filed actions in other forums alleging harassment, a hostile work environment, and wrongful failure to promote him.[1] The actions have named petitioner, both his present and past supervisors, and other district employees. Various members of petitioner's staff have complained of hostile and counter-productive behavior by respondent, and have expressed concerns about respondent's state of mind and physical condition.

[1] Two actions have been dismissed. The Commissioner is not apprised of the disposition, if any, of the federal court action.

The school librarian described encounters with respondent in which he spoke to himself, claimed there were conspiracies against him, turned red and physically shook with anger. At some point in 2006, respondent began secretively taping conversations with his colleagues.

Various teachers reported that respondent was demeaning to women, smirking and leering into their classrooms when he had hall duty. He clearly held his female supervisor – Madalena Zak – in disregard, for he was reported to have made negative remarks about her during staff meetings and in front of students. One of the teachers in respondent's school remembered occasions on which respondent came to her room, accused Zak of lying, and conducted an agitated, one-sided conversation about Zak's alleged falsehoods.

A number of petitioner's staff observed an incident in October 2006 in which respondent's deportment became disruptive and disquieting. The setting was a workshop which was apparently planned to discuss how best to integrate mainstreamed special education students. Respondent was against mainstreaming the students, and refused to listen to suggestions by the special education teachers as to how the science curriculum might be modified to accommodate the special education pupils. Various accounts of the incident described respondent as loud, obnoxious, and disruptive. He was reported to have muttered that the workshop was a waste of time. When asked to leave, he tore up the workshop materials.

Testimony and evidentiary materials disclosed a number of ways in which rigidity and uncooperative behavior led to difficulties between respondent and colleagues. He reportedly would not work with another science teacher to develop a laboratory curriculum or to enforce measures to keep the shared laboratory clean. He also failed to follow the same protocol as the other Earth Science teacher in the mid-term exam, resulting in his students neglecting to answer the essay questions.

The Commissioner notes that the negative impact of respondent's rigidity and uncooperativeness was not visited exclusively on his co-workers. His students were clearly impacted

by his conduct regarding the midterm exam. The special education students, who had Individualized Education Programs that called for mainstreaming, were not well served by respondent's refusal to develop ways of supplementing the curriculum to allow for their integration into the earth science classes. When respondent was suspended, the substitute teacher who replaced him was apparently able to successfully conduct the integrated classes.

The record also shows that respondent's co-advisor to the student government resigned from the position because of her observations that respondent was so rigid and controlling that he did not allow the students to direct activities on their own. The students' interest in student government dwindled and the student government became defunct. Further, the level of antagonism directed by respondent towards various colleagues – purportedly at times in the presence of students – must necessarily have had an impact on the environment in which the students were required to work and learn. The magnitude of respondent's hostility is reflected in the letters from two teachers advising that they were afraid of respondent and would not work at the high school if he returned.

One of those teachers – who had been required to share a laboratory with respondent – testified that he accused her of falsifying her students' grades, and threatened that he was compiling a file of evidence against her. The other teacher described respondent's above-referenced diatribe about Zak's alleged lies, and about "the girl's club." (Initial Decision at 12) As the tirade progressed, respondent paced, flailed his arms, sweated profusely and generally exhibited a flushed, angry demeanor. He stated that he was "going to get" Zak.[2] (*Id.* at 15)

Respondent does not appear to challenge the validity of *N.J.S.A.* 18A:16-2, *per se.* His arguments go to the applicability of the statute to his behavior. (Respondent's Exceptions at 10-12) At the outset, the Commissioner notes that respondent was given the notice and hearing to which he was entitled, and respondent does not appear, in his exceptions, to argue otherwise. The Commissioner also finds that petitioner met its burden to make a showing that respondent's

[2] This comment was conveyed to Zak and was, not surprisingly, a factor in Zak's discomfort with respondent.

behavior deviated significantly from the behavior one would expect from an individual in normal mental health. Having made that showing, it was incumbent upon respondent to rebut same with competent evidence. Based upon the facts articulated above, and found by the ALJ, the Commissioner concludes that respondent was not able to rebut petitioner's showing.

Respondent's exceptions address four "points." First, respondent argues that it was error for the ALJ to conclude that respondent had the burden of proof to show that his behavior was not a deviation from normal physical and mental health. Because the Commissioner concludes that petitioner made the necessary showing that respondent's behavior reflected a deviation from normal mental health, the question of who bore the burden of proof is academic, and will not be addressed.

Second, respondent refers to a number of facts that the ALJ allegedly overlooked:

a. Respondent was allowed to take students on a field trip that took place after petitioner had voted to compel the psychiatric exam;

b. Petitioner's district superintendent failed to investigate respondent's complaints of harassment and humiliation by his then new supervisor – Zak;

c. The above referenced conference concerning modification of the science curriculum was allegedly meant to cover possibilities for the 2007-2008 school year, so the students could not have been harmed by his refusal to modify the curriculum for the 2006-2007 school year;

d. If the ALJ had admitted into evidence all of respondent's evaluations [dating back to 1986], they collectively would not have suggested that he had become more confrontational and erratic over the past three to four years;

e. Respondent was never "formally charged or disciplined;"

f. The high school principal testified that she personally had never witnessed unusual behavior by respondent and did not feel threatened by him;

g. The ALJ erred in finding that respondent's two prior legal actions were dismissed: one was dismissed on procedural grounds and the other – an unfair labor practice charge at PERC – was resolved in favor of respondent;

h. Respondent secretly recorded Zak after his complaints to the administration about her were ignored. The ALJ should have neither excluded the tapes nor speculated that the secret recordings suggested mental instability;

i. Respondent's failure to complete grading of midterm exams was due to the timing of respondent's suspension; and

j. Because Laura Venner – the substitute who took over respondent's classes – did not have her certificate to teach science, the ALJ should not have given credibility to her testimony that she was able to effectively modify the curriculum to teach the special education students who were integrated into the earth science classes.

The Commissioner finds that – even if assumed true - none of the foregoing materially undermines the evidence which petitioner presented or affects the issues to be decided in this case.

Third, respondent cites to *Kochman et al. v. Keansburg Board of Education et al.*, 124 N.J. Super. 203 (Ch. Div. 1973) for the proposition that it is evidence of harmful, significant deviation from normal mental health *that affects the teacher's ability to teach, discipline or associate with children* that triggers a board of education's authority to compel a psychiatric evaluation. *Id.* at 212. (Emphasis added) There is no question that *Kochman* and other cases have so found. However, a board's authority to compel a psychiatric examination is grounded in *N.J.S.A.* 18A:16-2, which

states, in pertinent part:

> Every board of education may require its employees and shall require any candidate for employment who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health.

Thus, a board has the authority to direct an employee to undergo a psychiatric evaluation if it perceives that the employee is manifesting behavior that deviates from normal health. There is no explicit mandate for the board to prove that the employee's aberrant behavior has been specifically directed toward students. The protection of students is an obvious rationale for the statute. However, there is nothing in the statute that prevents a board from determining that hostile and abnormal behavior directed by one teacher towards several others, and outbursts of temper displayed on multiple occasions warrant a psychiatric evaluation, including an assessment of the likelihood that respondent's control could further deteriorate, and that his negative behavior could be visited upon students.

Finally, respondent contends that the accusation that he left students unattended one afternoon after school, even if true, does not implicate his mental health. If anything, it suggests incompetence or insubordination. The Commissioner agrees that this contention may have merit. It is, however, not material to the ultimate issue in this matter.

The weight of the competent evidence adduced at the hearing in the OAL abundantly depicts a level of hostility, belligerence and lack of control on the part of respondent that arguably exceeds the bounds of normal mental health. It was not unreasonable for petitioner to seek an evaluation of respondent to ascertain the likelihood that his antagonism and poor control might spill over to the classroom.

Moreover, as mentioned above, respondent's contempt for his colleagues resulted in inadequate communication about the midterm examination, which poor communication resulted in the failure of respondent's students to finish the exam. His rigidity interfered with the integration of special education students into his science classes, and his antagonism toward his colleagues poisoned the academic atmosphere in the school. Thus, his behavior was already affecting the students.

The Commissioner adopts the Initial Decision for the reasons articulated therein, as supplemented by this decision. Respondent is directed to submit to a psychiatric evaluation, and to a physical examination if the psychiatrist so recommends.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/07

Date of Mailing: 12/06/07

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

470-07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01711-07
AGENCY DKT. NO. 29-1/07

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,
Petitioner,
v.
JOHN A. BLEVIS,
Respondent.

Karen M. Reis, Esq., (Francis J. DeVito, P.A.) for petitioner

Roosevelt Porter, Esq., (Mets & Schiro, LLP, attorneys) for respondent

Record Closed: July 19, 2007 Decided: August 7, 2007

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter originally came before the Office of Administrative Law (OAL) on an application by the petitioner (Board) seeking an emergent hearing on its suspension of the respondent pending the outcome of a mental and physical examination. On October 16, 2006 the Board provided the respondent (Mr. Blevis) with a Rice Notice

advising him that issues pertaining to his employment would be discussed in closed executive session on October 18, 2006. Mr. Blevis chose not to attend the meeting. On that date the Board of Education determined that Mr. Blevis' behavior "deviated from normal physical and mental health" and that this condition was a possible danger to the pupils and/or employees of the school. On October 20, 2006 the Board requested that Mr. Blevis undergo a physical and psychological examination as per N.J.S.A. 18A:16-2. Mr. Blevis requested a hearing before the Lyndhurst Board of Education. The meeting was originally scheduled for Monday, November 13, 2006. However, on November 10 the attorney for the respondent requested an adjournment and the matter was rescheduled for November 15, 2006. The meeting was held on that date and Mr. Blevis was accompanied by his attorney. While a number of witnesses testified on behalf of the Board, Mr. Blevis choose not to testify or to present witnesses. Mr. Blevis' attorney did cross examine the witnesses presented by the petitioner. On November 15 the Board determined that Mr. Blevis had shown signs of a deviation from normal physical and mental heath and posed a possible danger to the health or welfare of the pupils and/or other employees. By correspondence dated November 22, 2006, the Board requested that Mr. Blevis undergo a physical and psychiatric examination on December 5 and 20, 2006. On November 30, 2006 Mr. Blevis advised the Board, through his attorney, that he intended to appeal the decision of the Board. Mr. Blevis did not attend the scheduled examinations. On January 22, 2007 the Board of Education suspended Mr. Blevis with pay pending compliance with the physical and psychiatric examinations and receipt of proof of recovery and/or a report that Mr. Blevis was fit to teach. On January 29, 2007 the Board filed a Motion for Interim Relief with the Commissioner of Education. The matter was forwarded to the OAL on February 7, 2007 and listed for a hearing for emergent relief on February 14, 2007. The Board requested that Mr. Blevis be compelled to submit to a psychological and physical examination. The Board's motion was denied and the matter was set down for a hearing on March 12, 2007. However, the case had to be rescheduled because ALJ Cohen had to appear before the Senate Judiciary Committee on that date. The matter was rescheduled for May 22 and 30. However, the respondent's attorney was not available on May 22 and the case was rescheduled for May 24 and 30. The matter was heard on those dates. On the first day of the hearing the attorney for the Board made a Motion in Limine to exclude three

audio tapes produced by the respondent, forty-two letters of commendation and four prior evaluations of Mr. Blevis. I excluded the audiotapes because two of the tapes were of such poor quality that I could not understand what was on them. The third I excluded because, although I could understand parts of the tape, there were gaps during which I could not determine what was being said. Under the circumstances I ruled that the prejudice to the petitioner outweighed any probative value of the tapes. As for the letters of recommendation, I allowed two letters to be admitted. The others were too remote in time and not relevant to the issue in this matter. In addition, the Board acknowledged that Mr. Blevis had been a well-regarded teacher in the past. I allowed the prior evaluations because they were relevant. At the conclusion of the case, the attorneys requested written summations. The attorneys were given until July 9 to provide Summation Briefs. Mr. Blevis' attorney asked for an extension to file his brief and it was granted. The respondent's Summation Brief was filed on July 19, 2007.

ISSUES

1. Did the respondent's behavior deviate to such a degree from normal physical and mental health that his condition posed a possible danger to the health or welfare of the pupils and staff?
2. Who had the burden of proof under N.J.S.A. 18A: 16-2?

FINDINGS OF FACT

Based on the testimony presented and the exhibits submitted, I make the following **FINDINGS OF FACT:**

1. Mr. Blevis has been employed as a school teacher at Lyndhurst High School since September 1986. He holds bachelors degrees in Biology and English. He has a Masters in Educational Administration and Supervision and Business Administration.
2. The respondent holds teaching certificates in Comprehensive Science, English, Supervisor and Supervisor/Principal (Eligibility).

3. On October 10, 2006 Mr. Blevis filed a lawsuit in Federal Court against the Board of Education, the principal of the High School, the Superintendent of Schools and his supervisor, Ms. Zak, alleging that he suffers from a hostile work environment at the High School, which has caused him mental distress. That suit is still pending. Prior to that suit, the respondent had filed two suits against the Board and his previous supervisor charging harassment, hostile work environment and failure to promote. Both of these suits were dismissed.
4. Mr. Blevis' behavior during the past 3-4 years has become more threatening, erratic and confrontational.
5. During a Workshop in October 2006, Mr. Blevis became upset with the special education teachers, who were making suggestions about modifying the curriculum in his Earth Science class to accommodate the mainstreamed special education students. As a result, he became loud and obnoxious and began muttering under his breath that the workshop was a waste of time. His behavior completely disrupted the workshop. As a result, he was asked to leave by his supervisor, Ms. Zak. When he left the workshop, he ripped up the workshop papers.
6. During the workshop Mr. Blevis advocated for having the special education students taught in a separate class. This was in contravention of their Individual Education Plans, which required mainstreaming of the students. Mr. Blevis refused to consider any suggestions put forward by the special education teachers to modify the curriculum to accommodate to the needs of the special education students.
7. Mr. Blevis claimed that Earth Science should be taught in the sophomore instead of the freshman year, because the students needed algebra in order to understand the concepts of the Earth Science. After Mr. Blevis' suspension, the substitute teacher was able to teach the algebra concepts involved in the Earth Science course.
8. On another occasion, Mr. Blevis came into Ms. DeCarlo's classroom. He became very upset and flushed; he was pacing and sweating. He told her that she (Ms. Zak) was a liar and had made a big mistake. He referred to the "political girls club" and how he was going to take action against them.

9. Ms. Cowell, the school librarian, had encounters with Mr. Blevis in which he claimed that there were conspiracies against him. When he came to the library, where she was working, he became very agitated and angry and his body started to shake. When Ms. Cowell tried to calm him down, he would not listen to reason.
10. Mr. Blevis took his briefcase with him at all times and would not let it out of his sight.
11. Beginning in March 2006, Mr. Blevis began secretively taping conversations with his fellow teachers and supervisors.
12. A number of his fellow teachers noted that Mr. Blevis was demeaning toward the women teachers in the department. In addition, he would smirk and leer into their classrooms, when he had hall monitor duty.
13. Mr. Blevis refused to assist his fellow science teacher, Ms. Vladescu, in her attempt to have the students keep the laboratory clean. He refused to work in conjunction with her in developing a laboratory curriculum.
14. Mr. Blevis would make negative remarks about his supervisor, Ms. Zak, during staff meetings and in front of students.
15. Mr. Blevis has failed to follow protocol. He has not had his students clean up after laboratory and he has not adhered to chemical and equipment sign out procedures.
16. Mr. Blevis and Mr. Russo, another Earth Science teacher, were supposed to follow the same test protocol in their mid-term exams for the course. Mr. Blevis did not follow the protocol. As a result almost all of his students failed the exam, because they did not answer the essay questions. It was therefore necessary to disregard the mid-term exam grades. As a result, a number of students, who might have been exempt from taking the final examination, had to take the exam.
17. On one occasion Mr. Blevis left the members of the student government alone after school unsupervised, when he left the building.
18. Ms. Cowell, Mr. Blevis' co-advisor to the Student Government, resigned from her position. She did so because she observed that Mr. Blevis was so rigid and controlling that he would not allow the students to direct activities on their

own. As a result, the student's interest in student government dwindled and the activity became defunct.

19. Mr. Blevis had claimed that he had to leave school on a Friday because he was ill. A fellow teacher, Mr. Williams, agreed to fill in for him at a student science competition on Saturday. Mr. Williams drove to the school and found Mr. Blevis there awaiting the students. He claimed that he tried to call Mr. Williams at home, but no one answered. Mrs. Williams was at home and claimed that Mr. Blevis never called.
20. Ms. DeCarlo and Ms. Vladescu both sent letters stating that they would not work at Lyndhurst High School, if Mr. Blevis returned to the school, because they were afraid for their safety.

ANALYSIS OF THE LAW

Burden of Proof

N.J.S.A. 18A:16-2 provides that:

> [T]he board [of education of any district in the State of New Jersey] may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

Because N.J.S.A. 18A:16-2 provides for a psychiatric exam when "there is evidence of deviation from normal...mental health," the burden is upon the one challenging it. There is a presumption of the constitutional sufficiency of a legislative enactment; and the onus of a showing *contra* is on him who interposes the challenge. Hart v. Scott, 50 N.J.L. 585 (E. & A. 1888); State v. Dolbow, 117 N.J.L. 560 (E. & A. 1937); Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403 (E. & A. 1938). The finding of the Legislature is presumed to have the support of facts known to it "unless facts judicially known or proved preclude that possibility"; generally, it is "not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided"; its function "is only to determine whether it is possible to say that the legislative decision is without rational basis." Clark v. Paul

Gray, 306 U.S. 583, 59 S. Ct. 744, 83 L. Ed. 1001 (1939). Every intendment is indulged in favor of the validity of the act. It is to be assumed that the act was directed to an exigency made manifest by experience, and the remedy was in accordance with the known need. Ward & Gow v. Krinsky, 259 U.S. 503, 42 S. Ct. 529, 66 L. Ed. 1033 (1922). These principles are largely applicable to local legislative acts in the exercise of a delegated police power. New Orleans Public Service v. City of New Orleans, 281 U.S. 682, 50 S. Ct. 449, 74 L. Ed. 1115 (1930).

The constitutionality of N.J.S.A. 18A:16-2 has been upheld both in federal and state courts, with findings that the interest of the State of New Jersey to protect its youth outweighs the individual constitutional rights of the teacher or employee in question. See Hoffman v. Jannarone, 401 F. Supp. 1095 (D.N.J. 1975) (rev'd in part); Gish v. Board of Ed. of Borough of Paramus, Bergen County, 145 N.J.Super., 96, 104-105, 366 A.2d 1337 (App. Div. 1976).

Procedurally, the implementation of N.J.S.A. 18A:16-2 requires that the teacher or employee be provided with a statement outlining the reasons the board in question is ordering said teacher or employee to submit to the fitness for duty examination, as well as an opportunity for a hearing, if such a hearing is requested. Further, a teacher or employee has a right to appeal from an adverse decision to the State Board of Education under N.J.S.A. 18A:6-27. Curcio v. Collingswood Bd. of Educ., 2006 U.S. Dist. LEXIS 46648, 2006 WL 1806455 at * 10 (slip op.) (D.N.J. 2006); Kochman v. Keansburg Board of Education, 124 N.J.Super. 203, 213-14, 305 A.2d 807 (Ch. Div. 1973). "With such procedural safeguards the application of N.J.S.A. 18A:16-2 will not violate due process." Kochman at 214.

It is clear that Mr. Blevis' due process rights were protected both at the preliminary hearing and at the OAL. He was represented by counsel and he was given an opportunity to present witnesses and to submit any documentary evidence that would bolster his case. Therefore, I **CONCLUDE** that Mr. Blevis has the burden to prove that his behavior was not a deviation from normal physical and mental health and therefore, an examination was not called for under the statute.

Reasons for Examination Request

The written statement of the reasons for the requested physical and psychiatric examination was presented to Mr. Blevis on October 20, 2006. They were as follows:

A. The incidents of erratic and unusual behavior are increasing in frequency and intensity; other staff members have confirmed incidents that evidence harmful, significant deviation from normal mental health including but not limited to, angry and unstable behavior exhibited by ripping up workshop documents and discarding them in the garbage, ranting and raving, pacing, and arms flailing which was described as adversarial, disruptive and alarming.

B. Staff members have complained of harassing and intimidating behavior by Mr. Blevis which is distracting and disruptive including but not limited to sabotaging experiments, making unnecessary derogatory and threatening comments, and staring staff members down at meetings, and constant snide and derogatory statements.

C. Staff members have commented that they feel physically threatened and are uncomfortable in your presence as you are angry, hostile, and constantly grumbling under your breath.

D. Incidents of failure to conduct laboratory activities or following required protocol on clean up and supplies.

The courts in New Jersey have held that a teacher's fitness is not based solely on his or her ability to teach. As the court pointed out In the Matter of the Tenure Hearing of Paula M. Grossman, 127 N.J. Super. 13, 22 (App. Div. 1974), quoting from Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S. Ct. 380, 96 L.Ed. 517 (1952):

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, can not be doubted.

Therefore, in assessing a teacher's fitness, it is necessary to look at the totality of the circumstances to see if there has been maladaptive behavior and to determine if that behavior has a negative impact upon the students that the teacher is charged with teaching.

Erratic Behavior:

The first incident that forms the basis of the charges against Mr. Blevis has to do with his behavior at the "Making Connections" workshop. The Board charged that Mr. Blevis was loud, obnoxious and maligned colleagues. In addition, he refused to listen to any suggestions about modifying the curriculum for the benefit of the special education students. In the end, he ripped up the papers from the workshop and was asked to leave. The Board alleged that this behavior not only impacted his relationship with other staff members, but ultimately affected students as well. In response Mr. Blevis asserted that none of the witnesses put forward by the Board could articulate why his behavior at the workshop had a negative impact on students. He characterized the encounter as a disagreement regarding teaching methods and that his behavior demonstrated his passionate commitment toward the mathematics and science curriculum. He pointed out that while Ms. Pappas, a special education teacher, raised her voice during the workshop, he was the only one asked to leave by Ms. Zak. He denied that he ever ripped up the workshop papers. He also pointed out that the special education teacher, who was suggesting modifications, had never taught high school students or physical science, nor did she receive formal training in science or math.

From the testimony presented and the exhibits introduced, it is clear that Mr. Blevis' behavior at the workshop was disturbing to a number of the staff members present. Ms. DeCarlo, a science teacher at Lyndhurst for twenty-two years, described Mr. Blevis' behavior at the workshop in a letter to the principal dated October 9, 2006. She said that:

> [A]ny of the activities that Mr. Blevis didn't approve of he made comments such as 'this is ridiculous' and 'Why do I have to be subjected to this nonsense.'... Mr. Blevis spent the entire time maligning Ms. Pappas for her comments about how the special education students in the classroom need modification. He became very loud and obnoxious. ..Mr. Blevis has overstepped his bounds as an educator and as a human being. His outward disdain for those of us who he feels are inferior to himself, is totally out of control.

Ms. Rendzia, a special education teacher, who was present at the workshop, stated in a letter dated October 10, 2006:

> [N]o matter what suggestions I or myself made to Mr. Blevis, he would not consider one idea, refused our suggestions and basically made me feel that I had nothing worthy to contribute to the conversation on the subject of physical science.... Later, when Mr. Blevis finally did leave, he took the workshop papers, ripped them up in front of everybody and threw them in the garbage.

During her testimony Ms. Rendzia characterized Mr. Blevis' actions as hostile. She described his behavior as being angry, going beyond the normal voicing of an alternate opinion. She considered Mr. Blevis' actions as "a deviation from normal behavior." Both Ms. Vladescu, another science teacher and Ms. Zak the supervisor of the department testified that Mr. Blevis ripped up the workshop papers.

As another example of his inappropriate behavior and inability to work cooperatively with his colleagues the Board presented four witnesses: Ms. Rendzia, Ms. Vladescu, Ms. DeCarlo and Ms. Zak, who testified regarding Mr. Blevis' behavior while he was on hall monitoring and study hall monitoring. Ms. Rendzia remarks seemed to typify the testimony of the other witnesses on this issue. She stated:

> I think he's very scary. I think he's very angry. I've seen him in the hallway, when he's had hall monitoring duties, and he would like look into your classroom and see what's going on, and it was very intimidating. ...Because it wasn't just like a glance into a classroom to see who was there. It was like a leer -- like looking, like a little bit of a smirk, and like, 'Hey, what's going on?' You know, 'I'm here!' It was intimidating, you know, it wasn't just a glance like if you're walking by a classroom, like who's in there. It was a stare...

Ms. Zak testified that she observed during study hall that Mr. Blevis was monitoring staff instead of monitoring his students.

Mr. Blevis denied that he leered, smirked or spied on other teachers. Any smirking that did occur at the workshop was the normal reaction of an older teacher dismissing the uninformed opinion of a newer teacher. In any case, he asserted that the Board had failed to prove that his smirking or leering was directed at students or had an impact on them.

I do not agree with Mr. Blevis' assertion that his behavior at the workshop did not impact on his relations with his students. In the first place, according to their IEP's, these students were supposed to be mainstreamed into the regular education curriculum in Earth Science. Mr. Blevis' insistence that the students be taught in a segregated class was contrary to their IEP's and in violation of the IDEA. He had an obligation to try to modify the curriculum to meet the needs of these students. Mr. Blevis explained his behavior at the workshop as being passionate about the fact that Earth Science should be taught after algebra was completed or the special needs children would not be able to grasp the material. While that might have been considered for the following year, it was not an option at the time of the workshop.[1] He absolutely refused to listen to any suggestions to make the curriculum accessible to the special education students during the current school year. His behavior, in light of the legal requirements, had a definite impact on the students in his class. The assertion regarding his behavior toward other staff and its impact on the students will be dealt with later in the opinion.

Negative behavior toward colleagues

The Board pointed to a number of incidents of harassing and threatening conduct, which they asserted created an intolerable working relationship with staff and ultimately impacted the students. They included a letter from a fellow science teacher, Mariana Vladescu, in which she claimed that Mr. Blevis accused her of falsifying her

[1] Ms. Venner, the substitute teacher who took over Mr. Blevis' class, when he was suspended, claimed that she was able to teach the special education students the algebra concepts that applied to the Earth Science class.

student's grades and threatened that he was compiling a file of evidence against her. She claimed that these accusations made her very nervous. Ms. Vladescu also alleged that Mr. Blevis destroyed a label maker that she used in setting up her lab. She testified that only Mr. Blevis, the custodian and she had access to the prep room where the label maker was kept. She also testified that she believed that Mr. Blevis had sabotaged one of her experiments. She felt that Mr. Blevis harassed her by coming to her classroom door and listening to her lessons and interrupting her class to go into the prep room to pretend to make telephone calls. Most disturbing to Ms. Vladescu was Mr. Blevis' subsequent admission to taping conversations with his fellow colleagues without their knowledge. She considered the taping an attempt to carry out his prior threat to compile a file against her. Ms. Vladescu also testified that she was scared that Mr. Blevis' strange behavior would culminate in a violent situation as had occurred at the Virginia Tech shooting.

The Board also pointed to a letter dated October 16, 2006 written by Ms. DeCarlo, in which she noted threatening, erratic and unusual behavior by Mr. Blevis. It related to an encounter that she had had with Mr. Blevis, when he came into her room.

> He immediately began pacing up and down the floor ranting about how 'SHE is a LIAR' and that 'SHE made a big mistake spewing her lies on paper because you know I have HER now.'... He became flushed, diaphoretic and left. I did not feel comfortable in the company of Mr. Blevis at that time, especially alone. He became more angry and unstable as his one sided conversation progressed. His arms were flailing, he was pacing and sweat was dripping down his brow. His reference to the girls club seemed to be a veiled threat to me as well as other women who have 'crossed' him and 'how dare they'! His demeanor is adversarial, disruptive and alarming.

Mr. Blevis' response to Ms. DeCarlo's charge was that he visited Ms. DeCarlo, as his LEA representative, for the purpose of complaining about Ms. Zak's harassing and hostile behavior toward him. When Ms. DeCarlo refused to seriously consider his complaints, contrary to her obligation as a LEA representative, Mr. Blevis became upset and frustrated.

Ms. Cowell, the school librarian, also testified about disturbing behavior by Mr. Blevis. Ms. Cowell stated that she has worked with Mr. Blevis for twenty years and had been president of the teacher's association for part of that time. During the past 3-4 years she has seen his behavior deteriorate. She claimed that Mr. Blevis would come into the library very upset, angry and annoyed. He would become red, shaky and start talking to himself. Whenever things did not go his way, he claimed that there was a conspiracy against him. Ms. Cowell saw the actions that he complained about as the normal procedures in a school. She counseled him to do as he was told. She said that Mr. Blevis would come into the library with his briefcase and shuffle papers. He took the briefcase everywhere with him. If she asked him if she could help him, he would say nothing. She testified that his behavior affected his ability to work with the other teachers. She described him as rigid. She testified that this type of behavior had to affect the students as well as the staff. As an example she stated that she had been co advisor to the student government. She said that Mr. Blevis would not let the students have a say in how the government was run. Everything had to be under his control. As a result she felt compelled to resign her advisory position, because she could not work jointly with him. The student government dwindled and became defunct.

Mr. Blevis' response was that he came to Ms. Cowell as president of the Association. On a number of occasions he wanted to file grievances, but the executive members of the council told him that his complaints were not grieveable. He became upset because Ms. Cowell and the committee were unresponsive. Mr. Blevis also objected to Ms. Cowell's statement that she tried to counsel him. He stated that she was not a professional counselor and he would not come to her for counseling.

The Board also pointed to Mr. Blevis' inappropriate comments in front of students as an indication of his behavior having an impact on the students. Ms. DeCarlo testified to two incidents where Mr. Blevis made inappropriate comments to her in front of students. In one incident, after Mr. Blevis left, the student asked "What was Mr. Blevis' problem? Why did he do that to you?" Ms. DeCarlo claimed that another time, Mr. Blevis indicated in front of students that a teaching method that she was using was useless. Ms. DeCarlo acknowledged that she had requested a transfer, if Mr. Blevis

returned to Lyndhurst High School. She stated that "His disturbing behavior brings me to a point where I can no longer trust working with him." Ms. DeCarlo was particularly disturbed that Mr. Blevis shared a classroom with her. She believed that he was leaving his briefcase in the room to record her and her colleagues.

Mr. Blevis did not acknowledge making inappropriate comments in the presence of students. As far as the recording of conversations, he admitted that he started taping staff in March 2006. He stated that he did this following an argument with Ms. Vladescu and an encounter with Ms. Zak where she yelled at him. He said that he consulted with his brother who advised him that Ms. Zak was volatile and he should tape his conversations with staff to protect himself.[2]

It is clear from the testimony presented by the Board, that a number of the teachers felt strongly that Mr. Blevis had exhibited inappropriate behavior in front of them. The words agitated and angry were used by a number of witnesses. In addition, they all seemed to conclude that Mr. Blevis' behavior had deteriorated in the past number of years. They were especially nervous about the fact that Mr. Blevis was taping their conversations, though they did not discover this until after he had been suspended from school. Mr. Blevis has pointed to the fact that the Board has failed to present any direct testimony showing detrimental effect suffered by the students as a result of his alleged erratic behavior. This will be discussed further within the brief.

Relationship with Ms. Zak

There was extensive testimony from Ms. Zak that she had been subjected to harassing and threatening conduct by Mr. Blevis. She claimed that Mr. Blevis stared her down or smirked at her during meetings. She asserted that he was trying to intimidate her and she was uncomfortable being alone with him. Mr. Williams, another veteran teacher in the Board, testified that Mr. Blevis deliberately baited Ms. Zak by smirking and grinning at her during meetings. He believed that Mr. Blevis was particularly demeaning toward women in the department and this attitude had worsened

[2] It should be noted that while Mr. Blevis' brother was present during the hearing, he was not called as a witness by the respondent.

over the years. According to him, it definitely affected the ability of the staff to work together in a collegial fashion. Ms. Zak claimed that she had witnessed Mr. Blevis banging on computer desks, slamming down telephones, mumbling under his breath and ranting about how stupid she is in front of staff and students. She testified that, after Ms. DeCarlo told her about her encounter with Mr. Blevis, when he said that he was "going to get her", she became very nervous. While she could not prove it, she believed that the damage done to her two cars, caused by chemical thrown at the vehicles, was caused by Mr. Blevis. Ms. Zak testified that staff had threatened to leave, if Mr. Blevis returned to the school. The loss of seasoned teachers would definitely harm the students. In addition, she believed that his inward rage could explode and endanger the students. She also stated that his negative comments about her and some of the other staff in front of students showed that he was not a good role model to students.

During Mr. Blevis' testimony he made it clear that he believed that Ms. Zak had targeted him for ridicule. She had placed a less senior member of the department in charge of materials and he had to go to Ms. Vladescu to ask permission to get supplies. He believed that Ms. Zak criticized him for not doing enough labs, but arranged his schedule so that it was impossible to do the labs in the time provided. Because of the arrangements that she had made about doling out chemicals, he did not have the proper materials to teach his science classes. He denied instigating arguments with her, but instead claimed that she was the one who was irrational and provoked encounters. In addition, he pointed out that Ms. Zak's evaluation of him the prior year had been positive. He argued that this proved that his behavior had not deteriorated as she charged. As for the fact that Mr. Blevis' prior evaluation by Ms. Zak was positive, I found Ms. Zak's testimony credible that she had been at the school a relatively short period of time, when the prior evaluation was done. As time passed, she got a clearer understanding of Mr. Blevis teaching abilities and behavior.

It is clear from the testimony of Ms. Zak and Mr. Blevis that their relationship is completely poisoned. Mr. Blevis was obviously angered that Ms. Zak received the supervisory position, which he believed he was more qualified to hold. In addition, he

had years of experience in the Board, while she had never taught there before. The witnesses also pointed out that Mr. Blevis had a problem with women in authority and Ms. Zak held such a position. On the other hand, it also seems clear that Ms. Zak had great trouble dealing with Mr. Blevis. Some of her early decisions likely exacerbated a difficult situation, which she should have realized could occur between a supervisor hired from outside the Board and a senior staff member, who had the credentials for the supervisory position. She allowed herself to be rattled easily and took the bait that Mr. Blevis threw out. On the other hand, Mr. Blevis had an obligation, as a teacher and staff member, to work together with his supervisor and colleagues. There is no indication that he did so and in fact tried his best to undermine his supervisor's position.

Protocol

The Board pointed to a number of incidents when Mr. Blevis failed to follow school protocol and was unprofessional. As a result of which, other members of the staff were inconvenienced. There was testimony that Mr. Blevis was supposed to be present at an academic competition on a Saturday. He went home sick on Friday. Mr. Williams volunteered to cover the competition. He arrived at the school early Saturday morning only to find Mr. Blevis there. Mr. Blevis claimed that he had tried to call Mr. Williams at home and got no answer. However, there was testimony that Mrs. Williams was at home and never got a telephone call from Mr. Blevis. Another instance involved Mr. Blevis failing to have his class clean up after their lab. Ms. Vladescu stated that, not only did she have to clean up after Mr. Blevis' students, but he claimed that it was Ms. Vladescu's class that was responsible for the mess. There was also testimony about Mr. Blevis failing to have his students clean up their dissecting trays after the laboratory experiment was over. Ms. Zak also alleged that Mr. Blevis did not follow the chemical and equipment sign out procedures. She claimed that none of the seven other science teacher failed to follow the chemical and equipment sign out procedure. For his part, Mr. Blevis asserted that, as a result of this flawed procedure, he did not have the proper chemicals for his laboratories.

Impact on Students

The Board claimed that Mr. Blevis' behavior was having an adverse effect on the students. Ms. Zak received complaints from the parents of special education students, that Mr. Blevis was going too fast and that their children did not know what was going on in class. She requested that Mr. Blevis slow down and accept suggestions from the special education teachers to modify the curriculum. However, he refused all suggestions from her or the special education teachers. Once the substitute teacher took over, the children were able to grasp the material. Ms. Pescevich, the principal of the high school, testified that Mr. Blevis left the students unattended. She stated that as advisor to the student government, he was supposed to supervise a project to send care packages to the troops for the holidays. He was given an additional stipend as advisor. Ms. Pescevich complained that Mr. Blevis constantly made excuses for why the project was not completed in a timely fashion. The packages did not get sent out in time for the holidays. In addition, on one occasion, she found the students alone in school after hours. She stated that this jeopardized the safety of the students and was against the school rules. Mr. Blevis was responsible for staying at school until all of the students were gone. Ms. Zak claimed that she discovered, after Mr. Blevis was suspended, that he had failed to prepare his students for the academic competitions for which he was an advisor. Most importantly, the Board claimed that they discovered that Mr. Blevis had failed to follow the protocol established for the mid term exams. Mr. Blevis was supposed to follow the same test protocol as another teacher, Mr. Russo. The respondent alleged that Mr. Blevis told his students that they were only required to complete the multiple choice part of the test. The essays were for extra credit. This was not the agreed upon procedure. As a result, the majority of Mr. Blevis' students failed the examination, since Mr. Russo's students were instructed to complete both the multiple choice and essay portion of the test. The Board alleged, that due to Mr. Blevis' actions, the exam had to be scrapped for his entire class. This impacted the students, since some of them would have been exempt from the final, if they had passed the midterm.

Mr. Blevis countered that he was not aware that the students were planning to stay late to work on the troop project. He left school at the normal dismissal time and expected that the children in the student government had done the same. As for the examination, he testified that he had not told the students that the essays were only for extra credit. He said that there was a miscommunication between Mr. Russo and himself about the grading of the midterms. Because he was suspended before he had a chance to complete the grading, he was not given an opportunity to speak with Mr. Russo and correct the problem.

The Board claimed that Mr. Blevis' failure to follow the directives of his supervisor, failure to complete assigned duties, and failure to follow established policies affected his ability to teach and associate with the students. There seems to be ample evidence that, despite the awards that Mr. Blevis had received for outstanding teaching in the past, his present teaching methods, which consisted mostly of lecturing, were not particularly suited toward the students that he was teaching. Certainly his position as far as special education students had a direct impact on this portion of the student body and was in contravention of the IDEA. There was testimony about students sitting on the window ledge and falling asleep during astronomy class lectures and students saying that they were having "pretend lab day". It also appears that Mr. Blevis was trying to get as many stipends as possible for being advisor to various student groups, but he expended the minimum amount of effort in these activities. This behavior points more to a condition of burn out, rather than proof that his behavior deviated from the norm. However, there was ample proof that Mr. Blevis' behavior toward his colleagues and supervisors had become more and more erratic and irrational during the past few years. Testimony that he was so perturbed that he became red in the face and shook all over are signs of a person who is losing control. Statements about conspiracies against him and taping of fellow staff members indicate issues of mental stability. His passion about the curriculum and proper school procedure does not explain away his unusual behavior. As the respondent has pointed out, N.J.S.A. 18A:16-2 was designed to protect students from the actions of teachers who show evidence of deviation from normal physical or mental health. While, the majority of the incidents cited by the Board dealt with erratic behavior by the respondent against staff members, this type of

behavior cannot be isolated from the student body. In a school setting there is constant interaction among teachers and students. Problems with staff will ultimately affect the students. Teachers who feel threatened will eventually react to the tension they are feeling. This is bound to impact on students as well. In addition, if the staff is threatening to leave, that certainly affects the student body. This does not mean that, if a group of teachers, for no good reason, have decided that they do not wish to work with a fellow teacher; that the Board should acquiesce to their demands. However, that is not the case in this situation. There is ample evidence that Mr. Blevis has acted in an irrational and threatening manner to his fellow teachers and supervisor. There is also evidence that Mr. Blevis' unusual behavior has increased in frequency in the past several years. The Board is obligated to protect its student body. While there has been no direct threats to students, the behavior exhibited by the respondent could certainly spill over to the classroom.

CONCLUSION

Based on my analysis of the testimony and evidence presented and the legal arguments presented, I **CONCLUDE** that the determination of the Board, that the respondent present himself for a physical and psychological examination, was reasonable and necessary in order to insure the safety and well being of the students and staff.

ORDER

I therefore **ORDER** that the decision of the Board of Education be upheld and the respondent be required to submit to a physical and psychological examination.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/7/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 8/7/07

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 9 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESSES

For Petitioner:

Joseph Abate, Jr.

Susan Cowell

Lesley DeCarlo

Anita Pescevich

Margo Rendzia

Laura Venner

Mariana Vladescu

Richard Williams

Madalena Zak

For Respondent:

John A. Blevis

EXHIBITS

For Petitioner:

P-1 Ms. DeCarlo's Letter, dated October 9, 2006

P-2 Ms. DeCarlo's Letter, dated October 16, 2006

P-3 Ms. DeCarlo's Letter, dated May 15, 2007

P-4 Memo from Mr. Williams to Principal, dated October 10, 2006

P-5 Letter from Ms. Rendzia to Principal, dated October 10, 2006

P-6 Letter from Ms. Vladescu to Mr. Abate, dated May 8, 2006

P-7 Memo from Ms. Vladescu, dated October 10, 2006

P-8 Memo from Ms. Vladescu to Mr. Abate, dated October 16, 2006

P-9 Memo from Ms. Zak to Mr. Blevis, dated October 16, 2006

P-10 Memo from Ms. Zak to Mr. Abate, dated October 16, 2006

P-11 Memo from Ms. Zak to Mr. Blevis, dated May 9, 2006

P-12 Memo from Ms. Zak to Mr. Blevis, dated June 14, 2006

P-13 Memo from Ms. Zak to Mr. Blevis, dated March 23, 2006

P-14 Memo from Ms. Zak to Mr. Blevis, dated February 9, 2006

P-15 Memo from Ms. Zak to Mr. Blevis, dated January 30, 2006

P-16 Letter from Ms. Zak to Mr. Blevis, dated October 12, 2005

P-17 Memo from Ms. Zak to Mr. Blevis regarding Chemical and Equipment Sign-out, dated September 15, 2006

P-18 Memo from Ms. Zak to Mr. Blevis, dated October 9, 2006

P-19 Memo from Ms. Zak to Mr. Blevis, dated October 20, 2006

P-20 Memo from Ms. Zak to Mr. Blevis regarding Special Education Students, dated October 20, 2006

P-21 Rice Notice, dated October 16, 2006

P-22 Letter from Mr. Abate to Mr. Blevis, dated October 20, 2006

P-23 Memo, dated October 30, 2006

P-24 Complaint in Federal Court, dated October 10, 2006

P-25 N.J. Superior Court Complaint April 17, 2003

P-26 Memo regarding September 20 meeting, dated September 27, 2006

P-27 Letter from M. Kiefer to Ms. Zak, dated October 26, 2006

P-28 Memo from Ms. Pescevich to Mr. Blevis, dated November 28, 2006

P-29 Memo from Ms. Pescevich to Mr. Blevis, dated December 1, 2006

P-30 Memo from Ms. Pescevich to Mr. Blevis, dated December 5, 2006

P-31 Memo from Ms. Zak to Mr. Blevis, dated October 24, 2006

For Respondent:

R-1 Evaluation, dated February 9, 2006

R-2 Annual Narrative Report, dated May 1, 2006

R-3 Memo from Ms. Pescevich to Mr. Blevis regarding October 6, 2006 Memo, dated October 10, 2006

R-4 Trip Request Form, dated December 18, 2006

R-5 Letter from Lawyer to Mr. Abate, dated July 14, 2006

R-6 Grievance to Ms. Zak from Mr. Blevis, dated September 15, 2006

R-7 Memo from Mr. Blevis to Ms. Zak, dated October 6, 2006

R-8 Memo from Mr. Blevis to Ms. Zak regarding Special Education, dated October 23, 2006

R-9 Memo from Mr. Blevis to Ms. Pesevich, dated December 11, 2006

R-10 Letter from Mr. Blevis to Ms. Pesevich, dated January 29, 2007

R-11 Transcript –Exhibit "G" admitted only for the purpose of impeachment of Ms. Zak

#471-07

OAL DKT. NO. EDU 5368-05
AGENCY DKT. NO. 74-3/05

DONNA YACKWACK,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/05/07

Date of Mailing: 12/06/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05368-05
AGENCY DKT. NO. 74-3/05

DONNA YACKWACK,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, LLC, attorneys)

Record Closed: November 5, 2007, Decided: November 13, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 13, 2005 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for hearing before the undersigned on November 30, 2007. Prior to that date the parties reached a settlement and forwarded the enclosed Settlement Agreement indicating the terms of settlement which was received by the undersigned on November 5, 2007.

I have reviewed the record and the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11-13-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 11-16-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 16 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, NJ 07102-5504
(973-642-0161
Attorney(s) for Petitioner

RECEIVED
OFFICE OF ADMIN. LAW
2007 NOV -5 P

DONNA YACKWACK,	
Petitioner,	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
vs.	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,	**OAL DKT. NO.: EDUOT 05368-2005N**
Respondent.	**AGENCY REF. NO.: 74-3/05**
	SETTLEMENT AGREEMENT

Petitioner, Donna Yackwack, hereby agrees with Respondent, Board of Education of the City of Elizabeth, to settle the above referenced matter as follows:

1. Petitioner has filed for a disability pension with the Public Employees Retirement System effective June 1, 2007, which application is currently being processed by the PERS;

2. Respondent shall reinstate to Petitioner a total of 6 sick days utilized on October 19, 20, 21, 22, 25 and 28, 2004, a family illness day utilized on October 26, 2004 and two personal days utilized on October 27 and 29, 2004;

3. The Respondent will maintain the Petitioner on its various health and medical insurance plans through September 1,

2007 in order to assure that Petitioner will be receiving such coverage through the date that the PERS Board of Trustees acts on her application for an ordinary disability pension;

4. The parties agree that this settlement shall not constitute an admission relative to this case by either party;

5. Petitioner agrees that this settlement resolves any and all claims that she has, or may have had, against Respondent relative to any issue raised in or related to this matter;

6. Petitioner agrees to waive any rights she has or may have had to file any other grievance, complaint, petition or charge in any court of law or administrative agency, including, but not limited to the Commissioner of Education, Division of Workers Compensation, Office of Administrative Law, Public Employment Relations Commission or any other forum, relative to any issues or potential issues that arose or could have arisen during the time that petitioner incurred and was treated for the injury which occurred on or about October 18, 2004;

7. Petitioner waives any claims for compensatory damages, interest, attorney fees, class of suit and/or any other forms of relief in relation to the injuries that occurred on or about October 18, 2004;

8. Petitioner agrees that she has entered into this settlement agreement voluntarily and without coercion;

9. Petitioner agrees that she has been fully and fairly represented by legal counsel throughout this proceeding;

The Petitioner agrees to withdraw with prejudice her petition in this matter;

10. All parties mutually agree and enter into the terms contained in this settlement;

11. All parties agree and acknowledge that the settlement agreement herein embodies the parties full understanding of the terms of the parties' settlement and constitutes a full and final resolution, with prejudice, of the case referenced herein;

12. This agreement may only be modified in writing signed by all the parties;

13. All parties hereby agree that the terms of this settlement are binding upon all parties, their heirs and assigns.

OXFELD COHEN, PC
Attorney(s) for Petitioner

DATED: 9/27/07

By: _____
NANCY I. OXFELD, ESQ.

MURRAY LAW FIRM, LLC
Attorney(s) for Respondent

DATED: 10/1/07

By: _____
KAREN A. MURRAY, ESQ.

DATED: 9-26-07

_____
DONNA YACKWACK, Petitioner

C
O
P
Y

10p

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Oxfeld Cohen, PC on behalf of Donna Yackwack have engaged in discussions to resolve pending litigation, (OAL Dkt. No. EDUOT 05368-2005N; Agency Ref. No. 74-3/05), and

WHEREAS, in the interest of cost effectiveness and judicial economy and in lieu of a hearing, the parties have agreed to resolve this matter, with prejudice,

NOW THEREFORE, BE IT RESOLVED, that the Board hereby agrees to accept the Confidential Agreement on file with the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON OCTOBER 18, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

473-07

#473-07SEC

AGENCY DKT. NO. 324-10/07

IN THE MATTER OF ROSEMARIE ARNOLD,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF SADDLE RIVER, BERGEN COUNTY.	:	DECISION
	:	

The record of this matter and the amended decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed.[1] No comments were filed by the respondent, but the Commissioner has been notified that the respondent did attend training on November 17, 2007 as directed by the Commission.

Upon review, the Commissioner notes that the penalty recommended by the Commission in its amended decision dated November 2, 2007 – suspension until attendance at the next scheduled training, and removal if the respondent did not so attend – is consistent with penalties historically imposed for violations of this type. However, in the present instance, the question of removal is moot in light of the respondent's having attended training as directed, and no suspension can be effectuated because the training in question occurred prior to expiration of the period within which the respondent was entitled to submit exceptions to the Commissioner before her final ruling on the Commission's recommendation. *N.J.A.C.* 1:6C-18.3(b). Thus, notwithstanding her concurrence with the Commission's action in principle, the Commissioner cannot order the sanction recommended.

Under the circumstances, the Commissioner instead finds that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish

[1] On October 11, 2007, the School Ethics Commission issued a written decision incorporating its September 25, 2007 determination that respondent had failed to attend training and recommending to the Commissioner that respondent be suspended until she went to such training on October 23, 2007, but removed if she did not. In response to respondent's representation that she could not attend on October 23, 2007, but would attend on November 16, 2007 (actually November 17, 2007), the Commission – on October 30, 2007 – authorized issuance of an amended decision so permitting; that decision was duly issued on November 2, 2007.

her for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/06/07

Date of Mailing: 12/07/07

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T01-07**
Rosemarie Arnold	:	**AMENDED**
Saddle River Board of Education	:	**DECISION FOR FAILURE**
Bergen County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Rosemarie Arnold was newly elected or appointed in May 2006 to a local school board or charter school board and therefore, had until May 2007, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on July 31, 2006, and December 28, 2006; and

WHEREAS, the NJSBA conducted seven training sessions between April 2006 and March 2007 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on September 7-9, 2007; and

WHEREAS, the Commission issued an Order on August 17, 2007, directing Ms. Arnold to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Arnold responded to the Order on August 20, 2007 and indicated that she attended the training session on December 9, 2006; and

WHEREAS, Mark A. Bonjavanni from the NJSBA certified that Ms. Arnold had arrived late to the December 9, 2006 training session and had missed the legal portion of the training; and

WHEREAS, the Commission notified Ms. Arnold that the Commission would discuss this matter at its September 25, 2007 meeting; and

WHEREAS, Ms. Arnold has failed to attend the legal portion of the required training program during the first year of the board member's first term as required in N.J.S.A. 18A:12-33; and

WHEREAS, at its September 25, 2007 meeting, the Commission found that her failure to attend the legal portion of the board member training from April 2006 to March 2007 constituted a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, at its September 25, 2007 meeting, the Commission found that the appropriate penalty for the violation was suspension from the board until she attends the legal portion of the October 23, 2007 training session and removal if she failed to attend the legal portion of the October 23, 2007 session and recommended such penalty to the Commissioner of Education; and

WHEREAS, Ms. Arnold indicated that she could not attend the October 23, 2007 training session because of inability to obtain child care for her children and requested the Commission to consider its September 25, 2007 recommendation to the Commissioner; and

WHEREAS, at the October 30, 2007 meeting, the Commission reconsidered its decision and voted to amend its penalty determination finding that the appropriate penalty for the violation was suspension from the board until Ms. Arnold attends the legal portion of the November 16, 2007 training session and removal if she fails to attend the legal portion of the November 16, 2007 training session; and

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Rosemarie Arnold violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until she attends the legal portion of the November 16, 2007 training session and removal if she fails to attend the legal portion of the November 16, 2007 training session.

Paul C Garbarini /gb

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: November 2, 2007

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on October 30, 2007.

Joanne Boyle
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions/decision template

473-07

#473-07 SEC

IN THE MATTER OF RAYMOND A. DELBURY, :

SUSSEX-WANTAGE REGIONAL BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, SUSSEX COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission (Commission) found that respondent – a member of the Sussex-Wantage Regional Board of Education – violated *N.J.S.A.* 18A:12-24(d), (e), (i) and (j) of the Code of Ethics for School Board Members of the School Ethics Act through actions which included, *inter* alia: voicing questions and concerns directly to reporters without attempting to address them through the district administration, and contacting teachers and administrators directly without going through the superintendent. The Commission recommended the penalty of censure in this matter.

The Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – adopted the Commission's recommendation that respondent be censured, finding that the Commission fairly considered the nature and circumstances of respondent's violations, as well as applicable case precedent pertaining to penalty.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 6, 2007

AGENCY DKT. NO. 337-11/07

IN THE MATTER OF RAYMOND A. DELBURY, :		
SUSSEX-WANTAGE REGIONAL BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SUSSEX COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission") – finding that Sussex-Wantage Regional Board of Education (Board) member Raymond A. Delbury violated *N.J.S.A.* 18A:12-24.1(d), (e), (i) and (j) of the Code of Ethics for School Board Members of the School Ethics Act (Act) and recommending a penalty of censure – have been reviewed pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1. Although Mr. Delbury was afforded 13 days from the mailing date of the decision to file written exceptions to the Commission's recommended penalty pursuant to *N.J.A.C.* 1:6C-18.3(b), no exceptions were received.

Initially, the Commissioner emphasizes that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is not reviewable herein. Rather, the Commissioner's jurisdiction is limited to review of the sanction recommended by the Commission following its finding of violation.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure of Mr. Delbury is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations it found, the Commission adequately considered the nature and circumstances of Mr. Delbury's offenses, so that there is no basis upon which to disturb its recommendation.

Accordingly, IT IS hereby ORDERED that Raymond A. Delbury be censured as a member of the Sussex-Wantage Regional Board of Education.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/06/07

Date of Mailing: 12/07/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF RAYMOND A. DELBURY	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C64-06**
SUSSEX WANTAGE REGIONAL BOARD OF EDUCATION *SUSSEX COUNTY*	:	**DECISION**

This matter arises from a complaint, filed on December 11, 2006, by Arthur Jacobs, President of the Sussex Wantage Regional Board of Education (Board), alleging that Raymond Delbury, a member of the Board, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. Complainant specifically alleges as follows:

1. The respondent violated N.J.S.A. 18A:12-24.1(a), (c), (e) and (g) of the Code of Ethics for School Board Members and Board policy when, on November 9, 2006, he took out a classified ad in the local newspaper which said, "Call Sussex Wantage BOE member Ray Delbury for answers to your questions (973) 702-3935."

2. The respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (g) and (j) of the Code of Ethics for School Board Members and Board policy when, on November 9, 2006, he wrote a letter to the editor.

3. The respondent violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics for School Board Members and Board policy because he attempted to control spending and micromanage the Sussex Wantage Regional School District (District). The respondent also violated N.J.S.A. 18A:12-24.1(a), (c), (d), (g), (i) and (j) of the Code of Ethics for School Board Members because he went into the school and took pictures of open windows in the middle school and maxi pads in the Board office bathroom. He then spoke with reporters regarding the open windows in the middle school and the maxi-pads in the Board office bathroom.

4. The respondent violated N.J.S.A. 18A:12-24.1(a), (g) and (j) of the Code of Ethics for School Board Members because he did not take his questions to the superintendent or request information from the superintendent or an appropriate administrator. Instead, he went directly to the Board office without asking or notifying anyone and takes the information he wants. The respondent then showed the information to reporters. On October 12, 2006, the respondent was found going through documents in a secretary's office while the secretary was not present.

5. The respondent violated N.J.S.A. 18A:12-24.1(b) and (f) of the Code of Ethics for School Board Members because he home schools his children and has made every decision based on stopping or reducing spending rather than on the basis of the educational welfare of the children of the District.

6. The respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members because he has treated the teachers and other education professionals in a demeaning and harassing manner and contacts teachers and administrators directly without going through the superintendent.

The respondent filed a timely answer on January 22, 2007 through his attorney, Donald P. Hogan, Esquire, wherein he denied that he violated the Act, asked the Commission to find the complaint frivolous and impose sanctions, pursuant to N.J.S.A. 18A:12-29(e), and answered as follows:

1. The respondent admitted taking out the ad, but maintained that he did not indicate in the ad that he was speaking on behalf of the Board.

2. The respondent admitted that he wrote the letter to the editor. The respondent argued that he did not sign the letter as a Board member; rather the newspaper added his Board member title. He further maintained that the letter was accurate.

3. The respondent denied that he micromanaged the District or attempted to control spending.

4. The respondent answered that he has repeatedly asked questions of the administration. The respondent denied opening file cabinets, going through anyone's desk or removing any documents from the Board offices.

5. Respondent maintained that Board members go regularly to the Board office to pick up mail. He further argued that he did not need permission to see bills that he had reviewed earlier in the day.

6. The respondent denied that he harassed, demeaned or bullied staff in the District.

The Commission invited, but did not require, the parties to attend its April 24, 2007 meeting. The parties were advised of their right to bring counsel and witnesses. The matter was adjourned to the May 22, 2007 meeting. The complainant and his witnesses, Susan Petrick, Joyce Cosh, Edward Izbicki, Susan Boyle and Diane Snure attended the May 22, 2007 hearing and testified before the Commission. The respondent did not attend the meeting. During the public portion of the May 22, 2007 meeting, the Commission voted to find that the respondent did not violate the Code of Ethics for School Board Members as alleged in allegations one, two, three, four and five. The Commission also voted to find that the respondent did not violate N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (g) and (j) as alleged in allegation six. However, the Commission voted to find that the respondent violated N.J.S.A. 18A:12-24.1(i) as alleged in count six and to recommend to the Commissioner of Education that the respondent be

reprimanded. At its June 26, 2007 meeting, the Commission reconsidered its previous determination and voted to find that the respondent also violated N.J.S.A. 18A:12-24.1(j) as alleged in count four and N.J.S.A. 18A:12-24.1(e) as alleged in count six. At its September 25, 2007 meeting, the Commission again reconsidered its previous determination and voted to find that the respondent violated N.J.S.A. 18A:12-24.1(j) as alleged in count three and N.J.S.A. 18A:12-24.1(d) and (j) as alleged in count six. At its October 30, 2007 meeting, in light of the additional violations it found at its June and September meetings, the Commission reconsidered its determination to recommend to the Commissioner of Education that the respondent be reprimanded and voted to recommend to the Commissioner of Education that the respondent be censured. The Commission adopted this decision at its October 30, 2007 meeting.

FACTS

The Commission was able to discern the following facts based on the pleadings and the documents submitted.

At all times relevant to the allegations in this complaint, the respondent was a member of the Board and the complainant was President of the Board. Board Policy 9020 provides that only the Board President can speak for or in the name of the Board.

On November 9, 2006, the following classified ad was taken out by the respondent in a local newspaper: "Call Sussex Wantage B.O.E. member Ray Delbury for answers to your questions. (973) 702-3935." On the same day and in the same local newspaper, the following letter to the editor, written by the respondent, was published:

> As a newly appointed member of the Sussex Wantage Board of Education, I still do not understand why it is so hard for you and me, (the taxpayer) to find our basic information concerning the running of our school system.
>
> I do not understand why, when I ask simple questions (about subjects such as transportation or travel logs) or request copies of expense accounts (if they exists[sic]), or request a detailed summery [sic] of an employees [sic] employment package, or ask to review a contract or other basic information necessary to run a 21-million dollar enterprise, I either receive partial information, or I need to request the information a second or third time causing month's [sic] of delay, or I might not get the requested information at all.
>
> Ladies and gentleman, we need your involvement and help. I am constantly told:
>
> Shhhhhhh keep it quiet. It can be quiet no longer. It is your money. You must get involved. With your help and the help of those board members that are willing to stick their necks out for you and our children, we together can (and will) straighten this place out. But it can not, and it will not, be done without your involvement.

If you owned a 21-million dollar business, (You do!!), what would you do to the individual(s) that made the following decision? (Would you give them tenure? Would you leave them in the position? Would you move them horizontally?) (The Peters Principal) Let us know. In or about July 2006 the decision was made to purchase $12,000 to $15,000 worth math books to supplement our 10 year old books. The people who made this decision were in the position to know, or should have known, that new math books [sic] costing us nearly $50,000 were going to be presented to the board for purchase in September-October 2006.

To this day, I still do not know who the people were that made the decision to purchase these now obsolete math books.

I would also like you to know that the $12,000 to $15,000 July purchase was not presented to the finance committee for payment until October. If it had been given to finance, earlier this would have alerted the board to this expenditure,

We were once again sucker punched.

The respondent signed the letter "Raymond A Delbury" and the newspaper added "Sussex-Wantage Board of Education" under the respondent's name.

On or about December 5, 2006, the respondent spoke with reporters and complained about open windows at a school building and maxi-pads in the Board office bathroom. There was testimony that the respondent took pictures of the maxi-pads and open windows and these pictures were published in a local newspaper. The respondent's comments were printed in a December 5, 2006 local newspaper.

Mr. Izbicki, the District's Business Administrator, testified that it is normal practice for the finance committee to review bills before committee meetings. He testified that finance committee members go into the office of the business administrator to review and sign off on the bills before the committee meeting. He further testified that the respondent reviewed the bills with another member of the finance committee, but that he never signed off on the bills. On the morning of October 12, 2006, the respondent and another Board member, as members of the finance committee, went to the office of the business administrator to review the bills. The business administrator was not there. Ms. Cosh, the District's bookkeeper, testified that she provided the respondent and the other Board member a container with the bills. The respondent and the other Board member reviewed the bills, gave the container back to Ms. Cosh and left the office. When Ms. Cosh returned to the office about one hour and a half later, she found the respondent in the office reviewing the bills from the same container in which he had reviewed bills earlier that morning. The respondent had returned without notifying anybody that he was going back to finish reviewing the bills.

Ms. Petrick, the District's Supervisor of Curriculum and Instruction, testified that the respondent stopped in her office every Friday for several weeks and would ask her questions that she could not answer. She testified that the respondent would then get upset with her and ask why he could not get the information. Ms. Petrick testified that

the respondent wanted to see what the teachers actually used to teach and he wanted to observe the teachers teaching. She also testified that the respondent wanted to see the evaluations for each teacher. Ms. Petrick testified that she felt intimidated by the respondent when he became upset with her. She testified that she felt that the respondent was bullying her. Ms. Petrick testified that when the respondent got upset with her, his face would get red and he would get loud and in her face to the point that she would have to back off. She further testified that the respondent would put his hand in her face. Ms. Snure, a member of the Board, testified that she has seen the respondent get in the face of the people he demands information from. She also testified that if the respondent does not like what you say, he puts his hand in your face. She testified that she has seen the respondent treat Ms. Petrick in an unprofessional and intimidating manner.

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29, the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members.

The Commission will first address the complainant's contention in allegations one and two that the respondent violated Board policy. The Commission does not have jurisdiction to enforce Board policy. It only has jurisdiction to enforce the Act. Therefore, the Commission will not make a determination regarding the complainant's contention, in both allegations one and two, that the respondent violated Board policy.

The Commission will next address the complainant's allegations in counts one, two, three, four and six that the respondent violated N.J.S.A. 18A:12-24.1(a). N.J.S.A. 18A:12-24.1(a) provides:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Desired changes shall be brought about only through legal and ethical procedures.

As noted above, the Commission only has jurisdiction to find a violation of the Act; it does not have jurisdiction to find a violation of all laws, rules and regulations of the State Board of Education or court orders pertaining to the schools. Absent a determination from a court of law or an administrative agency of this State finding that the respondent failed to enforce all laws, rules and regulations of the State Board of Education, or court orders pertaining to schools, or a finding that the respondent attempted to bring about changes through illegal or unethical procedures, the Commission cannot find that the respondent violated N.J.S.A. 18A:12-24.1(a). The Commission can find no evidence to factually prove that the respondent failed to enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools or that the respondent failed to bring about changes only through legal and ethical procedures. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(a) and dismisses the

allegation that the respondent violated N.J.S.A. 18A:12-24.1(a) with respect to allegations one, two, three, four and six.

The Commission will next address the remaining allegations in counts one through six.

COUNT ONE

In count one, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (e) and (g) of the Code of Ethics for School Board Members when, on November 9, 2006, he took out a classified ad in a local newspaper. N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

To find a violation of N.J.S.A. 18A:12-24.1(c), the Commission would initially have to find that the respondent took Board action when he placed the classified ad in the local newspaper. The Commission would then have to find that the respondent failed to confine his Board action to policy making, planning and appraisal when he placed the classified ad. The classified ad said, "Call Sussex Wantage BOE member Ray Delbury for answers to your questions (973) 702-3935." The Commission notes that the respondent took out the classified ad on his own and without knowledge of the Board. In the ad, the respondent identifies himself as a member of the Board and gives a phone number where he can be called for answers to questions. The respondent does not indicate that he will answer questions on behalf of the Board. He does not indicate that he put the ad in the paper on behalf of the Board. He also does not indicate that he will only answer questions regarding the Board or education topics. Since he was not acting on behalf of the Board, the Commission finds that the respondent took private action when he placed the classified ad in the local newspaper. Since the respondent's action was private action and not Board action, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(c) and dismisses the allegation that respondent violated N.J.S.A. 18A:12-24.1(c) when he placed the classified ad in the local newspaper.

N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Having found that the respondent took private action when he placed the classified ad in the newspaper, in order to find a violation of N.J.S.A. 18A:12-24.1(e), the Commission must determine whether that private action could have compromised the Board. The complainant has provided no evidence to show how the respondent's

classified ad could have compromised the Board. To prove a violation of N.J.S.A. 18A:12-24.1(e), the complainant maintains that the ad violated Board policy because only the president speaks for the Board. However, the Commission notes that the ad does not indicate that the respondent will answer questions on behalf of the Board or speak for the Board. The ad only indicates that the respondent, a member of the Board, will answer questions. Having found no evidence to factually prove that respondent's private action compromised the Board, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(e) and dismisses this allegation in count one.

N.J.S.A. 18A:12-24.1(g) provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

To prove a violation of N.J.S.A. 18A:12-24.1(g), the complainant argues that the respondent gave misinformation in the ad. The Commission can find no misinformation in the ad. The respondent identifies himself as a member of the Board and gives a phone number for answers to questions. He does not indicate that he is acting on behalf of the Board or with knowledge of the Board. He does not indicate that he put the ad in the newspaper on behalf of the Board. The Commission can find no evidence to factually prove that the respondent failed to provide accurate information when he placed the classified ad in the local newspaper. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(e) and dismisses this allegation in count one.

COUNT TWO

In count two, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (j) of the Code of Ethics for School Board Members when, on November 9, 2006, he wrote a letter to the editor. The Commission initially notes that the respondent's letter to the editor was written prior to the Commission's advice in *Advisory Opinion A03-07*, (April 2, 2007), and, therefore, the Commission will not apply its advice to this case.

To prove a violation of N.J.S.A. 18A:12-24.1(c), which is set forth above, the complainant argues that the respondent took Board action when he wrote the November 9, 2006 letter to the editor and that the Board action went beyond policy making, planning and appraisal. The complainant also argues that the respondent did not have authority to write the letter to the editor on behalf of the Board. While the Commission notes that the respondent began the letter to the editor by identifying himself as an appointed member of the Board, it is apparent to the Commission, after reviewing the contents of the letter, that the respondent did not hold himself out as representing the

Board. It is also apparent to the Commission that the letter was written in the respondent's capacity as a private citizen. Thus, the respondent did not take Board action when he wrote the letter. Since the respondent's action was private action and not Board action, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(c) and dismisses the allegation that respondent violated N.J.S.A. 18A:12-24.1(c) when he wrote the November 9, 2006 letter to the editor and dismisses this allegation.

N.J.S.A. 18A:12-24.1(d) provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

To prove a violation of N.J.S.A. 18A:12-24.1(d), the complainant maintains that the respondent administered the schools when he wrote the letter to the editor. The Commission notes that in all of its previous decisions where it found a violation of N.J.S.A. 18A:12-24.1(d), there was some overt action that was taken by the board member to administer the schools. For example, in I/M/O William Lahn, C25-05, (December 20, 2005), a board member was found to have violated N.J.S.A. 18A:12-24.1(d) when he went directly to the guidance secretary to ask for documents, and when he went to the boys' locker room, inspected the lockers and instructed district employees regarding the supervision of students. Also, in I/M/O Julia Hankerson, C36-02, (June 24, 2003), a board member was found to have violated N.J.S.A. 18A:12-24.1(d) when she went to the board office on several occasions and instructed district employees to perform certain tasks. As alleged in count two, the respondent did not interact with staff, nor did he take any overt action to administer the schools. Rather, he wrote a letter to the editor critical of the administration, which does not rise to the level of administering the schools. Therefore the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(d) when he wrote the November 9, 2006 letter to the editor and dismisses this allegation.

Having found that the respondent took private action when he wrote the letter to the editor, in order to find a violation of N.J.S.A. 18A:12-24.1(e), which is set forth above, the Commission must determine whether that private action could have compromised the Board; however, the respondent has not provided any factual evidence to show how the letter could have compromised the Board. While the respondent's letter is critical of the administration and somewhat critical of the Board, this alone does not show that the letter compromised the Board. The Commission can find no factual evidence to show that the respondent's letter to the editor compromised the Board or could have compromised the Board. Based on the foregoing, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(e) when he wrote the letter to the editor and dismisses this allegation.

The complainant maintains that the respondent violated N.J.S.A. 18A:12-24.1(g), which is set forth above, because he provided inaccurate information in the letter to the

editor. However, the complainant did not provide any evidence to show that the information was inaccurate. Thus, the Commission has no basis upon which to determine if the information was inaccurate. The complainant also maintains that the respondent violated N.J.S.A. 18A:12-24.1(g) because he was not working in concert with his fellow Board members. However, the phrase "in concert with my fellow board members" is modified by the phrase "interpret to the staff the aspirations of the community for its school," and the complainant has provided no evidence to show that, in not working in concert with the Board, the respondent failed to interpret to the staff the aspirations of the community for its school. Based on the foregoing, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(g) when he wrote the letter to the editor and dismisses this allegation.

N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief school administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

To prove that the respondent violated N.J.S.A. 18A:12-24.1(j) when he wrote the letter to the editor, the complainant maintains that the letter itself is a violation of N.J.S.A. 18A:12-24.1(j). However, the Commission finds that the letter is not a violation of N.J.S.A. 18A:12-24.1(j), because N.J.S.A. 18A:12-24.1(j) refers to a process for the resolution of complaints. In the letter to the editor, the respondent merely shares his personal opinion and concerns with the public and asks for their help. The respondent's letter to the editor does not circumvent the resolution of any particular complaint. The Commission notes that, in the letter, the respondent is critical of the administration because of its alleged inability to provide the respondent with information as requested. However, these are not concrete complaints, but are general criticisms of the administration. Based on the foregoing, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(j) when he wrote the letter to the editor and dismisses this allegation.

COUNT THREE

In count three, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics for School Board Members, which is set forth above, because he attempted to control spending and micromanage the District . In order to find a violation of 18A:12-24.1(d), the Commission must determine if the respondent administered the schools. As noted above, in previous decisions where the Commission found a violation of N.J.S.A. 18A:12-24.1(d), there was some overt action that was taken by the board member to administer the schools. The complainant has provided no factual evidence of any overt action on the part of the respondent to show how the respondent's attempt to control spending and micromanage the district rose to the level of administering the schools. The Commission notes that one of the responsibilities of a board of education is adoption of the budget. In attempting to control spending, the respondent was carrying out his responsibility as a board member in relation to the

budget. Based on the foregoing, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(d) as alleged above and dismisses this allegation.

In count three, the complainant also alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (g), (i) and (j) of the Code of Ethics for School Board Members because he spoke with reporters and questioned why windows were open in the middle school and why there were maxi-pads in the Board office bathroom. To prove a violation of the above provisions, the complainant maintains that the respondent did not have authorization to speak with reporters and give the reporters pictures he took of the open windows and maxi-pads. To find a violation of N.J.S.A. 18A:12-24.1(c), the Commission must find that the respondent failed to confine his board action to policy making, planning and appraisal. There is no factual evidence to show that the respondent indicated to the reporter that he was speaking on behalf of the Board when he discussed the open windows and maxi-pads with the reporter. Thus, the Commission cannot find that the respondent was taking Board action when he did so. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(c) and dismisses this allegation in count three. Regarding N.J.S.A. 18A:12-24.1(d), the Commission finds that the respondent's conduct as alleged in count three does not rise to the level of administering the schools in violation of N.J.S.A. 18A:12-24.1(d). While the respondent took an action related to the schools when he took pictures of the open windows and the maxi-pads, this action alone does not rise to the level of administering the schools. The respondent did not go into the schools and close the windows or ask school personnel to close the windows. The respondent did not take the maxi-pads out of the bathroom or tell school personnel to remove them. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(d) and dismisses this allegation in count three.

To find a violation of N.J.S.A. 18A:12-24.1(g), the Commission must determine if the respondent failed to hold all matters pertaining to the schools confidential which, if disclosed, would needlessly injure individuals or the schools or provided inaccurate information. The complainant provided no factual evidence to show that the respondent revealed information that should have been kept confidential. The information regarding the open windows at the middle school and the maxi-pads in the Board bathroom is not the type of information which the respondent was required to keep confidential. The complainant also did not provide information to show that the pictures were inaccurate. Therefore, the Commission finds that the respondent did not violate N.J.S.A. 18A:12-24.1(g) and dismisses this allegation in count three.

N.J.S.A. 18A:12-24.1(i) provides:

> I will support and protect school personnel in proper performance of their duties.

The complainant offers no argument or factual evidence to prove a violation of N.J.S.A. 18A:12-24.1(i) except that the respondent spoke to reporters and gave them

pictures of open windows in the middle school and maxi-pads in the Board bathroom. The pictures and respondent's statement were eventually published in a local newspaper. The complainant did not provide any factual evidence to show how this conduct failed to support school personnel in proper performance of their duties. There is no factual evidence to prove that the respondent had any interactions with school personnel or even implicated school personnel in his statements to the reporters. Based on the foregoing, the Commission finds that this conduct does not rise to the level of a violation of N.J.S.A. 18A:12-24.1(i) and the Commission dismisses this allegation in count three.

Regarding N.J.S.A. 18A:12-24.1(j), the complainant argues that the respondent violated N.J.S.A. 18A:12-24.1(j) when he went into the school and took pictures of open windows in the middle school and maxi-pads in the Board bathroom and then spoke with reporters regarding his concerns and gave the reporters copies of the pictures. Rather than go to the superintendent with his concerns regarding the open windows in the bathroom and the maxi-pads in the Board bathroom, the respondent went directly to reporters with his complaints. This evidence, in accordance with N.J.A.C. 6A:28-6.9(b)4, shows that the respondent acted on a complaint prior to referral of the complaint to the chief administrative officer, prior to the failure of an administrative solution and at a time other than a public meeting. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(j) as alleged in count three.

COUNT FOUR

In count four, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(g) and (j) of the Code of Ethics for School Board Members because he does not take his questions to the superintendent or request information from the superintendent or an appropriate administrator. Instead, he goes directly to the Board office without asking or notifying anyone and takes the information he wants. The respondent then shows the information to reporters. On October 12, 2006, the respondent was found going through documents in a secretary's office while the secretary was not present. The complainant did not provide any factual evidence to show that the information the respondent gave to the reporters was confidential or inaccurate. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(g) and dismisses this allegation in count four.

To prove a violation of N.J.S.A. 18A:12-24.1(j), the complainant argues that when the respondent gave the reporters information regarding the schools, he should have taken those concerns and complaints to the superintendent first and provided the superintendent with the opportunity to address the respondent's concerns. As noted in count three, when the respondent went into the school and took pictures of open windows in the middle school and maxi-pads in the Board bathroom and then spoke with reporters regarding his concerns and gave the reporters copies of the pictures, he violated N.J.S.A. 18A:12-24.1(j) because he did not go to the superintendent with his complaints and wait for an administrative solution to his concerns. This evidence, in accordance with N.J.A.C. 6A:28-6.9(b)4, shows that the respondent acted on a complaint prior to referral of the complaint to the chief administrative officer, prior to the failure of an

administrative solution and at a time other than a public meeting. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(j) as alleged in count four.

COUNT FIVE

In count five, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(b) and (f) of the Code of Ethics for School Board Members because he home schools his children and makes every decision based on stopping or reducing spending rather than on the basis of the educational welfare of children of the District. N.J.S.A. 18A:12-24.1(b) provides:

> I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race creed, sex, or social standing.

To prove a violation of N.J.S.A. 18A:12-24.1(b), the complainant argues that the respondent seeks to stop or reduce spending and does not make decisions based on the educational welfare of children. However, the complainant does not provide any factual evidence to show that the respondent does not make decisions in terms of the educational welfare of children. The respondent's focus on the reduction of spending alone does not prove that his decisions are not made in terms of the educational welfare of children. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(b) and dismisses this allegation in count five.

N.J.S.A. 18A:12-24.1(f) provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

To prove a violation of N.J.S.A. 18A:12-24.1(f), the complainant argues that because the respondent home schools his children, he has surrendered his independent judgment to special interest or partisan political groups and used the schools for his gain. However, the complainant has provided no factual evidence to prove this allegation except for the fact that the respondent home schools his children. The Commission notes that there is no involvement of a special interest or partisan political group. The Commission further notes that the fact that the respondent home schools his children does not prove that he has used the schools for his gain. Based on the foregoing, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(f) and dismisses this allegation in count five.

COUNT SIX

In count six, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members because he has treated the teachers and other education professionals in a demeaning and harassing manner and contacts teachers and administrators directly without going through the superintendent. To prove a violation of N.J.S.A. 18A:12-24.1(c), the complainant maintains that the respondent took Board action when he treated the teachers in a demeaning and harassing manner. Previously in I/M/O Paul Schaeder, C03/C04/C06/C07/C12-03, (September 23, 2003), the Commission found that the chairman of a board of trustees violated N.J.S.A. 18A:12-24.1(c) when he acted to terminate the chief administrative officer without giving notice to all of the board members that such action was to take place. In Schaeder, the chairman acted in his official duties as chairman of the Board of trustees when he terminated the chief administrative officer. In this matter, the respondent was not acting in his official role as a Board member when he interacted with administrators. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(c) and dismisses this allegation in count six.

To prove a violation of N.J.S.A. 18A:12-24.1(d), the complainant argues that the respondent went directly to certain administrators and asked them for information without going to the superintendent. The complainant presented evidence to show that the respondent stopped in the District's Supervisor of Curriculum and Instruction office every Friday for several weeks asking the supervisor for information. When the supervisor failed to produce the information, the respondent became upset, got loud, and got in the supervisor's face asking her why she could not give him the information. This proves that the respondent administered the schools because N.J.A.C.6A:28-7.1 defines "administer the schools," in part, as meaning that a board member has given a direct order to school personnel. Therefore, the Commission voted to find that the respondent violated N.J.S.A. 18A:12-24.1(d) as alleged in count six.

To prove a violation of N.J.S.A. 18A:12-24.1(e), the complainant argues that the respondent's demeaning and harassing treatment of the District's Supervisor of Curriculum and Instruction was private action that could have compromised the Board. Previously in I/M/O Eileen Quinn, C45-04, (February 7, 2005), the Commission found that a board member's distribution of a flier was a private action since it did not involve her board member duties. In this matter, when the respondent went to the supervisor to ask for information, he was not acting in his role as a Board member; therefore, his action was private action. The Commission finds that his demeaning and harassing treatment of the supervisor could have compromised the Board because it could have become subject to litigation. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(e) when he treated the supervisor in a demeaning and harassing manner.

The Commission cannot discern how the respondent's demeaning and harassing treatment of the supervisor violated N.J.S.A. 18A:12-24.1(g). To prove a violation of N.J.S.A. 18A:12-24.1(g), the complainant would have to provide factual evidence that

the respondent failed to hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools or provided inaccurate information. The complainant has not provided such factual evidence. Therefore, the Commission finds that the complainant has not demonstrated that the respondent violated N.J.S.A. 18A:12-24.1(g) and dismisses this allegation in count six.

To prove a violation of N.J.S.A. 18A:12-24.1(i) the complainant alleges that the respondent failed to support and protect District's Supervisor of Curriculum and Instruction in the proper performance of her duties. The evidence shows that the respondent got upset when the supervisor could not provide him with the information he requested. The supervisor testified that she felt that the respondent bullied her. She also testified that when the respondent got upset with her, he got loud, his face turned red and he got in her face and put his hand in her face. Ms. Snure, a member of the Board, also testified that she saw the respondent get in the face of people he demands information from and put his hand in their face. Certainly whenever a board member becomes loud with personnel in the district and intimidates them by getting in their face, that board member has failed to protect and support the District personnel in the proper performance of their duties. The evidence shows that the respondent did not support and protect the supervisor in the proper performance of her duties. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(i) when he treated the supervisor in a demeaning and harassing manner.

To prove a violation of N.J.S.A. 18A:12-24.1(j), the complainant alleges that the respondent went directly to certain administrators and asked them for information without going to the superintendent. The evidence shows that the respondent stopped in a supervisor's office every Friday for several weeks asking her for information. When she failed to produce the information, the respondent became upset, got loud, and got in her face asking her why she could not give him the information. The evidence also shows that the respondent went into the school and took pictures of open windows in the middle school and maxi-pads in the Board bathroom and then spoke with reporters regarding his concerns and gave the reporters copies of the pictures without going first to the superintendent and waiting for an administrative solution to his concerns. This evidence, in accordance with N.J.A.C. 6A:28-6.9(b)4, shows that the respondent acted on a complaint prior to referral of the complaint to the chief administrative officer, prior to the failure of an administrative solution and at a time other than a public meeting. Based on the foregoing, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(j) as alleged in count six.

DECISION

For the reasons expressed above, the Commission finds that Raymond A. Delbury violated N.J.S.A. 18A:12-24.1(d), (e), (i) and (j) of the Code of Ethics for School Board Members and the Commission dismisses the remaining allegations against him. The Commission recommends that the Commissioner of Education impose the penalty of a censure. The Commission notes that in I/M/O William Lahn, the Commissioner concurred with the Commission's penalty recommendation of censure where a board

member was found to have violated N.J.S.A. 18A:12-24.1(d) when he went directly to a guidance secretary and requested SAT reports insisting that he receive a copy of the reports and when he personally inspected the boys' lockers to determine if new lockers were needed and, in doing so, he instructed district employees to provide more supervision when the students were present. Also in I/M/O Kroschwitz, II and Sturgeon, C29-03, (November 25, 2003), the Commissioner concurred with the Commission's recommendation that two board members be censured where the Commission found that the two board members violated N.J.S.A. 18A:12-24.1(j) when they visited the kitchens in three schools without notifying the administration and without signing in, took pictures of the unsanitary conditions in the kitchens, appeared on a television program to air their complaints as to the sanitary nature of the kitchens and spoke to reporters regarding their complaints. This respondent's violations of N.J.S.A. 18A:12-24.1(d), (e), (i) and (j) are similar to the above matters in that the respondent went to reporters with complaints about the District and went directly to school personnel requesting information in a demeaning and harassing manner. Thus, the Commission recommends the penalty of censure to the Commissioner.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Delbury may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C Garbarini (jb)
Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C64-06

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony of the parties; and

Whereas, at its meeting of May 22, 2007, the Commission found that Raymond A. Delbury violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members as alleged in count six and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of June 26, 2007, the Commission reconsidered its previous decision and found that Raymond A. Delbury also violated N.J.S.A. 18A:12-24.1(j) as alleged in count four and N.J.S.A. 18A:12-24.1(e) as alleged in count six and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of September 25, 2007, the Commission reconsidered its previous decisions and found that Raymond A. Delbury also violated N.J.S.A. 18A:12-24.1(j) as alleged in count three and N.J.S.A. 18A:12-24.1(d) and (j) as alleged in count six and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of October 30, 2007, the Commission reconsidered its penalty determination and found that, because of the numerous violations, the Commission recommended that the Commissioner of Education impose a sanction of censure and adopted this draft decision as prepared by its staff; and

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini (jb)
Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 30, 2007.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/decisions/C61-06

477-07

COMPASS GROUP USA, INC.,
D/B/A/ CHARTWELLS,

PETITIONER,

V.

SODEXHO SCHOOL SERVICES,
ATLANTIC CITY BOARD OF EDUCATION,
FREDRICK NICHOLS, SUPERINTENDENT
OF ATLANTIC CITY SCHOOLS,
RA SHUN STEWART, INDIVIDUALLY AND
JOHN DOES A., B., AND C.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – formerly the contracted food service provider for the Atlantic City School District – filed an appeal seeking rescission of the food services contract between Sodexho School Services (Sodexho) and the Board for the 2007-08 school year. The petition claimed that the vote by which the contract was awarded was improper as it included the votes of sending district board members, contrary to *N.J.S.A.* 18A:38-8.1 and relevant school law decisions. Respondent Sodexho requested legal fees.

The ALJ found that: the initial vote awarding the contract to Sodexho – on May 1, 2007 – was contrary to statute and school law decision; the second vote awarding the contract to Sodexho – on June 26, 2007 – was proper, valid and in accordance with applicable law; the second vote was not arbitrary, capricious, unreasonable, or the result of fraud or mistake.

Upon full review and consideration of the record, the Commissioner adopted the Initial Decision as the final decision in this matter and dismissed the petition. In so doing, she clarified that the Commissioner does not have plenary authority to award counsel fees to a successful complainant in an education controversy.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 7, 2007

OAL DKT. NO. EDU 4664-07
AGENCY DKT. NO. 151-6/07

COMPASS GROUP USA, INC., D/B/A/ CHARTWELLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SODEXHO SCHOOL SERVICES, ATLANTIC CITY BOARD OF EDUCATION, FREDRICK NICHOLS, SUPERINTENDENT OF ATLANTIC CITY SCHOOLS, RA SHUN STEWART, INDIVIDUALLY AND JOHN DOES A, B, AND C,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner Compass Group USA, Inc., D/B/A/ Chartwells ("Chartwells") and those of respondent Sodexho School Services ("Sodexho"), along with reply exceptions of respondent Atlantic City Board of Education were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and fully considered by the Commissioner in reaching her determination herein.

The parties' exceptions essentially recast and reiterate their arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that these were considered and addressed by the ALJ in his decision, they will not be revisited here.

Upon full review and consideration of the entire record, which included a transcript of proceedings conducted at the OAL on August 2, 2007, the Commissioner agrees with the ALJ that the June 26, 2007 vote of the Board (excluding votes of the sending district

members) awarding Sodexho the food service contract for the 2007-08 school year was legal and proper. The Commissioner further concurs with the ALJ – for the reasons clearly presented in his decision – that this vote was neither arbitrary, capricious and/or unreasonable, nor was it the result of fraud or mistake.

Finally, it is noted that Sodexho, in its exceptions, again renews its request for legal fees. In this regard, the Commissioner is compelled to clarify that it is long established that, notwithstanding that the Commissioner of Education "has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws[,] *N.J.S.A.* 18A:6-9," (*Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 525 (1978), she does not have plenary authority to award counsel fees to a successful complainant in an education controversy. (*See Balsley v. North Hunterdon Regional High School*, 117 *N.J.* 434, 442-43 (1990); a*lso see State, Department of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473 (1983)) As such, the relief sought cannot be granted as a matter of law, as an award of attorney fees or costs of suit is not within the Commissioner's scope of authority.

Accordingly, the Initial Decision of the OAL is adopted for the reasons detailed therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/07/07

Date of Mailing: 12/07/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(On Motion for Summary Decision)
OAL DKT. NO. EDU 4664-07
AGENCY DKT. NO. 151-6/07

COMPASS GROUP USA, INC.
D/B/A CHARTWELLS,
Petitioner,
v.
SODEXHO SCHOOL SERVICES, ATLANTIC CITY BOARD OF EDUCATION, FREDRICK NICHOLS, SUPERINTENDENT OF ATLANTIC CITY SCHOOLS, RA SHUN STEWART, INDIVIDUALLY AND JOHN DOES A, B AND C,
Respondents.

Daniel J. Gallagher, Esq., for petitioner (Miller and Gallagher, attorneys)

Gerald A. Hughes, Esq., for respondent, Sodexho (Fenningham, Stevens and Dempster, L.L.P., attorneys)

John B. Comegno, II, Esq., for respondent, Board of Education of the City of Atlantic City (Comegno Law Group, P.C., attorneys)

Mark Soifer, Esq., for respondent, Ra Shun Stewart, President, Atlantic City Board of Education, and Fredrick Nickles, Superintendent) (Cooper, Levenson, April, Niedelman & Wagenheim, P.A., attorneys)

No one appeared for John Does A, B and C

Record closed: September 14, 2007 Decided: October 25, 2007

BEFORE **EDGAR R. HOLMES, ALJ, T/A**:

STATEMENT OF THE CASE, PROCEDURAL HISTORY AND UNCONTESTED FACTS

Chartwells, petitioner, held the contract for the provision of food services to the Atlantic City School District Board of Education (BOE) from the 2003-2004 school year through the 2006-2007 school year.

The BOE requested bids for the delivery of food services for the 2007-2008 school year.

Both Chartwells and Sodexho submitted bids (proposals) to the BOE and made presentations to the BOE's Goods and Services Committee on March 20, 2007. Chartwells was the low bidder.

No minutes were kept of the Goods and Services Committee meeting, nor was a recording made of the discussion, if any.

A Bid/Proposal Comparison Sheet dated February 7, 2007, was made available to the Board on or before May 1, 2007. This Sheet was prepared from information obtained from the 2005-2006 school year audit and the proposals of Sodexho and Chartwells.

On May 1, 2007, Resolution 07 5R 71, naming Sodexho as the food services provider for the school year 2007-2008 was presented to the BOE.

Resolution 07 5R 71 was affirmed by a vote of seven to four.

Consequently, Resolution 07 5R 72 naming Chartwells as the food service provider for the 2007-2008 school year was not offered.

The contract was awarded to Sodexho on May 9, 2007, by the BOE.

On June 1, 2007, Compass Group USA, Inc., d/b/a Chartwells (Chartwells) filed a petition with the Commissioner seeking rescission of the May 9, 2007, food services contract in favor of Sodexho on the grounds that the vote of May 1st included the votes of sending district board members contrary to N.J.S.A. 18A:38-8.1 and relevant school law decisions. The petition was subsequently amended.

On June 18, 2007, Chartwells moved before the Commissioner by way of an Emergent Application for Relief pursuant to N.J.A.C. 6A:3-16.

The composition of the Board changed slightly as a result of a citywide election held April 17, 2007, and the two new members were sworn in on June 26, 2007.

On June 26, 2007, proposal #43 was offered to the BOE naming Sodexho as the food services provider for the school year 2007-2008.

Resolution #43 carried by a vote of seven in favor and three against, with one abstention, the full board voting.

The count was taken again without counting the votes of sending district members and Resolution #43 was affirmed by a vote of five to three.

Prior to the May 1, 2007, Board vote on Resolution 07 5R 71 and up to and including the Board vote on Resolution #43 on June 26, 2007, the Board did not request

advice from the school Superintendent or the school Business Manager about the relative merits of the two proposals.

The matter was transmitted to the Office of Administrative Law (OAL) on June 26, 2007, to be heard as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to 15 and the Act creating the OAL, N.J.S.A. 14F-1 to 13. Answers and cross motions followed.

On July 25, 2007, an Order was entered resolving discovery issues.

A plenary hearing was scheduled in lieu of an emergent relief application for August 2, 2007.

On August 2, 2007, the parties convened in Atlantic City. The plenary hearing was adjourned without date and, as a result of the hearing, an **ORDER** was entered on August 15, 2007, **DENYING** cross motions to disqualify counsel and **DISMISSING WITH PREJUDICE** the claims against Ra Shun Stewart and Fredrick Nickles.

Briefs were filed, the last brief being filed on September 14, 2007, at which time the record closed.

ISSUES TO BE RESOLVED

1. Was the vote awarding the food services contract to Sodexho on May 1, 2007, contrary to N.J..S.A. 18A:38-8.1 and relevant school law decisions? The short answer is "Yes."

2. Was the vote awarding the food services contract to Sodexho on June 26, 2007, null and void because it was merely the affirmation of an illegal vote originally? The short answer is "No."

3. Was the vote awarding the contract to Sodexho on June 26, 2007, arbitrary, capricious, unreasonable and the result of fraud or mistake? The short answer is "No."

DISCUSSION

First Issue: The vote awarding the food services contract to Sodexho on May 1, 2007, was contrary to N.J.S.A. 18A:38-8.1, which describes the matters upon which sending district members are permitted to vote as follows:

> a. Tuition to be charged the sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;
>
> b. New capital construction to be utilized by sending district pupils;
>
> c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administrative staff; and
>
> d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district.

Clearly, a contract for the provision of food services is not included in the bill lists or contracts for the purchase, operation, or maintenance of facilities equipment or instructional materials and therefore sending district members may not vote on the contract or contract proposal. Neither does the provision of food services have anything to do with new capital construction, faculty appointments, benefits or removal or the adding or subtracting of curricular and extracurricular programs.

There is simply no provision in the statute which would permit sending district members to vote on a proposal to provide food services to a district.

School law decisions have permitted sending district members to vote on matters not enumerated in the statute, but these matters are limited entirely to in-house procedural matters, never substantive matters. See the discussion in the Initial Decision by Patricia M. Kerins, A.L.J. and the Commissioner in Scott Evans v. Atlantic City Board of Education, EDU 4116-06 (March 26, 2007) adopted, Comm'r. (May 1, 2007) <http://lawlibrary.rutgers.edu/oal/search.html>.

Second Issue: The June 26, 2007, vote of the BOE on proposal #43 offering Sodexho the food services contract for the school year 2007-2008 was legal and proper.

The petitioner's argument that the vote was merely the readoption of an illegal contract and therefore null and void ab initio is contradicted by the fact that the Board was not voting on the original Resolution #07 SR 71, but the new Resolution #43.

It takes only a moment to consider that in the event Chartwells was successful in this litigation and the award was set aside, a new Resolution would need to be offered to the Board. This argument is a quibble over language and is without merit. The Board merely cured its error in counting the vote of sending district members on May 1, 2007.

Third Issue: The vote awarding the contract to Sodexho on June 26, 2007, was not arbitrary, capricious or unreasonable. Neither was it the result of fraud or mistake.

Chartwells alleges that its bid was $500,000 lower than Sodexho's bid. This is not discernable from the proposals and would require expert testimony to establish. However, N.J.S.A. 18A:18A-1 does not require a Board of Education to award its contract to the lowest bidder. This Board has a long history of contracting with Chartwells so the fact that it has awarded a contract to a higher bidder does not establish that the award was arbitrary, capricious or unreasonable.

Chartwells argues that the Board's failure to obtain recommendations from the superintendent or the business manager was improper and suggests

unreasonableness. Chartwells concedes, however, that no New Jersey statute, rule or regulation requires a superintendent or business manager to make such a recommendation to the Board. It is not unreasonable for a Board to make a decision without the superintendent or business manager's input where it is not required.

The Bid/Proposal Comparison Sheet indicates that the projected loss for the current operating year 2007-2008 under the contract with Chartwells would be $572,317. Chartwells disputes this and the Board acknowledged that the projected loss will be $201,000. This was not the mistake of Sodexho but of someone in the business manager's office employed by the Board.

There is no hint that Sodexho had anything to do with this mistake and Chartwells does not suggest that Sodexho had. In fact, Chartwells was prepared to dismiss as to Sodexho early in this proceeding (see transcript of August 2, 2007). Sodexho remained in the case at its own request because of the stake it has in the outcome.

This matter of the size of the loss in 2006-2007 does not appear to have been a significant factor in the vote. It was not even discussed by the Board at the meeting prior to the vote.

The claim of fraud here is so amorphous that it is impossible to determine who or which party was involved in it. Sodexho remained in the case to protect itself from the allegation of fraud, but Chartwells' offer to dismiss as to Sodexho early in this case clearly indicates it is not Sodexho to whom the charge of fraud attaches. Only John Does A, B and C remain in the case besides the BOE. They were never mentioned again by the parties after the pleadings. There is not even an inference that they committed fraud.

The law governing common law fraud requires

> (a) a material misrepresentation of a presently existing fact; (2) knowledge or belief by the defendant of its falsity; (3) an

> intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Bonco Popular North America v. Gandi, 184 N.J. 161 (2005) quoting Gennari v. Weichart Co. Realtors, 148 N.J. 582, 610 (1997).

None of these elements have been pled in the instant case.

It is certainly not evident that the vote in favor of Sodexho was influenced by fraud or mistake.

I **CONCLUDE** that the vote awarding the contract to Sodexho on May 1, 2007, was contrary to statute and School Law decisions; and

I further **CONCLUDE** that the vote awarding the contract to Sodexho on June 26, 2007, was proper, valid, and in accordance with the statutes and School Law decisions; and

I further **CONCLUDE** that the vote awarding the contract to Sodexho on June 26, 2007, was not arbitrary, capricious, unreasonable, or the result of fraud or mistake.

ADDITIONAL ISSUE

Sodexho requests legal fees. As pointed out above, it remained in the case at its own request after Chartwells agreed to release it early in the proceedings. Its purpose in doing so was to protect the contract and to establish that it did not take part in any fraudulent activity. There was never a hint in this case that Sodexho was a party to any fraud. The implication is only that someone in the employ of the Board wanted Chartwells out of the new contract. That person or persons, presumably John Does A, B and C., were never identified, either by name or function or activity.

Therefore, I **DENY** Sodexho's request for legal fees.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 25 2007
DATE

EDGAR R. HOLMES
EDGAR R. HOLMES, ALJ, T/A

Date Received at Agency:

NOV 1 2007
DATE

Mailed to Parties:
PRESIDING AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/sd

478-07

#478-07

O.E. on behalf of minor child, A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged his son's indefinite suspension from regular educational classes after he authored notes and drawings containing threats toward other students whom – he alleged – had harassed and bullied him. A.E. has received home instruction since March of 2007, without benefit of a school library, physical education classes, or school social activities. Respondent Board argued that – pursuant to *N.J.S.A.* 18A:37-2 – A.E. posed a threat to others, based on an April 2007 psychiatric evaluation in which the word "minimal" was used in summarizing A.E.'s risk to himself or others.

The ALJ found, *inter alia,* that: A.E. drew depictions of tombstones with students' names on them for the purpose of alarming said students; there was nothing in the record to indicate that A.E. exhibited the behavior referenced in sections a, b, or d-j of *N.J.S.A.* 18A:37-2, and the herein controversy centers around section c, which prescribes punishment for conduct that "constitutes a continuing danger to the physical well-being of other pupils"; nothing in the record suggests that A.E.'s conduct presents such a danger; and A.E. is remorseful for his actions. The ALJ concluded that continuing the discipline imposed upon A.E. by the respondent into the new school year is arbitrary and capricious, and ordered that A.E. be returned to regular classroom instruction.

Upon full and independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that: A.E. has no history of physical violence or overt aggression; the physician who conducted his psychiatric evaluation recommended weekly personal counseling sessions focusing on coping and problem-solving skills, as well as weekly in-school counseling, rather than medications or higher level psychiatric intervention; and a rational basis for continuing discipline does not exist. The Commissioner further reminded the respondent of its obligations pursuant to *N.J.S.A.* 18A:37-15 and *N.J.A.C.* 6A:16-7.9 to provide a school environment free from intimidation, harassment and bullying.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 7, 2007

OAL DKT. NO. EDU 5790-07
AGENCY DKT. NO. 139-5/07

O.E. on behalf of minor child, A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner asks that his son be returned to a regular educational program in respondent's district. The record, including several exhibits submitted by the parties, the Initial Decision and the parties' exceptions have been reviewed. While the Administrative Law Judge (ALJ) reported that a plenary hearing had been held in the Office of Administrative Law (OAL), no transcript of same is before the Commissioner.

It is undisputed that petitioner's son, A.E., is currently 14 years old and receiving educational instruction at the eighth grade level. He was suspended from regular classes on or about March 18, 2007, after he authored notes and drawings containing threats toward other students. Since that date he has been given ten or more hours of academic instruction per week by teachers at one of respondent's facilities. He does not have access to the school library, physical education classes or school social activities.

In support of its position that A.E. should not be returned to regular classes, respondent offered as exhibits copies of several writings and drawings that were conveyed by A.E. to other students, or confiscated by school staff. (Respondent's Exhibit 1) The contents of the writings variously include profanity, insults, religious slurs, and homophobic and racist

remarks. One note articulates a declaration that the author is not afraid of the student to whom the note was addressed. Another writing in R-1 is a list of nine names - entitled "People that bother me!" – that A.E. gave his father, O.E., in preparation for a meeting between O.E. and the school principal. (Respondent's Exhibit 4 [R-4] at 2)

There are also copies of drawings in Respondent's Exhibit 1. Of heightened concern to respondent are sketches of six tombstones, each containing the name of a student and the phrase "R.I.P." Some of the tombstone drawings contain comments, such as "After World War III," "In a few days," "Killed in World War III." Another drawing depicts the stabbing of a female, with the caption "Born to kill A----."

After initial resistance, O.E. agreed to have his son evaluated by a psychiatrist – Mona Ismail, M.D, of Comprehensive Behavioral Healthcare, Inc. Dr. Ismail's report was issued on April 30, 2007. (R-4) Although she was not called to testify at the OAL hearing, both parties referred to the findings in Dr. Ismail's report, and neither party objected to its admission into evidence.

Criminal proceedings were instituted against A.E., resulting in an order dated June 1, 2007, deferring the matter until December 1, 2007, at which time the charges would be dismissed upon good behavior. (Petitioner's Exhibit 1)

At the OAL hearing, A.E. admitted drawing the tombstone pictures and placing them in the students' lockers to upset them, but denied responsibility for some of the other writings in R-1. (Initial Decision at 4) He testified that the students whose names were in the tombstones had been harassing him - calling him "gay" and a "terrorist." (*Ibid*) Frank Cocchiola, respondent's Superintendent of Schools, conceded on cross examination that A.E. had been "bothered" by kids in the past. (*Id.* at 3)

A.E. denied ever hitting or attacking anyone and, according to the ALJ, respondent offered no credible evidence that A.E. had ever engaged in violent acts against any student. Nor was there any evidence that A.E. 1) used profane or offensive language in class, 2) made racial or ethnic comments or 3) frequently disrupted class. (*Id.* at 5)

When asked at the hearing whether he was sorry for transmitting the notes/drawings, A.E. said that he was. (*Id.* at 4-5) The ALJ consequently found A.E. to be remorseful.

The ALJ correctly determined that petitioner has the burden to establish by a preponderance of the credible evidence that respondent's indefinite continuation of A.E.'s suspension is arbitrary, capricious and unreasonable. (*Id.* at 5) Thus, the ALJ assessed the facts adduced at the hearing by measuring them against *N.J.S.A.* 18A:37-2, upon which respondent relied in suspending A.E. *N.J.S.A.* 18A:37-2 provides:

> Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.
>
> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> a. Continued and willful disobedience;
>
> b. Open defiance of the authority of any teacher or person, having authority over him;
>
> c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;
>
> d. Physical assault upon another pupil;
>
> e. Taking, or attempting to take, personal property or money from another pupil, or from his presence, by means of force or fear;
>
> f. Willfully causing, or attempting to cause, substantial damage to school property;

> g. Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other person then in charge of such building or facility;
>
> h. Incitement which is intended to and does result in unauthorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district;
>
> i. Incitement which is intended to and does result in truancy by other pupils; and
>
> j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

As stated above, the ALJ determined that there was nothing in the record to indicate that A.E. had exhibited the behavior referenced in sections a, b, or d-j of *N.J.S.A.* 18A:37-2. Nor does respondent argue otherwise. The controversy centers around section c of *N.J.S.A.* 18A:37-2, which prescribes punishment, including suspension and expulsion, for "conduct of such character as to constitute a continuing danger to the physical well-being of other pupils."

In weighing the totality of the evidence, the ALJ concluded that A.E. does not pose a continuing danger to the physical well-being of other pupils. He stated:

> There can be no doubt that Board [sic] could reasonably find the "tombstone" drawings as petitioner's attempt to place fear or alarm in the mind of each student whose name appeared in the drawing. However, nothing in any of the testimony suggests that petitioner's conduct amounted to a "continuing danger to the physical well-being of other pupils."
>
> Initial Decision at 6

Having determined that A.E.'s behavior did not violate *N.J.S.A.* 18A:37-2, the ALJ reasoned that it would be arbitrary and capricious for respondent to continue to bar A.E. from regular classroom instruction.

Respondent's Exceptions to the Initial Decision stress its duty to provide a safe and secure environment for its school children. It contends that A.E.'s actions progressed from racial and ethnic remarks, vulgar notes and disgusting actions, to threats of violence and physical harm, Respondent's Exceptions at 2, and perceives that this 'progression' can be regarded as a continuing danger to the physical well-being of other pupils.

Respondent is not reassured by Dr. Ismail's evaluation because it states in the "Impression" section that "the chance of having overt physical violence or homicidal thoughts, risk to others or self are minimal." (R-4 at 4) Focusing on that sentence, respondent argues that even a minimal chance of physical harm is unacceptable. (Respondent's Exceptions at 2)

After careful review of the facts before her and the content of Dr. Ismail's report, the Commissioner concurs with the ALJ that a solid rational basis to support the further suspension of A.E. from regular attendance at school is lacking. First, it is undisputed that A.E. has no history of physical violence, overt aggression, cruelty to animals, destructive or suicidal behavior, serious risk-taking, psychoses, affect disorders, hospitalization or significant medical problems. Dr. Ismail reported that A.E. presented as cooperative and polite. His speech, affect, perception, concentration, memory , attention span and thought processes were normal.

Second, the record contains evidence that A.E. was harassed from the onset of his enrollment in respondent's high school, and that each of the writings offered as exhibits was an ill-conceived response to an incident of harassment by specific individuals. Both Dr. Ismail and the ALJ noted that A.E. was remorseful for retaliating via the menacing notes and drawings.

Dr. Ismail concluded that A.E.'s appearance and mannerism's may "render him a target to ridicule and criticism." (R-4 at 4) She observed that he "seems to have poor mechanisms and poor responses to stressors such as bullying in school," and he "tends to have

difficulty tolerating the bullying and the harassment behavior and the means of retaliating to him were by passive/aggressive means such as the drawings . . . ." (*Ibid.)*

Significantly, Dr. Ismail saw no need for medications or higher level psychiatric interventions. She recommended weekly personal counseling for A.E. to teach coping and problem-solving skills and provide support. She also recommended that A.E. receive weekly in-school counseling to check how he is coping and behaving. Finally, Dr. Ismail wrote: "The patient may follow up as an outpatient at this point since he is not presenting a risk to self or to others." (*Ibid.*, emphasis added)

In light of the foregoing, the Commissioner adopts the Initial Decision's order that A.E. be returned to regular classroom instruction without delay. While A.E.'s conduct warranted discipline, the Commissioner concludes that a rational basis for continuing the discipline into the new school year does not exist – provided that A.E. does not repeat the conduct which precipitated his suspensions.

Additionally, the Commissioner reminds respondent of its obligations pursuant to *N.J.S.A.* 18A:37-15 and *N.J.A.C.* 6A:16-7.9 to provide a school environment free from intimidation, harassment and bullying.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 12/07/07

Date of Mailing: 12/10/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05790-07
Agency Dkt. No.: 139-5/07

O.E. o/b/o minor child, A.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON, BERGEN COUNTY,

Respondent.

O.E. o/b/o minor child, A.E., pro se petitioner

Walter M. Slomienski, Jr., Esq., attorney for respondent

Record Closed: September 14, 2007 Decided: October 26, 2007

BEFORE **IMRE KARASZEGI, JR.**,

STATEMENT OF THE CASE

This is an appeal on behalf of a fourteen year old child, A.E., challenging his suspension from regular educational classes. Petitioner, A.E., receives home instruction in a Borough of Wallington Board of Education ("Board") facility since

March 19, 2007. Petitioner requests return to his regular educational classes. Respondent Board objects on the basis that petitioner poses a "threat" to others.

PROCEDURAL HISTORY

On May 25, 2007, petitioner filed an application for emergent relief with the Commissioner of Education ("Commissioner"). On June 4, 2007, Commissioner transmitted the matter to the Office of Administrative Law ("OAL") where it was filed as a contested case. On June 8, 2007, oral argument was presented at the OAL and I denied petitioner's motion for emergent relief. The Commissioner adopted the recommended Order to deny emergent relief by decision dated June 15, 2007. On September 14, 2007, I held a plenary hearing and the record closed on the same date.

FINDINGS OF FACT

Petitioner is currently fourteen years of age and receiving educational instruction at the eighth grade level. On March 19, 2007, petitioner was suspended from his regular educational classes and has received a minimum of ten (10) hours per week of home instruction at a Board facility since his suspension date. Petitioner is not classified.

Frank Cocchiola, Superintendent of Schools for the Wallington school district, testified that petitioner's educational instruction, implemented on March 19, 2007 as part of his out of school suspension, consists of "all academic subjects with all his teachers" in a "1:1" student-teacher setting. Cocchiola indicated that petitioner does not have "physical access" to the school library and is not provided any "social activities or physical education" as part of his curriculum.

As to the Board's reasons for suspension, Cocchiola testified that several drawings and notes were allegedly confiscated from petitioner, one of which was a drawing consisting of six "tombstones", each with the letters "R.I.P." and a student's first name. This drawing especially "caused concern" for the school district. In his certification, Cocchiola was more specific as to his concerns regarding the notes and drawings, they "demonstrate racial and ethnic comments, nazi signs and vulgar language. These items were indications of threats to do harm to other students . . . ." As to the six "tombstones", Cocchiola states in his certification, "The drawing was of a series of head stones with students' first names, and an 'R.I.P.' notation inferring that they would die." Cocchiola testified that the drawing depicting six tombstones was brought to the Board's attention by "one of the children's parents" as well as by "the police". During cross-examination, Cocchiola did admit that petitioner had been "bothered by kids" in the past.

Cocchiola added that at the time the suspension commenced, he recommended both a "district child study team evaluation and, at the least, a psychiatric evaluation". He indicated that petitioner's father "rejected" this recommendation initially but later agreed to only the psychiatric evaluation by "Comprehensive Care". Cocchiola affirmed that he "agreed to the psychiatric evaluation at Comprehensive". Although no individual from Comprehensive Behavioral Healthcare testified as to the psychiatric evaluation of petitioner dated April 30, 2007, both petitioner and Board referred to its findings and had no objection to the evaluation report being admitted into evidence. Cocchiola indicated that despite the conclusions of the evaluation report, the Board was "not totally convinced that there is no danger to other students". He cited a concern regarding the meaning of the word "minimal" as it was used by the psychiatric evaluator under the heading of Impression; "Hence, the chance of having overt physical violence or homicidal thoughts, risk to others or to self are minimal". Cocchiola added that the evaluation's recommendation that petitioner

is "not presenting a risk to self or to others" conflicts with the earlier use of the word "minimal" in describing the same risk.

Petitioner admits to drawing the tombstones, as depicted in Exhibit R-2, and placing the drawing in the student lockers. Petitioner testified that he admitted this in the Superior Court of New Jersey, Family Part (Bergen County) on or about June 1, 2007. He affirmed that his sentence consisted of a "deferred disposition for a period of six months". The juvenile Order, dated June 1, 2007, indicates final disposition of the matter under N.J.S.A. 2C:33-4a. This provision reads;

> "Except as provided in subsection e, a person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively course language, or any other manner likely to cause annoyance or alarm; . . . ."

Petitioner testified that his understanding of the Superior Court Order, as a "deferred disposition", required him to "behave through December 2007 and the matter would be dismissed".

Petitioner denied drawing any pictures depicting "cats". He admitted that the students whose names appeared in Exhibit R-2 were "harassing me". They "called me gay" and they "called me a terrorist". Petitioner also admitted that he put the drawing "in the lockers to bother them". He continued, "Once they saw the note, I wanted them to feel upset". At various times during cross examination, petitioner testified;

> Q. Are you sorry that you did this?

A. Yes

Q. Did you ever hit or attack anybody?

A. No.

Although the Board disputes petitioner's "selective memory", the Board did not present any credible evidence that petitioner engaged in violent acts against any student. The Board also failed to provide any evidence as to petitioner "shouting out of offensive and profane language in class; speaking racial and ethnic comments, using vulgar language, and constantly disrupting class".

I **FIND** that petitioner drew depictions of tombstones with students' names for the purpose of alarming those students. I **FIND** that petitioner has been suspended from his regular classroom instruction since March 19, 2007 and has been provided ten hours per week of home instruction at a Board facility since that date. I **FIND** petitioner to be remorseful for his actions.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

It is well settled that petitioner must establish by a preponderance of the credible evidence that respondent Board's imposition of a long-term suspension is "improper, that is, patently arbitrary, without rational basis or induced by improper motives." J.D. & E.D. o/b/o B.D. v. Toms River Regional School District Board of Education, OAL Docket No. EDU6009-97, 1991. In general, the action of a local school board "which lies within the area of its discretional powers may not be upset unless patently arbitrary . . ." Kopera v. Board of Education of West Orange, 60 N.J. Super. 288, 294 (App. Div., 1960). Therefore, in order to prevail, petitioner must show that respondent acted in an arbitrary and capricious fashion in imposing the discipline set forth.

In order to determine whether Board acted arbitrarily and capriciously, we must first examine its legal position. Board premises its determinations on the theory that this matter falls within the parameters of N.J.S.A. 18A:37-2, which states in pertinent part:

Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.

Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:

c. Conduct of such character as to constitute a continuing danger to the physical well being of other pupils;

There can be no doubt that Board could reasonably find the "tombstone" drawings as petitioner's attempt to place fear or alarm in the mind of each student whose name appeared in the drawing. However, nothing in any of the testimony suggests that petitioner's conduct amounted to a "continuing danger to the physical well-being of other pupils".

Accordingly, I **CONCLUDE** that petitioner's conduct, while admittedly alarming or annoying, does not constitute a continuing danger to the physical well-being of other pupils.

The Board makes clear that the safety of other students lay at the heart of its actions. Therefore, in light of that perceived purpose, the question becomes, are any of the sanctions imposed so unreasonable as to be "patently arbitrary" or

"without rational basis"? J.D. & E.D. o/b/o B.D., supra. It is undisputed that petitioner is suspended from regular classroom instruction since March 19, 2007 and is receiving home instruction since that date. Given that petitioner's conduct has not violated N.J.S.A. 18A:37-2(c) and given the fact that petitioner's suspension continues into a second school year, I **CONCLUDE** that the discipline imposed is excessive to the point that it borders on arbitrary and capricious. Petitioner cannot be barred forever from the school without formal expulsion.

ORDER

I **ORDER** that petitioner, A.E., be returned to regular classroom instruction by the Board without delay.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 26, 2007

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 10-26-07

Mailed to Parties:

OCT 30 2007

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES

Petitioner

A.E.

Respondent

A.E.
Frank Cocchiola

EXHIBITS

Petitioner

P-1 Juvenile Order, Superior Court of New Jersey, dated June 1, 2007
P-2 Walter M. Slomienski, Jr., Esq. letter dated April 27, 2007

Respondent

R-1 Notes and drawings (11 pages)
R-2 Drawing of six tombstones
R-3 Envelope cover with cat drawings (3 pages)
R-4 Psychiatric Evaluation of A.E. dated April 30, 2007
R-5 Disciplinary Referral dated 1/22
R-6 Cat drawings (4 cat drawings-2 pages)

480-07

#480-07

OAL DKT. NO EDU 3969-07
AGENCY DKT. NO. 93-3/07

IN THE MATTER OF THE TENURE	:	
HEARING OF ELBERT WINSTON,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF ELIZABETH, UNION COUNTY.	:	DECISION

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner cannot be satisfied – as she must be in order to meet her obligation to the schools and children of New Jersey – that the proposed agreement meets the established standard for settlement of tenure matters as set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846, and *N.J.A.C.* 6A:3-5.6.

Initially, it is observed that the tenure charges certified by the District against respondent are of a serious nature; specifically, two counts of unbecoming conduct alleging "violent physical contact" made upon minor students on two separate occasions, *i.e.*, student T.G. in May 2004[1] and student I.S. in May 2005[2]

[1] This was the only charge investigated by the Department of Children and Families (DCF). As noted by the Administrative Law Judge (ALJ), by letter dated July 31, 2007, the DCF modified its finding of substantiated abuse against respondent on this charge to "not substantiated." However, the DCF's finding of not substantiated child abuse – and its removal of respondent's name as a perpetrator of abuse on the Central Abuse Registry with respect to this incident – in no way precludes the possibility of the Commissioner finding him guilty of unbecoming conduct on this charge.

[2] The record indicates that a police complaint alleging assault was filed as a result of this incident. Such charge was dismissed by the Elizabeth Municipal Court on September 6, 2005. The record does not indicate whether this result

The proposed Settlement Agreement here provides, in pertinent part, that respondent will submit an irrevocable letter of resignation from all employment with the District, to be effective at the close of business on *November 1, 2009*; until that date, he will be continued on paid administrative leave, inclusive of benefits and pension contributions, and receive all salary increases – pursuant to the collective negotiations agreement with the District – for the 2007-08, 2008-09 and 2009-10 school years. Moreover, upon respondent's proof of attainment of a Masters Degree, he will be granted lateral movement on the salary guide which would serve to further increase his salary for each of these school years. The proposed settlement also provides that the District will restore salary – in the amount of $24,447.36, withheld from respondent pursuant to *N.J.S.A.* 18A:6-14, subsequent to the certification of the tenure charges against him – and will restore salary, adjustment and longevity increment(s) withheld for the 2006-07 and 2007-08 school years ($1,854.00 and $1,600, respectively.) In sum, the proposed agreement seeks to provide respondent with financial benefits in excess of $188,000.

It is well-established that, having once taken up the burden of tenure charges, the District may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. (*In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, 1983 *S.L.D.* 489; *aff'd* Appellate Division, January 30, 1986.) In the instant matter, the District has presented no credible reasons why these charges cannot or should not go forward. Although the proposed settlement purports to serve the public's interest because,

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was as a consequence of adjudication or otherwise. In any event, it is clear that the outcome of a criminal charge in municipal court would not foreclose establishment of unbecoming conduct in this forum based on the identified conduct, largely because of the significant difference in the required burdens of proof in the respective forums, *i.e.*, beyond a reasonable doubt vs. preponderance of the credible evidence.

in essence, it is anticipated that the hearing in this matter "would be protracted and costly" and would lead to the disruption of the District's educational program due to time lost by administrators and other witnesses who would be required to testify in this matter, acceptance of these assertions – without more – could essentially eviscerate the purpose of the tenure hearing law, since the same can be said for the prosecution of *all* tenure charges. Most importantly, however, the Commissioner finds it inexplicable on this record how the public interest is at all served by the District's granting respondent an almost 2-year paid leave, with benefits and salary increases, until the date of his resignation on November 1, 2009.[3] Such a financial windfall of public monies is incomprehensible, particularly in an Abbott District where it is essential that expenditure of scarce resources be directed to the education of the District's children.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further expansion of the record and revision of the Settlement Agreement, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/14/07

Date of Mailing: 12/14/07

[3] The Commissioner is wholly unpersuaded that such a leave is justified by respondent's purported willingness to forego payment for 240 days of leave time accrued over his teaching career. Payment for such accrued time represents compensation to which respondent may or may not be entitled pursuant to the terms of his employment contract or collective bargaining agreement. The administrative leave sought here is no less than a "gift" of public funds.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03969-07
AGENCY DKT. NO. 93-3/07

IN THE MATTER OF THE TENURE HEARING OF ELBERT WINSTON, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

Karen A. Murray, Esq., for petitioner (The Murray Law Firm, LLC, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: October 25, 2007 Decided: October 26, 2007

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter involves tenure charges of conduct unbecoming, certified by the State-Operated School District of Elizabeth (District) against Elbert Winston (Winston or respondent) under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Winston is a tenured teaching staff member employed by the District. The District accused Winston of striking T.G., a student, on her face on May 12, 2004, and on May 26, 2005 of striking I.S., a student, upon the face with his elbow.

On March 30, 2007, the District filed its written charges with the Commissioner of Education (Commissioner). Winston filed his answer on April 12, 2007. Subsequently, the matter was referred by the Commissioner to the Office of Administrative Law (OAL) where it was received on April 23, 2007 for a hearing as a contested case.

An action was also brought by the Department of Children and Families (DCF)/Institutional Abuse Investigation Unit, under OAL docket number HDY 05208-07/agency docket number AHU# 07-154, for the acts alleging physical abuse upon T.G., a minor student, on May 12, 2004. The DCF was not involved with the charge alleging violent physical contact upon I.S., a minor student, on May 26, 2005. Winston denied the allegations and appealed that matter to the OAL. By Order of the undersigned dated May 18, 2007, the matters were consolidated for hearing and the DCF was vested with the predominant interest in the conduct and outcome of this consolidated proceeding.

By letter dated July 31, 2007, Keri Ann Eglentowicz, Deputy Attorney General, in behalf of the DCF, notified all parties and the undersigned that the DCF had modified its finding of substantiated abuse against respondent to "not substantiated" and removed his name from its Central Registry. Accordingly, DCF withdrew from these proceedings. In light of its withdrawal there is no basis to follow the predominant interest order requiring that this initial decision be submitted to DCF before submission to the Commissioner.

On September 5, 2007, a date scheduled for hearing, both parties agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in In re Cardonick, State Board decision of April 6, 1983 [1990 School Law Decisions (S.L.D.) 842] and as codified by N.J.A.C. 6A:3-5.6, the record of any proposed settlement must include:

> . . . the nature of the charges, the length of the teacher's employment, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the administrative law judge's finding that the teacher entered into the agreement with a full understanding of his or her rights and [a finding] that the agreement is consistent with the public interest.

On September 5, 2007, the OAL held a public hearing on the issue of whether or not the proposed settlement agreement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Winston testified that he fully understood and voluntarily agreed to the terms of the settlement. In addition, the parties have prepared a Stipulation of Settlement, which is attached to and fully incorporated in this decision. Thereafter, on September 20, 2007, the Elizabeth

Board of Education (Board) approved the settlement, as evidenced by the attached resolution which was received at the OAL on September 27, 2007.

After additional review of the proposed Settlement Agreement in preparation of the Initial Decision, the undersigned had reservations about the requirement that the agreement was consistent with the public interest and accordingly notified counsel for the respondent and the Board of its intent to disapprove the agreement. Of particular note, was the continuation of salary, less State and Federal income tax deductions and pension contributions, until November 1, 2009 when respondent is to tender his resignation. During this period, the agreement provides that respondent would be on an administrative leave. At the request of the parties, the undersigned scheduled oral argument for October 25, 2007 on the issue of the public interest. The District produced Harold Kennedy, Jr., the Business Administrator-Secretary to the Board. As represented by both counsel for respondent and the District at the time of oral argument, and as confirmed by the sworn testimony of Mr. Kennedy, the respondent has accrued more than 240 days of leave time over a twenty-three year teaching career, although such leave time was not specifically provided for in the agreement. Based upon the further representations of respondent's counsel and counsel for the District, respondent agrees not to seek payment for this unused leave time as part of the settlement. Additionally, counsel for the District and Mr. Kennedy both expressed their concerns of further legal fees and costs in the event of appeals should this matter continue.

Based upon my review of the record, the testimony of respondent, the representations of both counsel and sworn testimony of Mr. Kennedy on the date of oral argument, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Winston has been employed as a teacher in the Elizabeth school system for the past twenty three years.

2. It is anticipated that the hearing in this matter would be protracted and costly.

3. The decision of DCF to modify its previous finding of "substantiated" child abuse against respondent to "not substantiated" may impair the ability of the District to prove its case.

4. If a hearing becomes necessary, the District has identified school personnel who are potential witnesses.

5. Litigation of the charges would lead to the disruption of the District's educational program due to the great amount of time lost by administrators, other personnel and students who would be required to testify to the occurrences which led to the filing of the tenure charges.

6. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing and any appeals involved.

7. Respondent has agreed to resign irrevocably from the District on November 1, 2009 and, based upon his counsel's representation and counsel for the District, respondent waives any claim for payment of accrued leave time.

8. Before entering into this agreement, Winston fully understood his rights and had adequate opportunity to consult with legal counsel.

9. In particular, Winston acknowledged his understanding that the Commissioner is required under N.J.A.C. 6A:9-17.4 to refer this matter to the State Board of Examiners for whatever action it deems appropriate.

10. The settlement fully disposes of all issues in controversy.

Based upon the foregoing, I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10-26-07
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 10-31-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OCT 31 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT

This Agreement is made this 5th day of September, 2007, by and between Elbert Winston (hereinafter "Winston"), who resides at 930 Prospect Avenue, Plainfield, New Jersey 07060, and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Winston is currently employed as a tenured teaching staff member; and,

WHEREAS, Wurster and the Board are parties to two (2) proceedings that were consolidated for hearings and which bear captions and docket numbers as follows: (a) In the Matter of the Tenure Hearing of Elbert Winston, School District of Elizabeth, Agency Dkt. No. 93-3/07, O.A.L. Dkt. No. EDU 03969-07; and DCF v E.W., Agency Dkt. No. AHU #07-154, O.A.L. Dkt. No. HDY 05208-07,

WHEREAS, on July 31, 2007, The Department of Children and Families (DCF) determined to modify its finding of substantiated abused against Winston to "not substantiated" thereby mooting the appeal in DCF v E.W., supra,

WHEREAS in light of the aforesaid determination by DCF, and in view of the costs of litigation for an Abbott District, the Board is agreeable to the dismissal of the tenure charges, subject to the conditions set forth in this Agreement;

WHEREAS, both the Board and Winston desire to enter into a Settlement Agreement stipulating the terms of his separation from all employment with the Board, together with the release of all his tenure and seniority rights as an employee of the Board, as well as providing for the exchange of General Releases of any and all claims

which the parties may have against the other arising from Winston's employment or otherwise;

WHEREAS, the terms of settlement take into account the public interest, as well as the fact that the litigation of these two (2) actions, and anticipated appeals thereafter, have caused and will continue to cause disruption to the educational program in the Elizabeth School District due to the absence of administrators, teachers and students who have or will hereafter have to testify at hearings, and that the Board and Winston have incurred and will continue to incur substantial financial costs to continue the litigation;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board agrees that the Tenure Charges in this matter bearing Agency Dkt. No. 93-3/07, O.A.L. Dkt. No. EDU 03969-07 shall be dismissed, with prejudice, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

2. The Board shall pay to Winston the amount of salary that it withheld from Winston pursuant to N.J.S.A. 18A: 6-14, which sum is stipulated to be Twenty Four Thousand, Four Hundred Forty Seven Dollars and Thirty Six Cents ($24,447.36). The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contribution. Additionally, this sum of $24,447.36 shall be paid to Winston within thirty (30) days of the approval of this Agreement by the Office of Administrative Law and the New Jersey Commissioner of Education.

3. Winston agrees to sign an irrevocable letter of resignation from all employment with the Board effective at the close of business on November 1, 2009. The resignation letter shall be in the form annexed hereto as Exhibit A and shall be expressly conditioned upon the Board's compliance with this Separation of Employment Agreement. The letter of resignation shall be null and void if the terms of the Separation of Employment Agreement are not met. The resignation is otherwise irrevocable. The Board waives all statutory or contractual claims for notification of Winston's resignation.

4. The Board will publicly approve and accept the resignation of Winston at its next regularly scheduled meeting, effective the close of business on November 1, 2009.

5. The Board shall approve the continuation of an administrative leave for Winston through and until the close of business on November 1, 2009.

6. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Winston for the 2006-2007 school year, which sum is stipulated to be One Thousand Eight Hundred Fifty Four Dollars ($ 1854.00). The sum of $1854.00 shall be paid to Winston as and for the increment amount that was to have been paid to him in the 2006-2007 school year. The aforesaid amount shall be paid net of normal payroll deductions for State and Federal income taxes and pension contribution. Additionally, this sum of $ 1854.00 shall be paid to Winston within thirty (30) days of the approval of this Agreement by the New Jersey Commissioner of Education. The Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2006-2007 school year is established to be Seventy Three Thousand Eight Dollars ($73,008.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Three Thousand Seven Hundred Fifty Eight Dollars ($73,758.00).

7. The Board shall restore the salary, adjustment and longevity increment(s) that it withheld from Winston for the 2007-2008 school year, which sum is stipulated to

be One Thousand Six Hundred Dollars ($1600.00). Subject to the terms of Paragraph 8, the Board shall further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2007-2008 school year is established to be Seventy Four Thousand Six Hundred Eight Dollars ($74,608.00), plus longevity in the amount of Seven Hundred Fifty Dollar ($750.00) for a total salary of Seventy Five Thousand, Three Hundred Fifty Eight Dollars ($75,358.00).

8. Upon Winston providing the Board with proof of the satisfactory attainment of a Masters Degree, the Board agrees that he shall be granted lateral movement on the salary guide and that his 2007-2008 salary shall be adjusted to Seventy Eight Thousand, Eight Hundred Eighty Four Dollars ($78,884.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Nine Thousand Six Hundred Thirty Four Dollars ($79,634.00). The Board shall then further undertake to amend its payroll records and pension reports to the N.J. Division of Pensions so that Winston's salary for the 2007-2008 school year is established to be Seventy Eight Thousand, Eight Hundred Eighty Four Dollars ($78,884.00), plus longevity in the amount of Seven Hundred Fifty Dollars ($750.00) for a total salary of Seventy Nine Thousand Six Hundred Thirty Four Dollars ($79,634.00).

9. Subject to effectuation of the adjustments to salary set forth in Paragraphs 6-8, and for the period through and until November 1, 2009, Winston shall be paid at the applicable salaries set forth in the collective negotiations agreement with the Elizabeth Education Association for the 2007-2008, 2008-2009 and 2009-2010 school years, inclusive of all salary, adjustment and longevity increments. The parties stipulate and agree that Winston's salary shall be $ 79,634.00 for the 2007-2008 school year, $81,434.00 for the 2008-2009 school year and the salary to be determined through collective negotiations at the MA Max step of the applicable salary guide for the 2009-2010 school year. Such salary shall be paid to Winston in the normal course of business, net of normal payroll deductions for State and Federal income taxes and pension contribution.

10. Through and until November 1 2009, the Board shall continue to provide Winston all of the insurance coverage(s) that it is presently providing to Winston under the plan(s) applicable to teaching staff members employed by the Board.

11. Upon the termination of Winston's employment on November 1, 2009 and consistent with his rights under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA"), Winston shall be able to purchase, at his own cost and expense, the insurance coverage presently provided to other teaching staff members employed by the Board.

12. In the event that Winston is unable to find alternative employment, the Board agrees that it will not contest, or oppose any claim for unemployment compensation that may be filed by Winston after November 1, 2009.

13. Winston's entry into this Settlement Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on his part.

14. Winston waives any and all rights to tenure, seniority, recall or reinstatement as of the effective date of his resignation. It is understood and agreed that Winston shall not, as of the effective date of his resignation, receive any other compensation or benefits or emoluments of employment except as otherwise provided in this Settlement Agreement.

15. In consideration of the above, Winston agrees for himself and his heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board ("Releasees"), past, present and future; of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims seeking employment or reemployment with the Board, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether

in law or in equity, which he, or his estate, might otherwise have or have had. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to his employment or his termination from employment with the Board.

Notwithstanding the signing of the release by Winston, the Board shall remain obligated to indemnify Winston against claims of third parties arising on or prior to November 1, 2009 pursuant to N.J.S.A. 18A: 16-6 and 6.1.

16. The Board, its members, agents, servants and employees ("Releasees"), agree to release irrevocably and unconditionally, and discharge Winston from any and all claims which it may have against Winston. It specifically releases Winston from any and all claims arising out of the employment relationship, including but not limited to any cause of action pursuable before any state or federal court or agency (including the filing and/or certification of tenure charges under the N.J. Tenure Employees' Hearing Law), or any other federal or state statutory provision, administrative regulation, collective negotiations agreement or other act that has the force and effect of law; as well as any claims for counsel fees, or any statutory or common law claim or cause of action for defamation, libel, tortious interference, breach of duty or loyalty, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis.

17. The parties agree that, subsequent to the date of this Agreement, any inquiries from potential employers regarding Winston shall be channeled solely to the then current Assistant Superintendent for Human Resources. Responses to such inquiries shall be limited to providing the dates of Winston's employment, his position, his salary, and that he left the district voluntarily to pursue other career opportunities. Nothing in this Settlement Agreement shall prohibit Winston from seeking other employment after the date of this Agreement.

18. The Board and Winston agree that Winston shall be provided a mutually convenient opportunity to obtain whatever personal belongings of his remain within the school district, as well as to return any district materials that Winston has in his possession.

19. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same position(s) which they held prior to this Settlement Agreement, and all rights are reserved in that event.

20. Winston acknowledges that, notwithstanding the parties entry into this Settlement Agreement, he has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding his teaching certificates as it deems appropriate.

21. In the event that the State Board of Examiners determines to initiate proceedings that results in a final determination for the suspension or revocation of Winston's teaching certificates, the Board agrees that it will nonetheless remain obligated to pay to Winston the full amount of salary, benefits and/or other consideration required under this Settlement Agreement. Any salary or benefits that would have been due to be paid to Winston between the effective date of any such final decision suspending or revoking Winston's teaching certificates and the effective date of Winston's resignation shall thereafter be paid to Winston by the Board in lump sum.

22. Nothing in this Settlement Agreement or the Releases set forth above shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

23. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees).

24. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and has been informed of their legal rights and obligations.

25. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

26. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

27. All terms of this Settlement Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

28. This Separation of Employment Agreement incorporates and settles all claims and disputes which may exist between Winston and the Board arising from his employment or otherwise. Further, this Settlement Agreement incorporates the complete financial obligation of the Board with regard to its employment relationship with Winston and Winston's separation from employment.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Witness

Elbert Winston

Dated: 9/5/07

Board Secretary/Business Administrator

Board President

Dated:

Exhibit A

ELBERT WINSTON

930 Prospect Avenue
Plainfield, New Jersey 07060

September 5, 2007

Armando Da Silva, Board President
Elizabeth Board of Education
500 North Broad Street
Elizabeth, New Jersey 07207

Re: Letter of Resignation

Dear Mr. DaSilva :

Pursuant to the terms of the Settlement Agreement between the Elizabeth Board of Education and myself, I hereby submit my irrevocable resignation from the position of Teacher, effective the close of business on November 1, 2009. This resignation is expressly conditioned upon the Board's compliance with the terms of the parties' Settlement Agreement and the general releases contained therein; and, is of no force and effect, even if accepted, unless said Settlement Agreement and the general releases contained therein which I have executed are fully performed by the Board.

Sincerely,

Elbert Winston

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RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2007 SEP 27 P 4: 17

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the counsel for the Elizabeth Board of Education and Elbert Winston have negotiated a resolution of the following case: In the Matter of the Tenure Hearing of Elbert Winston, School District of the City of Elizabeth, Agency Dkt. No. 93-3/07, OAL Dkt. No. EDU 03969-07, and DCF v. E.W., Agency Dkt. No. AHU 07-154, OAL Dkt. No. HDY 05208-07.

WHEREAS, in the interest of cost efficiency and judicial economy, and in lieu of a hearing, the parties have agreed to resolve the above-referenced case, with prejudice;

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts the Confidential Settlement Agreement on file with the School Business Administrator/Board Secretary.

Elizabeth, New Jersey

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD SEPTEMBER 20, 2007

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

07-65

482-07

#482-07E

OAL DKT. NO. EDU 8821-07
AGENCY DKT. NO. 336-11/07

VINCENT CRAPELLI, WILLIAM M. MOORE, AND JOSEPHINE LEE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF TRUSTEES OF THE RED BANK CHARTER SCHOOL MONMOUTH COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CHARTER SCHOOLS,	:	
RESPONDENTS.	:	

The record of this matter – including the audiotape of proceedings – and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 N.J. 126 (1982), and *N.J.A.C.* 6A:3-1.6. In particular, the Commissioner notes that applicants seeking extraordinary remedy must demonstrate – in addition to irreparable harm – a likelihood of success on the merits of the underlying appeal and a balancing of interests and equities which rests in their favor – none of which petitioners herein have done.

Accordingly, for the reasons succinctly expressed therein, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted and this matter shall duly proceed to hearing as contemplated by the parties and the ALJ.

IT IS SO ORDERED.[1]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/07
Date of Mailing: 12/18/07

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 8821-07

AGENCY DKT. NO. 336-11/07

VINCENT CRAPELLI, WILLIAM M. MOORE AND JOSEPHINE LEE,

Petitioners,

v.

BOARD OF TRUSTEES RED BANK CHARTER SCHOOL AND THE NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CHARTER SCHOOLS,

Respondents

Vincent Crapelli, William M. Moore and Josephine Lee, petitioners, pro se

Malachi J. Kenney, Esq., for respondent, Red Bank Charter School (Kenney, Gross, Kovats & Parton, attorneys)

Sookie Bae, Deputy Attorney General, for respondent, Office of Charter Schools (Anne Milgram, Attorney General of New Jersey, attorney)[1]

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[1] The Department anticipates filing a motion to be dismissed as a party and takes no position on the merits.

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. The file was transmitted to the Office of Administrative Law as a contested case on November 5, 2007; oral argument on an application for emergent relief was heard on November 13, 2007. The Charter School submitted a responsive brief on November 16, 2007.

Petitioners are former trustees and trustees of Red Bank Charter School and they seek to undo a settlement reached between the Charter School, Patock Construction Corp., and Short-Term Money, LLC. The settlement was approved by the Charter School on September 6, 2007 to resolve a lawsuit filed by these latter entities in Superior Court, Monmouth County. The application for emergent relief seeks to prevent the Charter School from taking steps in furtherance of the settlement.

The agreement between the parties in the Superior Court action contemplates a payment of approximately 1.3 million dollars from the Charter School to Patock and Short-Term Money. If paid timely no interest or costs would accrue. The current President of the Charter School, Bruce Whitaker, certifies that he was advised by special counsel, Parsons and Nardelli, as well as by the Schools regular attorneys, the firm of Kenney, Gross, Kovats and Parton, that the plaintiff's were likely to prevail at trial. Moreover, mediation sessions with retired Superior Court Judge Roger Feldman suggested the same outcome. Under these circumstances the Trustees voted for settlement so as to avoid interest payments probably calculated from 2004, costs and additional legal fees. They hope to refinance their current mortgage and incorporate the new debt.

Petitioners focus less on the agreement than on certain underlying facts. The Red Bank Charter School Foundation was organized in 2000 and tasked to help finance, purchase and renovate a permanent home for the Charter school. The President of the Charter School, Michael Stasi, was an ex-officio member of the Foundation; Gail Horvath, a Trustee of the Charter School, was the Foundation's

Treasurer. In 2003 Patock contracted with the Foundation to renovate a building for use as a school. There were change orders and cost overruns totaling approximately $500,000. Subsequently Short-Term Money lent the Foundation $800,000 to cover unanticipated costs. The school property and its debts were eventually transferred to the Charter School. When Patock and Short-Term Money were not reimbursed according to their understandings, suits were filed against both the Foundation and Charter School on the theory that the two organizations were interconnected. Petitioners reject this premise. They maintain that neither Mr. Stasi, nor Ms. Horvath were authorized by the Charter School to incur these additional expenses and further that the other Trustees were largely in the dark about them. They conclude that the School is not bound by these arrangements, and that missteps of this nature cannot be ratified *via* settlement, citing, Bauer v. City of Newark, 7 N.J. 426 (1951). This is the substance of the record for purposes of emergent relief.

To establish entitlement to emergent relief petitioners must show irreparable harm, a likelihood of success on the merits, that the law is settled and that the harm to them will exceed the harm to the Charter School if relief is denied, Crowe v. DeGioia, 90 N.J. 126 (1982).

On the core question of "likelihood of success" it is necessary to understand that Boards of Education have wide discretion in the conduct of school affairs, Thomas v. Morris Bd. Of Educ. 89 N.J. Super. 327 (App. Div. 1965); Kopera v. West Orange Bd. Of Educ., 60 N.J. Super. 288 (App. Div. 1960). Thus, petitioners must show that the Trustees' settlement decision is likely to be seen as arbitrary. This has not been done. The Trustees do not deny that prior arrangements with the Foundation were problematic. The Department's Office of Charter Schools has already made this finding, imposed penalties, and directed corrective action. Rather, the Trustees hope to curb their losses. Their original posture in the Patock/Short-Term Money lawsuits was that they were independent of the Foundation and not obligated to its creditors. The Trustees filed a motion to dismiss based on this theory, which was denied. They then went to mediation with an experienced retired trial judge, who also suggested their position was untenable. Both of the Charter Schools' law firms have advised that it

cannot successfully disaffiliate from the Foundation's obligations. The Trustees settled in the face of poor prospects.

Petitioners characterize the Trustees' action as ratification and then rely on principles that forbid governmental units from embracing illegal or *ultra vires* conduct, to conclude that the Board may not settle the Patock/Short-Term Money claims. Yet, the matter does not rest alone on prior errors and misdeeds, but upon the totality of circumstances before the Trustees now. Petitioners would have the Charter School reject a significant body of legal opinion and continue to defend these suits on the strength of their understanding of the law. As interest, costs and attorney's fees could be substantial; the Trustees were unwilling to bear further risk.

In its responsive papers the Charter School briefly suggests that the OAL/Commissioner decline jurisdiction as these questions have been or should be vetted in the Superior Court, where settlement was reached. I reserve on this question as the argument to this point is undeveloped. Petitioners have filed a motion for summary decision and the Charter School may wish to elaborate in its response.

Based on the foregoing, it is **ORDERED** that emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

11/29/07
DATE

SOLOMON A. METZGER, ALJ

/cad

482-07

D.G., Sr., on behalf of D.G., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a residency appeal on behalf of his son, a 12th grader in West Orange schools. The respondent sought reimbursement of tuition for the period of D.G. Jr.'s ineligible attendance, January to June 2007. Petitioner failed to appear at a November 2007 hearing, at which respondent presented testimony pertaining to the cost of the education provided D.G. by the Board.

The ALJ found that: petitioner failed to prosecute his appeal, leaving no basis to consider overturning the residency determination of the respondent Board, and respondent's proofs as to ineligibility and tuition rate were convincing and satisfy its burden of proof for the counterclaim The ALJ concluded that petitioner must pay the respondent tuition in the amount of $7,751 for the period from January 18 through June 20, 2007.

The Commissioner concurred with the ALJ, adopted the Initial Decision as the final decision in this matter, ordered petitioner to compensate the Board for tuition owed in the amount of $7,751, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 19, 2007

484-07

OAL DKT. NO. EDU 7231-07
AGENCY DKT. NO. 127-5/07

D.G., Sr., on behalf of D.G., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon a full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioner's appeal is appropriately dismissed for failure to prosecute and the Board's counterclaim for tuition is appropriately granted.

Accordingly, the recommended decision of the OAL is adopted for the reasons articulated therein. Petitioner is hereby directed to compensate the Board in the amount of $7,751.00 for the period of D.G., Jr.'s ineligible attendance in the Board's schools (January 18, 2007 to June 20, 2007, a total of 100 days, @ $77.51 per day). The instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/19/07

Date of Mailing: 12/19/07

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 07231-07

AGENCY DKT. NO. 127-5/07

D. G., Sr. ON BEHALF OF D.G., Jr.,

Petitioner,

v.

TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,

Respondent.

D. G., Sr. petitioner, pro se

Stephen J. Christiano, Esq, for respondent

Record Closed: November 2, 2007 Decided: November 5, 2007

BEFORE **JOANN LASALA CANDIDO,** ALJ:

PROCEDURAL HISTORY

On May 4, 2007, petitioner, D.G., Sr., filed a residency appeal on behalf of his child, D.G., Jr., grade 12. On June 21, 2007, the Township of West Orange Board of Education (BOE or respondent) filed an Answer with the State Department of Education (DOE) seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of his minor child in the BOE's school district from January

18, 2007 to June 2007. The DOE transmitted this matter to the Office of Administrative Law (OAL) on June 28, 2007, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The parties appeared on August 6, 2007. Petitioner requested the opportunity to obtain documentation before proceeding. The parties were advised by the undersigned that the matter would be scheduled for hearing on November 2, 2007. Petitioner failed to appear. Notwithstanding, testimony was taken pertaining to the cost of the education provided by the BOE.

FINDINGS OF FACT

Petitioner bears the burden to prove that his child was domiciled in the Township of West Orange. Failure to sustain that burden leaves in place and effect the findings of BOE at its hearing regarding domicile of the child. By petitioner's failure to appear at the plenary hearing, he fails to prosecute his appeal and there is no basis to consider overturning the finding of BOE.

Frank Guarneri, the district registrar for the district testified on behalf of the BOE in support of its counterclaim for tuition. He testified that D.G. attended high school in West Orange for 100 days from January 18, 2007 to June 20, 2007. (Exhibit "R-1") Guarneri testified regarding the results of the investigation supporting the finding that D.G is not domiciled at the West Orange address provided by petitioner, but continued to attend public schools in the school district of BOE. (Exhibit "R-3")

BOE provided certification that the per student tuition rate for school year 2006-2007 is $13,952.00 and the daily cost for the student at the rate of $77.51 totaling $7,751.00. BOE has sustained its burden of proof with respect to its counterclaim for tuition as to D.G. for the one hundred days of attendance at the public schools of BOE.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is whether D.G. was a domiciled student during the one hundred days he attended school in West Orange.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

N.J.S.A. 18A:38-1(b)(2) in pertinent part reads as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

N.J.A.C. 1:1-14.4(a) requires the withholding of any action for one day "if, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the clerk or judge." Thereafter, the matter may be returned to the transmitting agency for appropriate disposition.

Petitioner has failed to appear and to appropriately prosecute the matter brought by him. He has also failed to advise the reason for the nonappearance. Therefore, I **CONCLUDE** that the findings by BOE, that the child in question was not domiciled in the Township of West Orange from January 18, 2007 to June 20, 2007, is in full force and effect.

N.J.S.A. 18A:38-1(b)(1) reads in pertinent part as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

BOE's proofs as to ineligibility for attendance and as to the tuition rate are convincing and satisfy its burden of proof for the counterclaim. Therefore, I **CONCLUDE** that D.G., Sr. must pay BOE tuition calculated at the rates previously referenced for his child as to his attendance at BOE's public school during their ineligibility period.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, D.G., Sr., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that D.G., Sr. reimburse respondent the total sum of $7,751.00 for tuition costs associated with the attendance of his child D.G. in West Orange between January 18, 2007 and June 20, 2007.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 5, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: November 5, 2007

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 7 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

WITNESSES

Petitioner

Did not appear

Respondent

Frank Guarneri

EXHIBITS

Petitioner

None

Respondent

R-1 Student printout

R-2 tuition costs

R-3 Residency investigation report dated April 16, 2007

485-07

OAL DKT. NO. EDU 3185-07
AGENCY DKT. NO. 446-12/07

JOANN CARDILLO	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Stipulation of Settlement (Stipulation) and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the terms set forth in the Stipulation and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/19/07

Date of Mailing: 12/19/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03185-07

AGENCY DOCKET NO. 446-12/06

JOANN CARDILLO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Gregory Syrek, Esq. for petitioner
(Buccceri and Pincus, attorneys)

Robert E. Murray, Esq., for respondent
(The Murray Law Firm)

Record Closed: November 8, 2007 Decided: November 9, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 7, 2007, for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A telephone conference was conducted on March 22, 2007 at which time hearings were scheduled for September 12 and 13, 2007. During the September 12th

and 13th hearings the parties to the matter engaged in extensive settlement discussions. A status conference was scheduled and conducted on August 27, 2007 at which time the matter was given a control date for November 7, 2007. Prior to the hearing date the parties advised that the matter was settled and the fully executed settlement is forthcoming. The Stipulation of Settlement was received by the undersigned on November 8, 2007.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 9, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 11-15-07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 15 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

BUCCERI & PINCUS, ESQS.
1200 US Highway 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

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STATE OF N.J.
OFFICE OF ADMIN. LAW

JOANN CARDILLO,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 446-12/06 OAL DKT. NO. EDUOR 03185-2007N
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between Joann Cardillo (hereinafter "Ms. Cardillo"), who resides at 5-21 17th Street, Fair Lawn, New Jersey 07410-2161, and the State Operated School District of the City of Paterson (hereinafter "the District") having its offices at 33-35 Church Street, Paterson 07505-1306, New Jersey 07030. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Cardillo is a tenured employee of the District; and

WHEREAS, on or about October 5, 2006, Ms. Cardillo was notified that her position of employment (Director of Student Placement) was being abolished and that she was being reassigned to a teaching position; and,

WHEREAS, Ms. Cardillo filed a petition with the Commissioner of Education alleging that she gained tenure as a vice principal and that her reassignment to a teaching position violated her tenure rights; and,

WHEREAS, the District filed an answer denying Ms. Cardillo's allegations.

WHEREFORE, the parties have agreed to an amicable resolution of this matter in lieu of further litigation; and,

IT IS on this 5th day of November, 2007, agreed as followed:

1. The District will appoint Ms. Cardillo to an available position as a vice principal as soon as is practicable.

2. The District will pay Ms. Cardillo at the annual salary rate of $100,500, inclusive of longevity, for the period of time from December 1, 2006 to June 30, 2007. The parties calculate that her salary adjustment for this period of time is $3,829.70.

3. The District will pay Ms. Cardillo at the annual salary rate of $105,900, inclusive of longevity, commencing July 1, 2007. This salary shall be for the 2007-2008 school year.

4. All back pay due and owing as the result of this salary adjustment shall have all appropriate payroll deductions and withholdings made.

5. The amount of back pay owed to Ms. Cardillo as the result of this salary adjustment will be paid within thirty (30) days of the approval of this Stipulation of Settlement by the Commissioner of Education.

6. Entry into this Stipulation of Settlement shall not constitute, nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on the part of any party.

7. Ms. Cardillo acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Stipulation of Settlement, and has done so, and that she signs this document as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

8. The undersigned representatives of the District hereby acknowledge that they are authorized to sign this Agreement pursuant to the terms of the attached authorization of the District approving this Stipulation of Settlement.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

8. Both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Stipulation of Settlement and all of these stipulations, agreements, acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties

shall be returned to the status quo existing prior to this Agreement.

WITNESS:

Gregory T. Syrek

Joann Cardillo

Dated: 10/26/07

STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON

Dated: 11/5/07

487-07

OAL DKT. NO. EDU 6459-07
(EDU 632-07 ON REMAND)
AGENCY DKT. NO 20-1/07

IN THE MATTER OF THE TENURE HEARING OF STACY DEMBROWSKI, SCHOOL DISTRICT OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the executed "Settlement Agreement" (Settlement) with exhibits, petitioner's board resolution authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the terms of the settlement with one comment.

> Section 1 (B) of the Settlement recites that respondent
>
> Shall receive a retroactive payroll check on June 1, 2007 representing all retroactive pay from January 18, 2007 through June 1, 2007. Ms. Dembrowski George's wages will continue under this paid leave of absence from June 1, 2007 through January 18, 2008 . . . .

Thus, the provision anticipated that certain conduct would occur on a date that ultimately fell before the Settlement was actually executed by both parties, before it was ratified by petitioner via board resolution, and before it was considered by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for effectuation of same.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/20/07

Date of Mailing: 12/20/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6459-07
(On Remand from EDU 632-07)
AGENCY DKT. NO. 20-1/07

IN THE MATTER OF THE TENURE HEARING OF STACY DEMBROWSKI,

Louis J. Greco, Esq., for petitioner

Ned P. Rogovoy, Esq., for respondent

Record Closed: October 18, 2007 Decided: November 1, 2007

BEFORE **BRUCE M. GORMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 13, 2007, on remand from OAL Docket Number EDU 632-07, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. The parties have also submitted certain supporting documents setting forth the basis of the settlement. Those documents include an attorney's statement, a detailed resolution of the Board of Education accepting the settlement, the resignation of the respondent, a joint statement of the Board of Education, and an affidavit of the respondent/

I have reviewed the record, the terms of settlement, and the submitted documentation and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11/1/07
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 8 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

Law Office of
NED P. ROGOVOY, ESQUIRE
A Limited Liability Company

NED P. ROGOVOY, ESQUIRE
Member of NJ Bar

Madison Square Complex
782 S. Brewster Road • Unit A6
Vineland, NJ 08361

(856) 205-9701
Fax: (856) 205-9704

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STATE OF NEW JERSEY

October 15, 2007

Honorable Bruce M. Gorman
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road
P.O. Box 049
Mercerville, NJ 08625-0049

Re: In the Matter of the Tenure Dismissal of Stacy Dembrowski a/k/a Stacy George, Employee of the Somers Point Board of Education
OAL Docket No. EDUTH 06459-2007S
Agency Docket No. 20-1/07

Dear Judge Gorman:

Please find enclosed an original attorney statement regarding the Cardonick requirements, copy of the Resolution of the Somers Point Board of Education, Settlement Agreement, Approved Leave of Absence and Resignation, and an original Affidavit of Stacy Dembrowski a/k/a Stacy George which should satisfy the Commissioner of Education that there was a proper reason for a universal settlement, that all parties have been informed properly and that the approvals are knowing and voluntary.

The original Settlement Agreement was forwarded to the Honorable W. Todd Miller on June 7, 2007 and I am sure was sent in the package to the Commissioner of Education.

Thank you.

Very truly yours,

NED P. ROGOVOY

NPR:pal
enc.
c w/enc: Louis J. Greco, Esquire
Ms. Stacey George
c: Myron Plotkin, Uniserv Rep.

In re Cardonick documentation

The nature of the charges are as delineated in the "Statement of Charges" and are contained in Exhibit A. The answer of Respondent employee is also contained in Exhibit A.

The answers to Interrogatories 1 - 4, which are enclosed as Exhibit B, clearly demonstrate the life problem, the resolution of the criminal matters, and the evidence of the abusive relationship that the Respondent used to have with James H. Dagostino.

Both parties agree that there was no evidence that the Respondent ever was in the school when intoxicated and/or under the influence of any intoxicating substance. Respondent was a teacher for seven years and had very good evaluations until she was suspended and tenure charges were brought on or about January 18, 2007. A copy of a 2003 Teachers Evaluation Report is enclosed as Exhibit C to demonstrate that this was a typical evaluation until the 2006-2007 school year, when as a result of the tumultuous relationship, the respondent did miss more days than she should have missed. A Memo dated May 15, 2006 to the Respondent from the Superintendent of Schools is enclosed in Exhibit D evidencing the change in the Respondents absenteeism wherein an increment withholding was threatened.

The actual tenure case was not due to begin until on or about May 18, 2007 and probably would have taken a number of days to try. On May 18, 2007, the District would have had to begin paying the Respondent since the 120 day period passed. The District would incur extensive legal expenses, and naturally even after the decision was rendered (which could be decided one way or the other), the Commissioner would have a review period and there would be an appeal available to the State Board of Education which could have caused the District to pay significant sums with no guarantee of total success.

The Respondent likewise, would have had to appear at trial, go through an entire trial, and also, take the risk that her tenure would have been taken. The Respondent, is well aware, that the matter is referable to the Board of Examiners for their independent action if chosen. During the pending trial, the district would have been unsettled, requiring the production of witness and attention paid to the case, as well as hiring a substitute until the outcome of the tenure case was final.

All of those factors contributed to settlement negotiations on both sides and the ultimate Settlement Agreement was entered into by both parties voluntarily.

Both parties signed the Settlement Agreement having been fully advised of all of their rights, however, enclosed you will also find a Resolution of the Board of Education allowing the President to sign on behalf of the Board and also a

statement signed by the Respondent averring that the settlement agreement was singed freely and voluntarily and after being advised of all of her rights.

The Board believes that it is in their interest to spend public tax dollars judiciously, and in a case wherein a result is not absolute, and the dollars spent would be substantial, the public is served by settling the matter once and for all with the Petitioner's District and placing stability back into the system.

Dated: ~~August~~ Sept. 27, *2007*

Louis Greco, Esquire
Attorney for Somers Point Board of Education

Ned P. Rogovoy, Esquire
Attorney for Stacy Dembrowski, a/k/a Stacy George

RESOLUTION
OF
THE SOMERS POINT BOARD OF EDUCATION

WHEREAS, the Board of Education has filed tenure charges against Stacy Dembrowski, a/k/a Stacy George for incapacity and misconduct; and

WHEREAS, the matter has been assigned for trial before Administrative Law Judge Bruce Gorman; and

WHEREAS, there are extensive documents, proofs and trial days possible which could result in significant expense for both sides; and

WHEREAS, the parties have conferred;

NOW THEREFORE, BE IT RESOLVED, as follows:

The Somers Point Board of Education hereby determines that it is in its best interests and the best interests of the public to agree to the settlement agreement attached hereto which includes the resignation of Stacy Dembrowski a/k/a Stacy George from the employment of the Somers Point Board of Education and resolves the tenure charge;

BE IT FURTHER RESOLVED, that among the reasons the Board of Education determines that this is in its best interest are as follows:

1. It is anticipated that trial in this matter may take six or more full days.
2. The anticipated trial would result in substantial financial expense to the Somers Point Board of Education both with respect to attorney's fees and loss of staff time.
3. The Board of Education will remain at risk should a trial occur since there is no guarantee of the outcome.

4. It is anticipated that the loss of work days for the Superintendent of Schools, the School Principal and other staff involved in this case as well as school personnel witnesses would amount to extensive lost personnel time.
5. But for the agreement between the parties, the Board of Education would have to continue paying her salary under the tenure hearing law for an extended period of time.
6. It is clearly a business decision to come to the agreement between the Board of Education and Stacy Dembrowski a/k/a Stacy George as it will clearly save the Board of Education money and the agreement will provide to the Board of Education the desired result of having Stacy Dembrowski a/k/a Stacy George resign from the School District.

BE IT FURTHER RESOLVED, that the President of the Board of Education and the Board Secretary are hereby authorized to execute this agreement in behalf of the Somers Point Board of Education.

The foregoing resolution was moved by Joseph Hall; and seconded by Karen Broomall.

ROLL CALL VOTE

NAME	AYES	NOES
Walt Wilkins	✓	
William August	✓	
Karen Broomall	✓	
Jamie DiMeglio	✓	
Joseph Hall	✓	

Constance Hiles ✓

Maureen Kern ✓

Dr. Gregg Pfund ✓

Joseph Toland absent

CERTIFICATION

I, Suzanne Keller, Board Secretary of the Board of Education of the City of Somers Point, herewith certify that the foregoing Resolution was approved by the Somers Point Board of Education in a roll call vote as herein set forth in executive session, at the regular meeting of the Somers Point Board of Education held on September 20, 2007.

Dated: Sept. 20, 2007

Suzanne Keller, Board Secretary

SETTLEMENT AGREEMENT,
APPROVED LEAVE OF ABSENCE AND RESIGNATION

This Settlement Agreement, Approved Leave of Absence and Resignation (the "Agreement"), is entered into this 6th day of June, 2007, by and between STACY DEMBROWSKI a/k/a STACY GEORGE ("Ms. Dembrowski George") and the SOMERS POINT BOARD OF EDUCATION, ATLANTIC COUNTY (the "Board") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the Somers Point Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Ms. Dembrowski George" shall mean and include Stacy Dembrowski a/k/a Stacy George and any and all of her heirs, executors, administrators, successors, predecessors, assigns, agents, representatives and privies. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Ms. Dembrowski George's employment by the Board.

WITNESSETH:

WHEREAS, the Board prepared and filed tenure charges ("Tenure Charges") based on charges of conduct unbecoming and incapacity against Ms. Dembrowski George pursuant to N.J.S.A. 18A:6-11 and said charges were certified and are pending under Agency Docket No. 20-1/07 and OAL Docket No. EDUTH 00632-2007S; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which the Board may have against Ms. Dembrowski George; and

WHEREAS, the Board acknowledges and agrees that this Agreement shall cause the Board to voluntarily dismiss, waive and withdraw any and all administrative actions of any kind against Ms. Dembrowski George and the Board has agreed to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges with prejudice;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. (A) Ms. Dembrowski George agrees that upon signing this Agreement and by signing her Resignation which is attached hereto as **Appendix A**, she is irrevocably resigning her employment with the Board effective at least by June 30, 2008 or sooner pursuant to the remaining terms of this Agreement.

(B) As a result of the tenure charges being certified and contested as represented in the prior introduction, Ms. Dembrowski George's pay was stopped as of January 18, 2007 and in light of this contested case, was not due to begin until on or about May 18, 2007. However, for all parties to avoid the litigation of the contested case before an administrative law judge, the Board agrees to place Ms. Dembrowski George on a retroactive paid leave of absence from January 18, 2007 through June 30, 2008 subject to the following terms and conditions:

Ms. Dembrowski George shall receive a retroactive payroll check on June 1, 2007 representing all retroactive pay from January 18, 2007 through June 1, 2007. Ms. Dembrowski George's wages will continue under this paid leave of absence from June 1, 2007 through January 18, 2008. Both sides realizing that since Ms. Dembrowski

George is a 10-month employee, she shall not receive any payroll compensation for the period July 1, 2007 through August 31, 2007 and that her payroll compensation will then begin as it would a regular contract teacher on September 1, 2007 and continue through January 18, 2008, and her status will be that she is on a paid leave of absence.

Benefits - In addition to her payroll benefits, Ms. Dembrowski George shall receive all of her benefits that are available from June 1, 2007 through June 30, 2008 even though she shall not receive any additional compensation after January 18, 2008.

The continuation of benefits is conditioned on Ms. Dembrowski George not obtaining other employment wherein health insurance benefits are available through her employment. Therefore, if during the period of June 1, 2007 through June 30, 2008, should Ms. Dembrowski George obtain gainful employment and that employment provides health insurance coverage equal to the one provided by the Board, she shall immediately notify the Board and the Board's obligation to provide benefits shall cease prior to any expiration of any time period. In no event shall Ms. Dembrowski George be on payroll past January 18, 2008, even if she has no other benefits and if she has no other health insurance as of January 18, 2008, her status will convert to an unpaid leave of absence with benefits until June 30, 2008 when that status shall cease.

In no event will the Board have any obligation to provide benefits to Ms. Dembrowski George beyond June 30, 2008, no matter what are the circumstances.

Ms. Dembrowski George shall receive the compensation for her retroactive paid leave of absence regardless of any other employment that she obtains during the period so that if she becomes employed after June 1, 2007 and before January 18,

2008, she shall be entitled to her payroll check during that period.

2. Ms. Dembrowski George, for the consideration given by the Board as set forth above, which she acknowledges is adequate and satisfactory to her, hereby commits as follows:

(a) Ms. Dembrowski George irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Ms. Dembrowski George has ever had or now has against the Board in connection with her employment with the Board, the resignation of her employment, compensation and/or benefits with the Board and the charges. Ms. Dembrowski George further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by her and which seeks personal, equitable or monetary relief for her against the Board, including but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income

Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment, discrimination; employee benefits; collective bargaining agreement; and the termination of employment; and any other claim arising from or relating to Ms. Dembrowski George's employment. Ms. Dembrowski George understands that she is not releasing any claims she may have to enforce the provisions of this Agreement. This release covers both claims that Ms. Dembrowski George knows about and those she may not know about, except for claims (i) that may arise after the date Ms. Dembrowski George executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Ms. Dembrowski George has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Ms. Dembrowski George further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of reasonable attorneys' fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

(b) The Board agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 20-1/07, OAL

Docket No. EDUTH 00632-2007S, with prejudice in light of Ms. Dembrowski George's Agreement to resign for the consideration specifically paid and leave of absence granted to her by the Board. In executing this Agreement, Ms. Dembrowski George understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and that notwithstanding, the Commissioner's decision with regard to the tenure charges, the remaining promises and covenants between the parties that are contained in this Agreement are enforceable upon the execution of the Agreement.

3. With respect to any inquiries directed to the Somers Point School Board's Department of Human Resources regarding Ms. Dembrowski George's status, the Board shall have the responsibility only as provided below. If any inquiries are made, there will be a neutral reference and **Appendix B** shall be read to the inquiring party.

4. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board or Ms. Dembrowski George. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which the Board or Ms. Dembrowski George has ever had or now has against each other arising out of or relating to her employment with the Board.

5. This Agreement may not be changed orally and no modification, amendment

or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the Board.

6. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this Agreement. This is an integrated document.

7. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect and to that end, the provisions of this Agreement are declared to be severable.

This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in the Superior Court for the State of New Jersey, County of Atlantic.

8. Ms. Dembrowski George agrees that she shall be responsible for her own attorney's fees and costs incurred in connection with any matter mentioned in this Agreement.

9. In executing this Agreement, Ms. Dembrowski George has had an opportunity to speak to her attorney and has relied upon the legal advice of her attorney as to the terms of this Agreement, which have been completely read by her and explained by her attorney, and those terms are fully understood and voluntarily accepted.

10. This Agreement shall not be executed in counterparts and shall be enforceable only if executed by Ms. Dembrowski George and the Board.

11. This Agreement shall become effective immediately following the execution by Ms. Dembrowski George and the Board.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

AGREED AND ACCEPTED:

Stacy Dembrowski a/k/a Stacy George Date: 6/6/2007

Stacy Dembrowski a/k/a Stacy George

Subscribed & sworn to before me
this 6th day of June, 2007

Ned Rogovoy

Notary Public

Attorney at Law

I hereby acknowledge and affirm that I have full authority to act on behalf of and to bind the Board to the terms set forth in this Agreement.

Dated: May 24, 2007

WALT WILKINS Board President

Witness:

Louis J. Greco

, Business Administrator/
Board Secretary

APPENDIX A

Resignation of Stacy Dembrowski George

To the Somers Point Board of Education, Atlantic County:

I, Stacy Dembrowski, a/k/a Stacy George, hereby resign my employment with the Somers Point Board of Education, Atlantic County, effective June 30, 2008.

Stacy Dembrowski, a/k/a Stacy George

Subscribed & sworn to before me
this 16th day of June, 2007.

Ned Rogovoy
Attorney at N.J.

APPENDIX B

Joint Statement of
Somers Point Board of Education, Atlantic County

Ms. Dembrowski George is on a paid leave of absence, but is not precluded from employment due to her paid leave status. She will not be re-employed by the Board after her leave expires and all disagreements were resolved amicably.

IN THE MATTER OF THE TENURE DISMISSAL OF STACY DEMBROWSKI a/k/a STACY GEORGE, EMPLOYEE OF THE SOMERS POINT BOARD OF EDUCATION
AGENCY DOCKET NO. 20-1/07
OAL DOCKET NO. EDUTH 06459-2007S

AFFIDAVIT OF STACY DEMBROWSKI a/k/a STACY GEORGE

STATE OF NEW JERSEY)
:ss
COUNTY OF)

STACY DEMBROWSKI a/k/a STACY GEORGE, of full age, being duly sworn according to law upon her oath, deposes and says:

1. I have reviewed the Settlement Agreement and all of its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have continued to the trial and had the judge make a determination as to whether or not the Board of Education had, by a preponderance of evidence, proved that I had "conduct unbecoming and incapacity" pursuant to the facts when applied to existing law.

3. I have entered into the Settlement Agreement freely and voluntarily and no one has forced or coerced me to resign, but I have done so at my own free will, knowing the perils and in some cases, benefits, that I will or could derive.

Stacy Dembrowski aka Stacy George (L.S.)
STACY DEMBROWSKI a/k/a
STACY GEORGE

SWORN & SUBSCRIBED TO
Before me this 15th day of
October, 2007.

Patricia A. Love
Notary Public of New Jersey
Commission Expires 3/15/2011

488-07

#488-07R

OAL DKT. NO. EDU 7579-07
(EDU 3522-06 ON REMAND)
AGENCY DKT. NO. 80-2/06

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES BONNER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF IRVINGTON, ESSEX COUNTY.	:	

The Initial Decision (on Remand) of the Office of Administrative Law (OAL), the parties' Stipulation of Settlement, and the record of this matter have been reviewed, mindful of the Commissioner's July 10, 2007 determination that the prior proposed withdrawal returned to the Agency by the Administrative Law Judge failed to address the standards of *In re Cardonick,* 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983, as is required for review in all proposed withdrawals and settlement agreements in tenure matters.

Upon review of the agreement and record on remand, the Commissioner approves the settlement terms, since they now comport with *Cardonick, supra*. The Commissioner adopts the settlement as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/20/07

Date of Mailing: 12/20/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07579-07
AGENCY DKT. NO. 80-2/07

IN THE MATTER OF THE TENURE HEARING OF JAMES BONNER, IRVINGTON BOARD OF EDUCATION.

Raymond L. Hamlin, Esq., for petitioner
(Hunt, Hamlin & Ridley, attorneys)

Louis P. Bucceri, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: November 2, 2007 Decided: November 2, 2007

BEFORE **IMRE KARASZEGI,** ALJ:

On July 20, 2007, this matter was filed and transmitted to the Office of Administrative Law on Remand of EDU 3522-06, for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement and Resolution.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 2, 2007

DATE

IMRE KARASZEGI, ALJ

Date Received at Agency: 11-8-07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 8 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

BUCCERI & PINCUS, ESQS.
1200 U.S. Highway 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Respondent

OFFICE OF ADMINISTRATIVE LAW
31 WASHINGTON STREET
NEWARK, NJ 07102

NOV 0 2 2007

IN THE MATTER OF THE	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
TENURE HEARING OF	:	ADMINISTRATIVE LAW
JAMES BONNER, SCHOOL	:	OAL DKT. EDU 07579-2007N (OAL EDU 03522-2006N ON REMAND)
DISTRICT OF IRVINGTON,	:	AGENCY REF. NO. 80-2/06
ESSEX COUNTY.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made this 31ST day of October, 2007, by and between James Bonner, who resides at 21 Acken Drive, Clark, NJ 07066 (hereinafter referred to as "Mr. Bonner" or "respondent"), and the Board of Education of the Township of Irvington, with its principal offices located at One University Place, Irvington, New Jersey 07111 (hereinafter the "Board" or "petitioner").

WHEREAS, an administrative action was instituted by the Board, pursuant to *N.J.S.A.* 18A:6-11 et seq., certifying to the Commissioner of Education three (3) charges of unbecoming conduct and one (1) charge of insubordination against Bonner; and,

WHEREAS, respondent filed an Answer denying those charges in compliance with *N.J.S.A.* 18A:6-16; and,

WHEREAS, the Institutional Abuse Investigation Unit of the Department of Human Services investigated the same allegations as related to the student involved in Charges 1, 3 and 4, and concluded that abuse was "UNFOUNDED" with concerns only about "horseplay" between the student and the respondent (Exhibit A); and,

WHEREAS, the process of discovery, interviewing of witnesses and the review of the IAIU reports as to the incidents set forth in the charges were inconclusive and therefore established an inability to support charges of assault or corporal punishment by respondent; and,

WHEREAS, given these facts, and Respondent's decision to retire, these proceedings have been rendered moot.

NOW, THEREFORE, the parties stipulate and agree as follows:

1. As to Charges 1, 3 and 4, these charges all relate to single incident on December 6, 2005, involving a student, A.R. The allegations were that, during a physical education class, respondent pushed a basketball in the student's face, slapped her, threw two (2) more basketballs at her, and called her a "fat cow" and "fat bitch, Jr." The

parties stipulate that the student admitted that she neither sought, nor required, any medical attention and that she had no injuries. The IAIU investigation found statements by a teacher, Ms. Shulman, and two student witnesses to be conflicting as to what happened. (Exhibit A) Respondent admitted throwing a basketball to A.R., which she admitted throwing back at the end of class. He acknowledged that the bell to end the period sounded just as he threw the ball for the last time. A.R. simultaneously turned to leave at that time as well, with the result that the ball hit her in the shoulder. There was no force behind the throw, as evidenced by the student's lack of bruises or injury and there was no information to support the alleged name-calling. Respondent apologized at the time, but the student was upset nonetheless. As per the IAIU report, the allegations of physical abuse were unfounded.

Criminal charges were brought by A.R. in municipal court against respondent. These charges were dismissed due to lack of prosecution, when A.R. and her parent repeatedly failed to attend Court to testify. The IAIU investigation found abuse to be "UNFOUNDED" and did not recommend termination of Respondent. (Exhibit A).

Respondent acknowledges that his playful interaction with A.R. was ill-advised since it resulted in the

accidental contact of the ball with the student. As such, Petitioner, therefore, withdraws Charges 1, 3 and 4, and agrees to their dismissal, with prejudice.

2. As to Charge 2: This allegation relates to another alleged incident, which allegedly took place on December 6, 2005, involving respondent and another teacher, Ms. Shulman. The account in the Statement of Evidence, as related by Ms. Shulman, accused respondent of slapping Ms. Shulman across the face with a book in reaction to a comment by her about his intelligence. Her claim was contradicted by statements taken from two (2) adult witnesses (Exhibit B) who were also present at the time. Rather than relating to the incident with the student, as Ms. Shulman insinuated, these witnesses clarified the fact that the incident between respondent and Ms. Shulman was again an example of minor contact with playful intent, not an assault. They assert there was a tap on the top of head in reaction to Ms. Shulman's insult, not a slap in the face. Ms. Shulman neither left the room when the incident took place, nor indicated any upset, fear, pain or injury. She instead proceeded with parent conferences.

The fact that respondent was Ms. Shulman's mentor for certification purposes is acknowledged in the Charges and raises issues of motive.

Respondent agrees that even tapping Ms. Shulman with the book, despite her insult as to his intelligence, was not warranted. However, the evidence no longer supports probable cause for termination in this regard and petitioner withdraws Charge 2 and agrees to its dismissal, with prejudice.

3. Despite his belief that termination was not warranted, respondent decided to retire from teaching as of October 1, 2006 because his experiences with regard to the accusations against him have caused him to realize that his time as a teacher was no longer as productive as it once was. His errors resulted from a too casual attitude, which indicated a need to leave the profession.

4. Respondent acknowledges that the Commissioner of Education will refer this matter to the State Board of Examiners for its review as to whether or not to issue an Order to Show Cause to revoke his educational certifications.

5. As part of this settlement, Respondent agrees to waive and abandon any and all rights and claims to back salary for the period of his suspension without pay or thereafter, as well as abandoning any right to tenure, seniority or reemployment in the District.

6. The parties agree that the pursuit of this litigation through plenary hearing is not in the best interests of the students, parents or the community of the petitioner school district because litigation would entail testimony by students and the expending of public funds, with the most probable result being, at most, a loss of 120 days pay or an increment withholding based on evidence which can, at worst, establish poor judgment.

If litigation were to proceed, respondent would have the right to withdraw from retirement and collect his salary since the 120 day period of suspension without pay has already expired.

7. This settlement is in the best interests of all concerned, and in particular, is in the public interest. The parties agree that the standards set forth in In the Matter of the Tenure Hearing of Frank Cardonick, 1990 S.L.D. 842, 846 and *N.J.A.C.* 6A:3-5.6 have been met.

8. Both parties have each had independent legal representation. They both fully understand the terms and conditions set forth in this Agreement, as well as their respective rights to litigate the issues in this case with a final decision to be made by the Commissioner of Education as an alternative to settlement. The decision to enter into this Agreement rather than to avail themselves of the right

to litigate has been made of their own free will without duress or coercion.

9. The parties acknowledge that this settlement must be recommended by the Honorable Imre Karaszegi, A.L.J., and approved by the Commissioner of Education. In the event such approvals are not forthcoming, the parties will resume the tenure charge process with all claims, charges, rights and defenses preserved, and this Agreement shall be null and void.

10. The stipulations and agreements set forth in this document are made as part of this settlement. In the event this settlement is not approved by the appropriate authorities, it is agreed that nothing set forth herein may be used as evidence in any subsequent proceedings.

11. All terms of this Stipulation of Settlement are deemed material and shall be controlled by the laws of the State of New Jersey. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. The parties signing below hereby acknowledge that they have been duly authorized to sign this Stipulation of Settlement. A copy of the Board's resolution adopting this Agreement is attached hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

FOR THE IRVINGTON BOARD OF EDUCATION

By: _____
Raymond L. Hamlin, Esq.

Dated: 10/20/07

FOR RESPONDENT, JAMES BONNER

_____
James Bonner

Dated: 10/31/07

_____
Louis P. Bucceri, Esq.

Dated: 10/31/07

REGULAR BOARD MEETING **OCTOBER 17, 2007**
WALK ON

RESOLUTION TO APPROVE LANGUAGE IN THE SETTLEMENT ENTITLED IRVINGTON BOARD OF EDUCATION V. JAMES BRONNER, OAL DOCKET NO.:EDU-07579-2007N (OAL DOCKET NO.: EDU-03522-2006N ON REMAND) AGENCY REFERENCE NO.:80-2/06, IN ACCORDANCE WITHIN RE: CARDONICK, 1990 SLD842 AND NJAC 6A:3-56 NO CHANGE IN SETTLEMENT TERMS.

ACTION:
Motion by: Norma Carty, Seconded by: Paul Inman
Roll Call: Unanimously approved on a roll call vote

As Certified by:

Reggie Lamptey
Assistant Superintendent for Business/Board Secretary

/vp

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
INSTITUTIONAL ABUSE INVESTIGATION UNIT
METROPOLITAN REGIONAL OFFICE
50-58 BURNETT AVENUE
MAPLEWOOD, NEW JERSEY 07040
(973) 763-3261

JON CORZINE
Governor

KEVIN M. RYAN
Acting Commissioner

CONFIDENTIAL

Ms. Ethel Davion, Superintendent
Irvington Board of Education
1 University Place
Irvington, NJ 07111

Re: **IAIU Finding Report** in the matter of Child Abuse concerning A R at Union Avenue Middle School on 12/06/05. **IAIU#05-3385**

Dear Ms. Davion:

New Jersey Law, as set forth in N.J.S.A. 9:6-8.11, requires the Department of Human Services, Institutional Abuse Investigation Unit to investigate all allegations of child abuse and neglect. On 12/07/05, the above referenced matter was received by the Department for investigation. **This letter will serve as the findings report in the matter of IAIU#05-3385.**

Investigative Findings

Physical abuse was unfounded regarding the actions of the Gym Teacher, James Bonner in accordance with N.J.S.A 9:6-8.21. However, there was a concern regarding staffs' actions. No adjudicative findings have been made. IAIU's review herein is solely investigative.

Evaluation Findings

A R was not injured as a result of this incident. According to A , she did not need to seek medical attention from the school nurse as a result of the incident. Also three other witnesses were interviewed; Teacher, Ms. Schulman; D Bi (student) and S C (student) and they gave conflicting accounts of the incident.

EXHIBIT A

There is a concern regarding the playfulness or horseplay between Mr. Bonner and A R . Mr. Bonner's actions where somewhat unprofessional and unwarranted toward A . Mr. Bonner was observed playing with the students later throwing an object; a ball. Mr. Bonner used poor judgment by throwing an object at a student. This is a violation of school policy. Furthermore the student, A , reported that Mr. Bonner verbally ridiculed her. Student, A R was made to feel uncomfortable by being ridiculed about her weight issues.

Remedial Action

It is the understanding of this office that the following remedial action was taken at the time of the investigation:

1. Mr. James Bonner was suspended indefinitely pending investigation.

Recommendations for Corrective/Disciplinary Action

Mr. James Bonner needs to be separated from student, A . R . If possible, Mr. James Bonner can teach in another gym and have no contact with A R.

Confidentiality Statement

Please be advised that the results of the Department's investigation, including identifying information, are maintained in the Department's files and can only be disclosed as set forth in N.J.S.A 9:6-8.10a. In accordance with the statute we can release the report to administration to ensure that proper care, treatment or supervision is provided, not only to the specific child or children involved here, but to all children under the supervision of the above referenced facility.

These reports may be used by any person or entity conducting a disciplinary, administrative or judicial proceeding to determine terms of employment or continued employment of an officer, employee or volunteer with an agency or organization providing services to children.

Sincerely,

Miguel Robles, Senior Investigator
Institutional Abuse Investigation Unit
Metropolitan Region

Charles Baker
Regional Supervisor
Institutional Abuse Investigation Unit
Metropolitan Region

Cc: Anthony Marino, Essex County Superintendent
Adrienne Bonds, Senior Assistant Child Advocate, Office of the Child Advocate

STATEMENT OF HECTOR ACEVEDO

My name is Hector Acevedo and I reside at 906 Columbus Drive, Brick, NJ. I have been employed for twenty-two years at the Union Middle School in Irvington, NJ. I am now the head custodian.

On December 6, 2005 we had a half day of school because there were parent conferences in the afternoon. At about 12:30 pm I was in the cafeteria/gym sitting at a table with Mr. Bauer, Ms. Shulman, Ms. Driscoll and Mr. Bonner. We were all joking and having a light conversation.

Ms. Shulman was reading a book and Mr. Bonner asked her what she was reading. She replied that it was too hard for Mr. Bonner to understand. He picked up the book and flipped through it. It was obvious that they were joking with each other and were not serious. Mr. Bonner had the book in his hand and he tapped the book near the back on Ms. Shulman's head on the right side. She wasn't mad at him and he wasn't insulted by her comment.

Mr. Bonner was wrong in tapping her head but he didn't do it with any great force and it wasn't in her face. I didn't think it was serious because they were in the middle of joking around and she didn't take offense.

The next day at school Ms. Shulman asked me if I would be her witness. I didn't know what she was talking about. She told me it was about Mr. Bonner hitting her in the face with the book. I was very surprised.

First I told her Bonner hadn't hit her in the face and then I told her I thought they were joking and the incident was in fun. I said that I didn't want to get involved and I wouldn't be her witness. I also told her that if she objected she should have said something to him right then and there, but to me she hadn't seemed upset.

I can't understand why Ms. Shulman has brought these charges. What happened was done in fun and was not intended to do her any harm.

She remained in the cafeteria and conducted her interviews after the incident and she seemed fine.

Hector Acevedo

3-6-06
Date

EXHIBIT B-1

STATEMENT OF ROBERT BAUER

My name Robert Bauer and I reside at 554 Flock Road, Trenton, NJ. I have been a gym teacher in the Irvington, NJ school system for twenty-six years. I have provided this statement to Susan Kennedy, a licensed private investigator retained by the law firm of Timothy Smith of South Orange, NJ.

December 6, 2005 was a half day of school because there were parent conferences in the afternoon. At about 12:30 pm I was sitting at a table in my gym at school, which doubles as a lunchroom at noon. The students were gone and I was waiting for the parents to arrive. Around the table were Mr. Bonner, Ms. Shulman, Mr. Acevedo, Ms. Driscoll, and myself. Some were standing and some were sitting.

Ms. Shulman was sitting reading a book, when Mr. Bonner approached her on her right side. There wasn't any tension and we were all joking and laughing together. Mr. Bonner asked Ms. Shulman what she was reading and she replied that the subject matter was over his head. He laughed and asked to see the book. I don't remember if Ms. Shulman gave him the book or he picked it up. He glanced through it briefly, and before he returned it to her, he tapped the right side of her head with the book. We all laughed. Ms. Shulman didn't seem insulted at all, nor was she outraged. The tap with the book was in jest and not physical at all.

Ms. Shulman remained in the gym with Mr. Bonner and me, and conducted her parent conferences. We all stayed until about 4 pm. Ms. Shulman's conduct seemed normal and she didn't appear to be angry with Mr. Bonner during the afternoon. She hadn't said anything that indicated she was upset over the incident with the book and I forgot about it.

I have read this one page statement and it is true to the best of my knowledge.

Robert Bauer

Robert Bauer

MAR. 9 '06

Date

EXHIBIT B-2

#490-07R

490-07

OAL DKT. NO. EDU 11778-07
(EDU 10466-06 ON REMAND)
AGENCY DKT. NO. 299-9/06

SALVATORE DI BELLA,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE CITY OF BERGENFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision on Remand issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the parties' settlement – the prior deficiencies in which have now been remedied – and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 12/20/07
Date of Mailing: 12/20/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 11778-07

Agency Docket No. 299-9/07

ON REMAND EDU 10466-06

SALVATORE DIBELLA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq. appearing on behalf of petitioner
(Springstead & Maurice)

Heather Marcalus, Esq., appearing on behalf of respondent
(Fogarty & Hara)

Record Closed: November 14, 2007 Decided: November 19, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 12, 2006 for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone conference was conducted on December

13, 2006 at which time the parties agreed to a hearing date of January 23, 2007. The January 23, 2007 hearing was adjourned and rescheduled to February 14, 2007 however, prior to the date of the hearing the parties advised that they reached a tentative settlement and requested an adjournment. The matter was then scheduled for a telephone status conference on June 19, 2007 at which time they advised the undersigned that the Board approved the settlement but there were still some language issues that needed to be resolved. On September 14, 2007 the undersigned received the fully executed settlement and a Stipulation of Dismissal, an Initial Decision approving the settlement was rendered and the record closed that day.

On October 30, 2007 the Commissioner of Education remanded this matter back to the OAL because the Decision did not contain exhibits A through C, the agreement not signed by the Board's attorney or authorized by a Board resolution. The matter was transmitted to the OAL on November 9, 2007. After receiving correspondence from the Commissioner, on November 5, 2007 respondent's attorney forwarded exhibits A through C, and a certified copy of the Board's resolution approving the Stipulation of Dismissal with prejudice withdrawing the subject petition of appeal. This matter was assigned to the undersigned on November 14, 2007 and the record closed that day.

Having reviewed the contents of the attached Stipulation of Settlement, fully executed Stipulation of Dismissal, Exhibits A through C, and Board of Education Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 14, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: NOV 21 2007

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 21 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

2007 NOV -5 P 5:53
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Respondent,
Bergenfield Board of Education
Our File No. 114

SALVATORE DiBELLA,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	
v.	:	OAL Dkt. No. EDU 10466-2006N
	:	Agency Ref. No. 299-9/06
BERGENFIELD BOARD OF EDUCATION	:	
	:	AGREEMENT AND
Respondent.	:	STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Bergenfield Board of Education (hereinafter referred to as the "Board"), and Salvatore DiBella (hereinafter referred to as "DiBella"), (hereinafter collectively referred to as the "Parties").

WHEREAS, DiBella has been employed by the Board as a teaching staff member since on or about September 1, 1996 and has obtained tenure in that position; and

WHEREAS, certain employment issues have arisen giving rise to DiBella filing a Petition of Appeal under the above docket number with the Commissioner of Education; and

WHEREAS, the Parties find it to be in their best interests to reach an amicable resolution so as to avoid the time and expense associated with litigation.

NOW, THEREFORE, in consideration of the promises and mutual covenants, understandings and mutual agreements contained in this Stipulation of Settlement, it is hereby agreed by and between the Board and DiBella as follows:

1. DiBella shall immediately resign from all employment with the Board, together with all tenure and seniority rights, effective June 30, 2009, subject only to the approval of this Stipulation of Settlement by the Board.

2. DiBella submits his resignation knowingly, voluntarily and irrevocably, free of concern or duress, after consulting with a representative of his choosing and receiving advice as to its ramifications. DiBella shall sign an irrevocable letter of resignation from all employment with the Board in the form attached hereto as Exhibit A.

3. The Board, by Resolution, shall publicly accept the resignation of DiBella. The form of the Board Resolution is attached hereto as Exhibit B.

4. Until the effective date of his resignation, or June 30, 2009, DiBella shall continue to serve as a teaching staff member for the Board, and receive the salary and benefits associated with such employment, except as modified by the terms of this Agreement, and except to the extent that DiBella is lawfully precluded from performing the duties associated with said position by any judgment, order or direction of any court of competent jurisdiction or the Commissioner of Education, in which case his employment, as well as his receipt of salary and benefits, shall immediately cease. Nothing contained in this paragraph, however, shall in any way prohibit the Board from taking appropriate action with respect to DiBella in accordance with N.J.S.A. 18A:6-8.3 and/or N.J.S.A. 18A:6-10 et seq..

5. Nothing contained herein shall be construed to restrict the Board's right to assign and/or transfer DiBella to any teaching staff position within the Bergenfield School District for which he is appropriately certificated. It is expressly agreed that any such assignment and/or transfer

shall not be considered disciplinary under N.J.S.A. 34:13A-25 or N.J.S.A. 34:13A-27.

6. DiBella specifically releases all claims which were or could have been asserted by, or on behalf of, him in the instant action, and, upon full execution of this Agreement by the Parties, shall immediately withdraw, with prejudice, all claims asserted in his Verified Petition of Appeal bearing OAL Docket No. EDU 10466-2006N.

7. Subject to the terms of this Stipulation of Settlement, DiBella's employment and adjustment increments shall be withheld for the 2006-2007 and 2007-2008 school years, without further action required on the part of the Board. DiBella specifically releases all claims which could be asserted by, or on behalf of, him with respect to these withholdings. Said increments may, however, be restored in accordance with the provisions of paragraph 10 herein.

8. DiBella hereby waives any and all claims he has, or could have, against the Board, its agents, employees, and representatives, including, but not limited to claims for discrimination, contract, tort, constitutional violations and/or attorneys' fees.

DiBella shall execute a General Release in favor of the Board, its agents, employees, and

representatives, releasing them from any and all claims, liabilities or expenses to which they may be subject arising from any claims or rights of DiBella, except to the extent that such waiver is expressly prohibited by law. The form of this General Release is attached hereto as Exhibit C.

9. Nothing in this Stipulation of Settlement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Stipulation of Settlement should there be a default in performance.

10. In consideration for DiBella's immediate resignation effective June 30, 2009, as provided in paragraph 1, 2 and 3 herein, the withdrawal with prejudice of the Verified Petition of Appeal bearing OAL Docket No. EDU 10466-2006N, as provided in paragraph 6 herein, as well furnishing of the release referenced in paragraph 8 herein, on or about May 15, 2009, the Board shall restore DiBella's employment and adjustment increments for the 2006-2007 and 2007-2008 school years. It is expressly agreed that any such restoration shall be wholly contingent upon DiBella's satisfactory completion of his employment obligations, which shall include, but not be limited to, upholding the professional standards and responsibilities of a public school teacher within the

Bergenfield School District, as well as satisfactorily and consistently fulfilling at least the minimum requirements and standards set forth in his job description and any Professional Improvement Plan developed relative to his employment.

11. Nothing contained herein shall be interpreted to restrict the Board's right for reasonable cause to withhold DiBella's salary increments for the 2008-2009 school year.

12. The Parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Stipulation of Settlement and that each signs this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

13. The Parties acknowledge that this Stipulation of Settlement shall be submitted to the Board for its review and approval, and that the terms of this Stipulation of Settlement are expressly made subject to and contingent upon such review and approval.

In the event that the Board disapproves and/or rejects any of the terms contained herein, this Stipulation of Settlement shall be null and void and the Parties shall return

to the same positions which they held prior to this Stipulation of Settlement.

14. This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

15. This Stipulation of Settlement and compliance with this Stipulation of Settlement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

16. This Stipulation of Settlement sets forth the entire agreement between the Board and DiBella, and fully supersedes any and all prior agreements or understandings, written or oral, between the Parties pertaining to the subject matter hereof.

17. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

18. All terms of this Stipulation of Settlement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the Parties.

19. The terms of this Agreement and the underlying facts upon which it is based shall remain confidential among the parties except to the extent that disclosure is required by law. The parties are free to discuss the terms of this Agreement among their attorneys and professional advisors who shall be bound to this provision in the same manner as their principals.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

Thomas P. Egan

THOMAS P. EGAN
Board Secretary/Business Administrator

Dated: 8/24/07

BERGENFIELD BOARD OF EDUCATION

BY: Eileen L. Ryder

EILEEN RYDER
Board President

Dated: 8/28/07

WITNESS:

Diane Edwards

Dated: 8/28/07

BY: Salvatore DiBella

SALVATORE DIBELLA

Dated: 7/19/07

Exhibit A

2007 NOV -5 P 5:53

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SALVATORE DIBELLA
95 Kenwood Road
River Edge, New Jersey 07661

June 21, 2007

Ms. Eileen Ryder
Board President
Bergenfield Board of Education
80 South prospect Avenue
Bergenfield, New Jersey 07621

Re: Letter of Resignation

Dear Ms. Ryder:

I hereby submit my irrevocable resignation from all employment with the Bergenfield Board of Education effective at the close of business on June 30, 2009. Said resignation is subject to full performance of the terms of the Agreement and Stipulation of Settlement entered between the Board and me dated June 21,2007.

Sincerely,

Salvatore DiBella

SALVATORE DIBELLA

Trustee Driscoll moved and Trustee Wada seconded to accept and approve the following resolution:

BE IT RESOLVED by the Bergenfield Board of Education (hereinafter referred to as the "Board") as follows:

1. The request of SD to tender his immediate resignation to the Board effective June 30, 2009 is hereby approved and accepted.

2. The terms, stipulations and conditions as established in the Stipulation of Settlement between the Board and SD, which is annexed to this Resolution, are hereby adopted and approved by the Board. The Board President and Board Secretary/School Business Administrator are hereby authorized and directed to execute the attached Stipulation of Settlement, and any other documents necessary to effectuate said Stipulation of Settlement.

Voting YES: Trustee Driscoll, Trustee Messina, Trustee Wada, Vice President Amara and President Ryder
Voting NO: None
Abstaining: None

The motion was passed.

This is to certify that this is a copy of the minutes of the Bergenfield Board of Education meeting held on 8/27/07.

Diane Edwards, Adm Assist/Notary Public

TP Egan, Business Admin/Board Secretary

Diane Edwards
Notary Public of New Jersey
My Commission Expires July 29, 2008

RELEASE

2007 NOV -5 P 5:53
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Release, dated June 21, 2007 is given

BY the Releasor(s)

SALVATORE DIBELLA

referred to as "I" or "DiBella",

TO **BERGENFIELD BOARD OF EDUCATION** and its members, officers, employers, administrators, agents, servants and all other persons, firms or corporations who or which are or might be liable in the premises from any and all claims which I have or might have against them.

referred to as "You" or "Board".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up until now. I specifically release the following claims:

More particularly, DiBella knowingly and voluntarily releases, waives, acquits, disclaims and forever discharges the Board from any and all claims which DiBella has or might have against the Board from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to claims arising under the Americans with Disabilities Act, the National Labor Relations Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, New Jersey Wage and Hours law, New Jersey Statutes Title 18A, Education, and/or any other federal, state or local employment, human rights, civil rights, wage hour, tenure, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract, collective negotiations agreement or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, or any action similar thereto against the Board including any claim for attorneys' fees, that DiBella, his heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct arising out of DiBella's employment with the Board from the beginning of time, up to and including the date of execution of this Release. This paragraph is not intended and shall not preclude DiBella from instituting proceedings seeking to enforce the terms of the Agreement and Stipulation of Settlement between Salvatore DiBella and the Bergenfield Board of Education, dated June 21,2007, or restrict DiBella's right to claim statutory indemnification from the Board as to any civil or criminal action brought or to be brought at any time against DiBella with regard to events occurring while he was employed by the Board. Also, specifically excepted from this release are pending or

potential Workers Compensation actions that have arisen or may arise during the term of my employment.

2. **Payment.** I have been paid a total of $1.00, and other good and valuable consideration as more specifically set forth under the terms of the Stipulation of Settlement between Salvatore DiBella and the Bergenfield Board of Education, dated June 21,2007, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

(Seal)
Notary Public
VANESSA B. JULIANO
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/10/2012

Salvatore DiBella
SALVATORE DIBELLA

STATE OF NEW JERSEY)
SS:
COUNTY OF Bergen)

Sworn to and subscribed before me this 21 day of June, 20 07

BE IT REMEMBERED that on this 21st day of June, 2007, before me personally appeared **SALVATORE DIBELLA,** who I am satisfied is the person mentioned in and who executed the within Release and who knows the contents thereof and thereupon I acknowledge that he signed, sealed and delivered the same as his voluntary acts and deeds for the uses and purposes therein expressed.

(Seal)
NOTARY PUBLIC
VANESSA B. JULIANO
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/10/2012

Prepared by:

/s/ Stephen R. Fogarty
Stephen R. Fogarty, Esq.

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
201-343-0003
Attorneys for Petitioner

SALVATORE DiBELLA,

Petitioner,

Vs.

BERGENFIELD BOARD OF EDUCATION

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 10466-2006N
Agency Ref. No. 299-9/06

STIPULATION OF DISMISSAL

The matter in difference being amicably resolved by the parties, the Petitioner hereby voluntarily withdraws the subject Petition of Appeal, with prejudice and without costs.

SPRINGSTEAD & MAURICE, ESQS.
Attorneys for Petitioner

By: _____
ALFRED F. MAURICE

Dated: September 14, 2007

FOGARTY & HARA, ESQS.
Attorneys for Respondent

By: _____
HEATHER MARCALUS

Dated: September 17, 2007

489-07

#489-07

OAL DKT. NO EDU 5235-07
AGENCY DKT. NO. 79-3/07

JENNIFER TAYLOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/20/07

Date of Mailing: 12/20/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05235-07

AGENCY DOCKET NO. 79-3/07

JENNIFER TAYLOR,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Gregory Syrek, Esq. for petitioner
(Buccceri and Pincus, attorneys)

James LaBianca, Esq., for respondent
(De Yoe, Heissenbuttle & Buglione, LLC)

Record Closed: November 15, 2007 Decided: November 15, 2007

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 9, 2007, for resolution as a contested case pursuant to N.J.S.*A*. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A telephone conference was conducted on May 31, 2007 at which time a hearing was scheduled for November 15, 2007. During the hearing the parties settled the matter. A stipulation of settlement was prepared and is attached herewith.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 15, 2007
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 11-17-07

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 19 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

JENNIFER TAYLOR,
Petitioner,

v.

STATE - OPERATED
SCHOOL DISTRICT OF
THE CITY OF PATERSON,
Respondent.

STIPULATION OF
SETTLEMENT

This matter having come before the court for a hearing on November 15, 2007, and the parties having reached an amicable resolution of this matter, the parties hereby agree as follows:

1. The respondent shall restore to the petitioner's sick leave bank 7 sick days charged to her during the period of time from May 1, 2006 through June 8, 2006.

2. Petitioner waives any claims she may have for the restoration of additional sick leave days for the period of time from May 1, 2006 through June 8, 2006.

3. Petitioner agrees to dismiss the matter captioned Taylor v. State-Operated School District of the City of Paterson, O.S.L. Docket No. EDUOS. 05235-2007 N, Agency Docket No. 79-3/07, with prejudice.

JENNIFER TAYLOR
Dated: 11/15/07

GREGORY T. SYREK

James M. LaBianca, Esq.
Counsel For State-Operated
School District of the City
of Paterson, Passaic County

492-07

492-07

OAL DKT. NO. EDU 99-06
AGENCY DKT. NO. 387-12/05

IN THE MATTER OF THE TENURE	:	
HEARING OF ALONZO KITTRELS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WILLINGBORO, BURLINGTON COUNTY.	:	

The record of this matter, the parties' Stipulation of Dismissal, and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner concurs with the ALJ that – based on the Superior Court having voided the Willingboro Board of Education's certification of the tenure charges against respondent – the proposed settlement must be held consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to the Board's ability to re-institute charges as it deems appropriate.

IT IS SO ORDERED.

Lucille E Day

COMMISSIONER OF EDUCATION

Date of Decision: 12/24/07

Date of Mailing: 12/24/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 99-06

AGENCY DKT. NO. 387-12/05

IN THE MATTER OF THE TENURE HEARING OF ALONZO KITTRELS.

Sidney H. Lehman, Esq. for petitioner, Willingboro Board of Education, (Szaferman, LaKind, Blumstein, Blader, and Lehman, attorneys)

Salvatore Perillo, for respondent, Alonzo Kittrels (Perskie, Nehmad and Perillo, attorneys)

Record Closed: November 5, 2007 Decided: November 14, 2007

BEFORE **DONALD J. STEIN**, ALJ

This matter was transmitted to the Office of Administrative Law on January 13, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Dismissal (J-1) indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of dismissal and I **FIND**:

1. The parties have voluntarily agreed to the dismissal as evidenced by their signatures or their representatives' signatures.

2. The dismissal fully disposes of all issues in controversy and is consistent with the law.

Alonzo Kittrells (respondent) filed suit in Superior Court under docket number L-261-06. Procedural issues were raised as to violations of the Open Public Meetings Act, as well as the fact that Board member Jessie Green was domiciled in the State of Delaware when she voted to certify tenure charges (J-2, J-3). Judge Sweeney determined that the actions by the Board voting to certify tenure charges against the respondent were void (J-2), and also stated that "the only thing left for the Board to do if they feel the tenure charges are appropriate is to start all over again" (J-2, p.62, 1-6).

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the dismissal should be approved. The Board cannot proceed on this set of tenure charges and is not precluded from starting the process again. Therefore, I approve the dismissal and **ORDER** that the parties comply with the dismissal terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 14, 2007
DATE

DONALD J. STEIN, ALJ

Date Received at Agency:

NOV 15 2007
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

DJS/bdt

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

J-2 Transcript of Motions

J-3 Order granting Summary Judgment

J-1

RECE

2007 NOV -7 P 12: 11

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

S:\K\Kittrels, Alonzo\Mat 1 - Willingboro Board of Education\Subfile C- Charges Before State Dept. of Ed\Stipulation of Dismissal 10-25-07 SP.doc

SALVATORE PERILLO, ESQUIRE
PERSKIE NEHMAD & PERILLO
P.O. Box 730
Somers Point, New Jersey 08244
Phone: (609) 927-1177
Fax: (609) 926-9721
Attorneys for Alonzo Kittrels

IN THE MATTER OF THE TENURE HEARING OF ALONZO KITTRELS, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Dkt. No. 387-12/05 OAL Docket No. EDU 99-2006S **STIPULATION OF DISMISSAL**

WHEREAS, on November 28, 2005, the Board of Education of the School District of the Township of Willingboro, Burlington County, filed Tenure Charges against Alonzo Kittrels, Superintendent; and

WHEREAS, on December 22, 2005, the Willingboro Board of Education voted to certify the Tenure Charges to the Commissioner of Education of the State of New Jersey; and

WHEREAS, the Commissioner of Education referred the matter to the Office of Administrative Law to conduct a tenure hearing; and

WHEREAS, Alonzo Kittrels filed suit in the Superior Court of New Jersey, Law Division, Burlington County, bearing Docket No. L-261-06 challenging, among other things, whether Board Member Jessie Green was domiciled in the State of Delaware on December 22, 2005, the date she voted to certify tenure charges against the Plaintiff and whether the Willingboro Board of Education

violated the Open Public Meetings Act with respect to the November 28, 2005 and December 22, 2005 Board Meetings; and

WHEREAS, Alonzo Kittrels filed a Motion for Summary Judgment in Law Division which was heard by the Honorable John A. Sweeney, J.S.C. on April 26, 2007; and

WHEREAS, Judge Sweeney in a Bench Opinion found that the Board of Education violated the Open Public Meeting Act with respect to the November 28, 2005 and December 22, 2005 Board Meetings and that Board Member Jessie Green was not domiciled in the Township of Willingboro on December 22, 2005, the date she voted to certify the tenure charges against the Plaintiff but was rather domiciled in the State of Delaware and that therefore the actions of the Board taken at the November 28, 2005 and December 22, 2005 Board Meetings with respect to Alonzo Kittrels are void; and

WHEREAS, Judge Sweeney indicated that "it seems to me that the Board - - the only thing left for the Board to do if they feel the tenure charges are appropriate is to start all over again." See transcript, April 26, 2007, p. 62, l. 6, annexed hereto as Exhibit "A"; and

WHEREAS, Judge Sweeney entered an Order granting Alonzo Kittrels summary judgment on Counts Two, Three and Four of his Complaint on May 11, 2007. See Order filed May 11, 2007 annexed hereto as Exhibit "B";

WHEREAS, the Board of Education of the School District of the Township of Willingboro has determined to voluntarily dismiss these tenure charges based upon the decision and order of Judge Sweeney.

NOW, THEREFORE,

(a) The within captioned tenure charges filed against Alonzo Kittrels, as the Superintendent of the School District of the Township of Willingboro, Burlington County, by the

Board of Education of that school district are hereby dismissed. This constitutes a final adjudication of this matter;

(b) Notwithstanding the above, pursuant to Judge Sweeney's decision, the Board can institute new tenure charges against Alonzo Kittrels, if it feels that is appropriate, if, and when, this Stipulation of Dismissal is approved by the Commissioner of Education;

(c) Upon approval of this Stipulation by the Commissioner of Education, Alonzo Kittrels shall be entitled to any pay which may have been withheld during his suspension, as provided by N.J.S.A. 18A:6-14, together with all other benefits and compensation that he may have been entitled to during the period of his suspension, but which were withheld as a result of that suspension, which payment shall be made within thirty (30) days of the issuance of the Commissioner's decision approving this Stipulation.

SZAFERMAN LAKIND BLUMSTEIN BLADER & LEHMANN PC

By_____
Sidney Lehmann, Esquire

PERSKIE NEHMAD & PERILLO, P.C.

By_____
Salvatore Perillo

Dated: November 1, 2007

MR. PERILLO: Yeah.
THE COURT: When was this resolution voted on? It says at the end of the resolution attached to the first document in exhibit F that Donella Edwards, the business administrator and Board secretary, certifies that the above and foregoing to be a true copy of a resolution adopted by the Willingboro Board of Education on December 22 by a vote of five to three, and the -- the minutes don't reflect any resolution at all.
MR. PERILLO: Or -- or any closed session. The minutes start at eight o'clock and don't reflect any -- any motion to go into closed session.
MS. PULLMAN: Your Honor --
THE COURT: Yes.
MS. PULLMAN: -- may I just briefly? I'd like to point out that the notice for December 22nd meeting indicated that executive session would start at 6:30 p.m. I'd also like to indicate that if there was anything wrong with any of the tenure charges adopted by the Willingboro Board of Education, they would not have been accepted by the Commissioner of Education, anything, as far -- there is -- it's -- they're very specific as to what has to take place prior to the charges going forward before the Commissioner.

THE COURT: Well, then it's res judicata. I have no -- you're saying I don't have any jurisdiction.
MS. PULLMAN: No. I'm just -- I'm speaking to the --
THE COURT: Procedures that were followed.
MS. PULLMAN: Correct.
MR. PERILLO: Judge, none of that is before Your Honor. There is nothing submitted indicating that the Commissioner has passed on any of this.
THE COURT: Well --
MS. PULLMAN: I would just submit, Your Honor, that this -- there is no denying that there are tenure charges pending before the Commissioner of Education.
THE COURT: I -- I don't think -- I think that's absolutely undebatable. I agree with you. All right. If there is nothing further.
I've read over these papers I think as carefully as -- as I could, and I think that the questions that I asked reflect my deep concern about what has transpired here, and, of course, it has nothing to do, my concern, that is, has nothing to do with the merit -- merits or lack thereof regarding the charges against Mr. Kittrels. Frankly, I'm not even sure what they are, and it's just as well that I not

know those things, because it enables me to review this in a dispassionate way without concern for what those charges might be and what they might reflect and permits me to be I think completely objective about my ruling in this matter.

On the jurisdictional issue, it is true that there is some case law that reflects that the doctrine of primary jurisdiction would normally dictate that if there is agency expertise and that some issues are brought that are cognizable by the Superior Court, that normally, the Court would give way on the issue of jurisdiction to the -- to the agency involved here, and as far as the tenure charges about which I know nothing, there is no question about the fact that jurisdiction lies with the Commissioner of Education and that ordinarily, the Commissioner would be free to decide those issues as the Commissioner sees fit.

But issues are raised here about the basic and fundamental actions of a Board of education completely independent of the tenure charges that exist. Here is a Board that has been warned time and again of violations of the Open Public Meetings Act, and in my opinion, even after the last warning occurred in October of 2005, continued to ignore the warnings.

It is clear that the statute, the Open Public

Meetings Act itself gives me the required jurisdiction to act on all of the matters that are raised here and that I need not pass this matter off to the Commissioner of Education merely because tenure charges are pending before the Office of Administrative Law on behalf of the Commissioner.

It is clear from this resolution of the Board that is dated -- well, I don't -- it's not -- it's not dated, but it is attached as exhibit F. It is clear that that resolution certifies to an action of the Board that began clearly before November 30, 2005, and so the issue -- the issues surrounding the meeting of November 28, 2005 are entirely relevant to this case.

November 28, 2005 was a scheduled meeting. Adequate public notice of that meeting had been given in the annual public notice. So there was nothing wrong with the holding of that meeting, but what went wrong in this case began at that meeting insofar as the Kittrels matter is concerned. There was no resolution as is required by law to go into a closed session. There was according to the minutes a motion. That in and of itself is inadequate. It was nowhere near specific enough to alert the public as to what type of litigation or actions were to be considered by the Board in that closed session.

More importantly, even if it were adequate notice, there are no minutes of the executive session to reflect what action the Board took, if any, and it's fairly obvious, as I said from the resolution, and I don't know when this was prepared, and I certainly don't know when it was voted on, but this resolution talks about the Board of Education having received sworn charges dated November 30th. That would be some indication that prior to that date something had to have happened that resulted in formal charges, sworn charges being filed in writing with the Board secretary about Mr. Kittrels on November 30th.

The December 22nd meeting was, in my opinion, another debacle. It was not a regular meeting, and so therefore, was a meeting that required a public notice. There was a public notice that is dated December 15, 2005 that simply says --

"Please take notice that the Willingboro Board of Education will hold a special meeting on Thursday, December 22, 2005 for the purpose of personnel and litigation."

Not regarding anything more specific than that and to take action on carryover items from the December 12, 2005 meeting. Nobody even talked about a December 12, 2005 meeting during the course of this

argument.

And then it goes on to say --

"...and any other business to come before the Board. The meeting will start at 6:30 p.m. to go immediately into executive session."

Presumably, and drawing an inference most favorable to the Board, it was about personnel and litigation. We don't know what personnel, and we certainly don't know what litigation, and then it goes on to say the regular portion of the special meeting will start at 8:00 p.m., and it goes on to say where it will be held.

And then the last sentence says, "The Board reserves the right to go into executive session and action will be taken." I don't know even what that refers to.

The minutes of the December 22 special meeting do not reflect nor is there any reason for the Court to believe that a resolution was adopted to go into closed session as the notice indicates was going to be the case. The law clearly requires that a resolution be adopted for that purpose. There wasn't even a motion in a public portion of that meeting at 6:30 to go into that 6:30 executive or private session and no indication at the meeting on December 22 what

the purpose of the 6:30 session was to be about.

And again, in total disregard for the warnings that had been given to this Board, there are no minutes of what happened in the executive session, and as if that were not bad enough, the minutes of the public session of that date reflect -- and if I counted correctly -- 17 role call votes on different matters, none of which dealt with Kittrels. There is simply no, and I mean none, no indication at all that Kittrels was even discussed at that meeting, and yet, that is the meeting from which this resolution miraculously appears stating that tenure charges were certified to the Commissioner.

The resolution indicates that the vote was five to three. It doesn't say when in the course of the meeting that occurred, and that brings into play the issue concerning Jessie Green. There is no debate about the fact -- no question at least raised in this case about Jessie Green's eligibility or her election to the Board of Education. And when I say eligibility, I mean under normal circumstances, eligible to vote on any matter before the Board. The question has to do with Jessie Green's legal right to vote at that meeting of December 22.

The evidence in this case is not disputed,

and it -- to give credit to counsel, counsel doesn't try to make up any argument based upon facts that don't exist, and as I have said before, counsel inherited this case and had no part in giving advice to the Board regarding anything that occurred, but it is not disputed nor debatable that Jessie Green sold her house, closed on that sale well prior to December 22nd, that she bought the house in Delaware and closed on it on I believe it was December 13th of 2005 and that she expressed in her deposition a clear reason for remaining in the State of New Jersey. It had nothing to do with the Board of Education and her concern about the tenure charges. It had to do with her grandchildren and her desire to remain here at a home that she did not own when she had already closed on a place in Delaware to remain with the grandchildren until the end of the calendar year.

An issue is raised concerning whether the Board could remediate what has been done improperly. This -- the Board that took this action is gone never to be reconstituted in such a fashion that it could remediate what it has either done wrong or failed to do.

The sole question here is what -- what is the remedy, and I think as counsel has pointed out, in the

absence of voiding what the Board of Education did, there is no remedy. This is one of those situations where you -- you can't put the toothpaste back in the tube and get things done the right way. It seems to me that the Board -- the only thing left for the Board to do if they feel that tenure charges are appropriate is to start all over again.

I have no qualms, no second thoughts about voiding the action here. If this were just a technical error, and I can't think of one that would justify my not voiding the actions of the Board, but if there were such a set of facts, I might look upon this somewhat differently, but this case I think cries out for the actions of the Board to be set aside and let the new Board of Education deal with this matter anew or say enough is enough.

Having said all of that, there was little -- there was no argument today about the OPRA aspect of this case, and I don't know whether you're -- you intend to pursue that, counsel, because the response seems to be that we have everything that you asked for, we've given it to you in discovery, didn't give it to you within the time limits because we didn't have the minutes then. Are you pursuing remedies?

MR. PERILLO: Judge, obviously, under OPRA, I

don't think it's undisputed that the Board did not comply within the time limits. They didn't even comply promptly after the suit was started.

What I need to do is figure out what counsel fees are attributable to the OPRA aspect of the case and figure that out, discuss that with my client and with counsel for the Board. So if we could defer the OPRA piece --

THE COURT: I will defer. I will defer. And I'm well aware of your arguments in regard to the OPRA situation, that you're -- you argue that you're in compliance, that you notified counsel of your compliance and your willingness to turn documents over and your contention that had he paid the money, that you would have supplied the documents. I'm aware of those arguments. Is there something else that you want to add?

MS. PULLMAN: I was just going to say since we're discussing fees, Your Honor, and I raised this in our cross-motion as well, we haven't received any payment for any of the documents that we've provided, and I did provide counsel with a total and plaintiff did sign off on, you know, having received the documents, what the copying costs were, et cetera, and it was approximately 5,000 pages worth of documents

sought by plaintiff, and that came to a total of $1,335.50 which has not been received, none of which has been received by the Board at this juncture.

MR. PERILLO: Judge, I can assure the Board that my fee application will be more than that.

THE COURT: Well, I suspected you would say that, and I would encourage you two to talk about that issue in light of this ruling, and of course, what you do with this ruling vis-a-vis the Commissioner of Education is up to you.

MR. PERILLO: Yes.

THE COURT: I can't order the Commissioner to do anything. That is a State agency, and of course, if the Commissioner decides to do what the Commissioner decides to do other than hear these -- you know, if the Commissioner decides to go ahead, that's appealable only to the Appellate Division, but I would encourage counsel to talk about the issue, the OPRA issue here. I will defer it until you tell me differently.

MR. PERILLO: Judge, I submitted an order with the -- with the motion. I don't know if Your Honor wants to go through that.

THE COURT: I will have to -- I will have to locate it. Let me see if I have it here in the file.

MR. PERILLO: In my package, it's after --

it's after my brief.

THE COURT: Well, let's see.

MR. PERILLO: The brief was --

THE COURT: See, sometimes my law clerk goes through this before I even read it. I can't put it my hand on it.

MR. PERILLO: That's all right, Judge. Do you want me to submit a new order?

THE COURT: If you be kind enough to do so and indicate in that the -- that the OPRA issue has been deferred.

MR. PERILLO: I will, Judge. Thank you, Your Honor.

THE COURT: Thank you both for your patience and your cooperation.

(Case adjourned)

* * * * *

CERTIFICATION

I, Maureen Emmons, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Burlington County Superior Court, on April 26, 2007, Tape #1, Index #0597 to #6836, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings.

Signature: Maureen Emmons

MAUREEN EMMONS
AOC #519
DOMAN TRANSCRIBING & RECORDING SERVICES

Date: 5/18/07

J-3

FILED WITH THE COURT

MAY 11 2007

HON. JOHN A. SWEENEY, A.J.S.C.

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ALONZO KITTRELS, Plaintiff, v. SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY and JESSIE GREEN, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY DOCKET NO. L-000261-06 Civil Action **ORDER GRANTING PARTIAL SUMMARY JUDGMENT**

THIS MATTER coming before the Court on a Motion for Summary Judgment, filed by Perskie, Nehmad & Perillo, P.C., counsel Plaintiff; and the Court having read and considered the papers filed in support of the Motion and the papers filed in opposition thereto, and argument of counsel; and good and sufficient cause having been shown, and for the reasons given in the Court's Bench Opinion on April 26, 2007;

IT IS on this day of May, 2007, ORDERED and ADJUDGED as follows:

1. Plaintiff's Motion for Summary Judgment on Counts Two, Three and Four of the Plaintiff's Complaint is hereby granted.

~~2. The Willingboro Board of Education has violated the Open Public Meetings Act with respect to the November 28, 2005 and December 22, 2005 Board meetings.~~

~~3. Board member Jessie Green was domiciled in the State of Delaware on December 22,~~

2005, ~~the date she voted to certify tenure charges against Plaintiff~~.

4. ~~The actions of the Board in adopting tenure charges against Plaintiff at the November 28, 2005 Board meeting and certifying those tenure charges at the December 22, 2005 Board meeting are hereby declared void.~~

5. Count One of the Plaintiff's Complaint alleging violations of the Open Public Records Act is still pending and is not affected by this Order.

6. Plaintiff's counsel shall serve a copy of this Order upon all counsel of record within ten (10) days after receipt of the signed Order Plaintiff's counsel.

JOHN A. SWEENEY, A.J.S.C.

Findings in stricken paragraphs 2, 3, 4 are on the record of these proceedings in the Court's opinion on 4/26/07.

493-07

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. DAVID L. WITMER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF MIDDLETOWN,	:	
MONMOUTH COUNTY.	:	

SYNOPSIS

Petitioning school district certified five tenure charges of unbecoming conduct against respondent, Superintendent of Schools Dr. David L. Witmer, and seeks termination of his tenured employment. Petitioner alleged that respondent failed to report vacation days, misdirected vacation and personal leave time, misused personnel and office staff, abused his authority, and intentionally deceived the Board of Education. Respondent sought dismissal of the tenure charges, arguing, *inter alia,* that they were simply technical violations of his employment contract based on differing interpretations of the document.

The ALJ found, *inter alia*, that: the respondent is guilty of unbecoming conduct on three of the five tenure charges, involving misdirection of vacation and personal leave time, and intentional deception of the Board of Education; with respect to the other two charges, the petitioning Board failed to sustain its burden of establishing unbecoming conduct; the nature and gravity of respondent's offenses does not support his removal nor establish his unfitness to discharge the duties of superintendent. The ALJ concluded that the appropriate penalty for respondent is a six-month suspension from duty without pay.

Upon a comprehensive and independent review of the record in this matter – including transcripts and exception arguments advanced by the parties – the Commissioner adopted the Initial Decision with modification, finding that the respondent is guilty of unbecoming conduct on three charges as found by the ALJ, and also on the fourth charge of abusing the authority of his position as Superintendent by directing his subordinates to take actions regarding the carryover of vacation days and the rollover of personal days into sick leave days for respondent's own financial benefit; the Commissioner concurred with the ALJ that the respondent's conduct – although extremely serious, and evidencing significantly impaired judgment and lack of professionalism – does not warrant his dismissal from his position. Accordingly, the Commissioner ordered that respondent be suspended prospectively from his contractually tenured position – without pay – for six months commencing on the date of this decision.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 24, 2007

OAL DKT. NO. EDU 590-06
AGENCY DKT NO. 62-2/06

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. DAVID L. WITMER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF MIDDLETOWN,	:	
MONMOUTH COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions and reply exceptions of both parties – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

The parties' exception and reply submissions – in large measure – recast and reiterate arguments advanced below. To the extent that these raise issues left unaddressed and/or unresolved in the Administrative Law Judge's (ALJ) extensive decision, they are presented below.

Charge #1 – Failure to Report Vacation Days

Board's Exceptions

The Board states that the essence of its charge here is that respondent engaged in unbecoming conduct when he intentionally failed to report two vacation days he took in December 2005. Although the ALJ found that respondent failed to advise the Board President of such planned absences – as required by his contract – he refused to find this unbecoming conduct because, subsequently, on January 10, 2006, respondent submitted a Request to Be Absent Form

and his leave account was charged for these days. The Board charges that the ALJ's analysis of the facts underlying this charge failed to take into consideration what it avers was the all important *sequence of events.* Specifically: 1) Respondent violated his contract by taking two vacation days without providing the requisite notice and was not charged for those days; 2) On January 10, 2006, some two weeks later, he was served with tenure charges which accused him, *inter alia*, of failing to comply with his contractual responsibility in the reporting of these days; 3) It was on this very date, after receiving the charges, that respondent submitted the Request to Be Absent Form. The Board maintains that the ALJ's conclusion that respondent's "after the fact" submission of this form somehow "mitigated" his culpability on the Board's charge is illogical, in that this submission – post-dating the tenure charges – does not invalidate or negate the claim made in the charges, which was true and accurate when the charges were served on respondent. More importantly, it submits, acceptance of the ALJ's analysis in this regard is patently unreasonable and its extension could lead to absurd results. If respondent had sent a communication to the Personnel Office on January 10, 2006 – after he had been served with these tenure charges – "undoing" his actions that formed the basis of Charges 2 and 3, and another letter to the Board of Education "clarifying" his prior misrepresentations, thereby "undoing" his Charge 5 behavior, he could then claim that he could not possibly be guilty of any of these charges because the matter had been "fixed." (Board's Exceptions at 7) Consequently, the Board argues, the ALJ's finding that respondent's submission "after the initiation of this litigation can somehow remediate or excuse his admitted conduct" as presented in the tenure charges must be rejected. (Board's Exceptions at 6-8, quote at 8)

In reply, respondent submits that the Board and the ALJ ignore the fact that his uncontroverted testimony established that he did give notice that he would be taking vacation on

December 27 and 28, 2005 at the December 12, 2005 Board meeting. Respondent further contends that elicited testimony also established that "there were other occasions when people gave notice of their taking time after the fact and that the purpose of the notice was to document the time before the end of the school year which occurred on June 30th." (Respondent's Reply Exceptions at 4-5)

Respondent's Exceptions

Respondent maintains that, contrary to the finding of the ALJ, his contract does not specifically require that he provide **advanced** notice of planned vacations less than five days in duration and, nonetheless, again presents that his testimony confirms that he notified the board of this planned time off on December 12. He additionally cites to testimony of petitioner's witness, Ms. Shopp, which he claims establishes that there were other instances where individuals submitted absence forms after they returned. Although conceding this circumstance usually involved sick days, he nonetheless takes the position that as long as notice was provided before the end of the school year so that accurate leave time tabulations could be made there was no problem. Respondent further takes the position that testimony of petitioner's witnesses also evidences that it was "obvious" that the two work days of the last week of December would be vacation days for respondent as such had been his custom every year since arriving in the District. Finally, respondent argues, "the most interesting omission of evidence in this matter is the fact that there was no documentation, which was submitted by Petitioner, which demonstrated that these two days were not recorded as vacation days." (Respondent's Exceptions at 2-4, quotation at 3-4)

Responding, the Board avers that respondent's claim that he provided notice of his planned absence to the Board at its December 12, 2005 meeting is directly contrary to the evidential record, most particularly his own testimony. "Respondent testified on October 18 that as to his December 2005 absences, he did not provide notice to the Board. (citation omitted). In fact, he acknowledged that he did not provide any notice of those absences until January 10, 2006, when he submitted Exhibit R-10 [Request to Be Absent Form] *hours after the within Tenure Charges were filed.*" (citation omitted) (Board's Reply Exceptions at 2) As to his charge that there is no documentation that the two days were not charged to vacation time, the Board cites to testimony of Rosie Shopp, stating "that as of the filing of the Charges, Respondent had not submitted documentation, nor had he been charged with vacation time, for December 27 or 28." (citation omitted.) (*Id.* at 3)

Charge #2 – Misdirection of Vacation Time

Respondent's Exceptions

Citing *Dunn v. Elizabeth Board of Education*, 96 *N.J.A.R. 2d* (EDU) 279 and *New Jersey Education Association v. Trenton Board of Education*, 92 *N.J.A.R. 2d* (EDU) 481, respondent maintains that, because resolution of charges 1, 2, and 3 necessitates the interpretation of contractual provisions, such resolution is outside the jurisdictional purview of the Commissioner. This is the case, he argues, because the courts have found that "there is no need to defer to administrative expertise since the only question properly presented to the Court in Contract disputes is one of contract interpretation." (*N.J. Education Association* at 489). (Respondent's Exceptions at 4-6, quote at 6) In this case, the issues surrounding tenure charges 1, 2, and 3 and, indeed, the ALJ's factual findings with respect to these charges, are based on

disputed interpretations of the language of the contract between respondent and the Board and, therefore, he submits, are outside of the Commissioner's jurisdiction. (*Id.* at 6)

Respondent further excepts to certain of the ALJ's factual findings which conflict with respondent's contentions that: 1) his contract does not address or prohibit maximization of days in his vacation bank; 2) that the personnel department misinterpreted his memo requesting the transfer of vacation days; and 3) that he could have 40 vacation days banked and still use his current 20 day allotment. (*Id.* at 7-10)

In reply, as to respondent's challenge to the Commissioner's jurisdictional authority to decide charges 1, 2, and 3, the Board submits that the Commissioner is vested with primary jurisdiction of all controversies under the school laws. Adjudication of tenure charges, pursuant to the Tenure Employees Hearing Law – *N.J.S.A.* 18A:6-10 *et seq.* and its implementing regulations, *N.J.A.C.* 6A:3-5.1 *et seq.* – is clearly a controversy arising under the school laws. (Board's Reply Exceptions at 5-6) Moreover, the cases cited by petitioner denying the Commissioner jurisdiction over purely contractual claims so hold because the "only" question presented to the court in contractual disputes is one of contract interpretation. Such is not the case here. Rather, the Board urges:

> Tenure Charges 1, 2 and 3 allege that Respondent committed unbecoming conduct when he knowingly violated his contract, abused his position, and conferred upon himself various unauthorized benefits. The analysis of those claims clearly entails a review of the parties' contractual relationship and their contractual duties to each other. However, the question before the Commissioner is. whether the actions taken by Respondent constitute conduct unbecoming a Superintendent of Schools. In fact, the determination of a breach of contract – as Judge Martone made with regard to Tenure Charge #1 – is not necessarily determinative of the ultimate issue of conduct unbecoming. Thus, as in *Dunn*, contract issues are implicated in this litigation, but unlike *Dunn* neither party here is asking the Commissioner to determine a pure breach of contract claim, nor to

> award contract damages. The question here is an evaluation of a Superintendent's conduct, and the determination of what penalty is appropriate based upon the totality of that conduct.
> (*Id.* at 6)

With respect to respondent's objection to certain of the ALJ's factual findings, the Board contends his exceptions in this connection are wholly belied by the evidentiary record and logic. Moreover, these factual findings are based on the ALJ's credibility assessments which are unassailable unless they are arbitrary, capricious or unreasonable. (*N.J.S.A.* 52:14B-10) (*Id.* at 9)

Charge #3 – Misdirection of Personal Leave Time

Respondent's Exceptions

Respondent essentially renews his arguments advanced below in excepting to the ALJ factual findings and conclusion on this charge. He additionally attributes the ALJ's misguided analysis to incorrect credibility determinations. (Respondent's Exceptions at 11-16)

Charge #4 – Misuse of Personnel Office Staff/Abuse of Authority

Board's Exceptions

The Board avers that the ALJ erred in concluding that respondent did not engage in unbecoming conduct by abusing his position when he directed staff members of the Personnel Office to confer unauthorized benefits upon him. Although not disagreeing with the ALJ's factual findings with respect to this charge, the Board contests his conclusion that – absent an element of intimidation, coercion or improper influence, which he did not find on this record – respondent was not guilty of unbecoming conduct, notwithstanding these factual findings. The Board contends such a conclusion is misguided for two reasons. First of all, it ignores the obvious impact respondent has over employees in the District by virtue of his position.

As Superintendent of Schools, all staff members – including those in the Personnel Department – report to him. Further, pursuant to *N.J.S.A.* 18A:27-4.1, the Superintendent possesses the exclusive power to recommend the hiring, termination, transfer, and other employment actions of all staff members. (Board's Exceptions at 10) The Board additionally cites to specific hearing testimony of Laurie Allocco and Rosie Shopp – Personnel Department staff members with whom respondent dealt – which confirms that these individuals were unwilling, and felt unable, to voice objection to or refuse to comply with directives of the Superintendent. Therefore, the Board contends that the intimidation, undue influence or coercion which the ALJ finds requisite to establish unbecoming conduct is clearly present in the instant record. (*Id.* at 10-13)

Finally, the Board argues – to the extent that this tenure charge can be viewed as a claim of official misconduct against respondent – the ALJ's decision imposes an enhanced burden of proof in these administrative tenure proceedings over and above that under the New Jersey Criminal Code. Specifically,

> [t]he New Jersey Supreme Court has held that to prove a case of official misconduct under the criminal standard of "beyond a reasonable doubt," the State must establish that 1) the Defendant is a public servant; 2) who committed an act relating to his office; 3) with the purpose to benefit himself or deprive another of a benefit. *State v. Bullock*, 136 *N.J.* 149, 153 (1994). The statute further specifies that a Defendant must commit such acts "knowing that such act is unauthorized or he is committing such act in an unauthorized manner." *N.J.S.A.* 2C:30-2(a). There is no requirement of intimidation.
>
> [The ALJ] has specifically found as a matter of fact that Respondent is a public servant (Initial Decision at pp. 1 and 65); that he took actions in his capacity as Superintendent with regard to his Contract with the Board of Education (*Id.* at 65); and that he acted to knowingly and intentionally violate his Contract and seek the unauthorized conferral of benefits upon himself via written directives to subordinate employees (*Id.* at 65) That is, the Court has found that Dr. Witmer has engaged in conduct meeting each element of Official Misconduct as defined by New Jersey law.

> Can the standard for conduct unbecoming in an administrative hearing possibly be higher than the criminal standard when all elements have been found present by the finder of fact? No intimidation, undue influence or coercion is required, and to the extent that such influence may buttress a claim of misconduct in this regard, the record requires an acknowledgement that written directives from the Superintendent of Schools inherently carry with them an influence which behooves the recipients of such directives to comply with them.
> (Board's Exceptions at 13-14)

For these reasons, the Board urges the Commissioner to modify the Initial Decision, finding respondent guilty of conduct unbecoming on this charge.

Charge #5 – Deception of the Board of Education

Board's Exceptions

Although specifically finding that respondent made knowing misrepresentations to the Board, the ALJ concluded that "the subject-matter of the untruthfulness *was simply not that important*." Such a conclusion, the Board maintains, wholly disregards the extreme importance of truthful communications between a superintendent and his board. The Board initially cites to hearing testimony of Board members Minnuies and Dorio, which – it avers – evidences the negative effect that respondent's dishonesty had on the pivotal relationship between himself and the Board, *i.e.,* they felt they could no longer trust him. (Board's Exceptions at 15-16) Moreover, it posits, although honesty and truthfulness are expected and demanded of all teaching staff members at all times, the importance of this expectation is exponentially heightened for the chief district administrator who, in addition to all his other managerial duties, is charged with communicating with the public via their elected representatives on the Board of Education. Indeed, it offers, this Board's requirements of its

superintendent in this regard are unmistakably delineated in Exhibit P-22 (Middletown Board of Education Policy No. 2131.2, paragraph 6), which explicitly directs that "**[t]he Superintendent must be frank, honest, concise and complete in reporting to the Board**." (*Ibid.*) For all of these reasons it urges the ALJ's conclusion downplaying the significance of respondent's lies to the Board cannot be allowed to stand, as untruthfulness and misrepresentations by a Superintendent are *always* important and such conduct should be punished by no less than termination. (Board's Exceptions at 18)

Respondent's Exceptions

Respondent charges that the ALJ's finding that he did not respond truthfully when questioned by the Board is not supported by any competent or credible evidence in the record. Rather, he contends, the Board's witnesses provided contradictory testimony as to even what the questions respondent was asked were. (Respondent's Exceptions at 17) Additionally, as observed by the judge:

> ***I am puzzled as to Dr. Witmer's motivation in responding the way he did and why he did not respond truthfully. He certainly gained no benefit from his untruthful response. There is also no indication in the record that the Board was accusing Dr. Witmer of any wrong doing in connection with the investigation of the matter. In addition by the time Dr. Witmer was questioned about the investigation, the termination matter had been or was about to be resolved. (Initial Decision at p. 91)

Respondent takes the position that the ALJ's "puzzlement" is a clear indication "that the pieces with regard to this alleged violation do not fit and therefore one cannot conclude that Dr. Witmer was untruthful." (Respondent's Exceptions at 17-18)

Citing extensively to his own testimony, respondent presents his version of the sequence of events surrounding this charge, and points to certain testimony of the Board's own witnesses which – he avers – serves to corroborate his rendition of the details. (*Id.* at 18-28)

In that the ALJ's conclusion that respondent made a misrepresentation to the Board is not based on the logical, competent testimony of the witnesses nor documentary evidence, respondent submits that this conclusion must be set aside. (*Id.* at 28-29)

In reply, the Board proposes that respondent's criticism of the ALJ's factual finding on an issue where there is conflicting testimony is unfounded. It advances that the ALJ has not only the authority but the obligation to make factual findings on issues where there is conflicting testimony based on credibility determinations -- which it avers he did here – and these findings may not be reversed unless they are arbitrary, capricious or unreasonable. (*N.J.S.A.* 52:14B-10; *N.J.A.C.* 1:1-18.6(c)) (Board's Reply Exceptions at 14)

Penalty

Board's Exceptions

The respondent in this case, the Board submits, is the Superintendent of Schools – the highest administrative position and the educational leader in a large school district. "Inherent in the position, and implicit in his Job Description, Contract and Board Policy is the duty to lead by example not only the 1,000 employees of the District, but at least as importantly, its 10,500 pupils." The nature and importance of public education are such, it argues, that the standard of conduct demanded from an individual in such a position is extraordinary – his conduct must be beyond reproach. The Board finds incongruous the fact that although the ALJ found respondent guilty of unbecoming conduct – by virtue of his self-dealing and dishonesty with the Board – and acknowledged the negative impact on the essential trust relationship between a board and its superintendent as a result of this behavior, his Initial Decision – nonetheless – proposes to return respondent to his position. The Board queries what message is being conveyed to the teaching

staff, the students and the public when an individual who has been found guilty of misdirecting benefits to himself, breaching his contract and lying to the Board is returned to his position as leader of the District. (Board's Exceptions at 19-20, quote at 19)

Citing to a number of prior superintendent tenure cases (*IMO Tenure Hearing of Louis Cirangle; IMO Tenure Hearing of Guma; IMO Tenure Hearing of Horowitz; IMO Tenure Hearing of Pitch* – citations omitted), it avers the Commissioner and the Court upon review have held that the breach of trust involved and its effect on the District – whose whole reason for existence is for the benefit of students and the community – cannot be adequately dealt with by a penalty less than dismissal. The Board offers that the *Cirangle*[1] decision specifically "stands for the proposition that 1) dishonesty and self-dealing, regardless of the amount of money involved,[2] are sufficient cause for the dismissal of a tenured Superintendent of Schools; and 2) the defense of 'mere' negligence, poor judgment, or mistake is insufficient to avoid the result of dismissal where that conduct touches upon the high standards implicit in the position." (Board's Exceptions at 21-23, quote at 22)

In closing, the Board submits that although the ALJ "found as a matter of fact that Dr. Witmer attempted to confer unauthorized benefits upon himself, knowingly exceeded his contractual authority, knowingly attempted to increase his benefits beyond his contractual authority via written directives to subordinate employees, lied to the Board of Education in

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[1] *In the Matter of the Tenure Hearing of Louis Cirangle*, 1980 *S.L.D.* 82, *aff'd* State Board at 97, *aff'd App. Div.* 1981 *S.L.D.* 1405 (October 22, 1981), *certif. den.* 87 *N.J. 347 (1981)*

[2] The Board observes that the instant respondent has repeatedly argued, and the ALJ apparently agrees, that misdirection of the small amount of money represented by the vacation and personal days at issue here dictates the imposition of a "minimal" punishment. To the contrary, it argues, "the misdirection of leave time valued at $19,845 (twenty vacation days and seven personal days times Respondent's per diem of $735) cannot be dismissed as *de minimus* here." (Board's Exceptions at 22, footnote 8) Moreover, also evidently contrary to the belief of the ALJ, the fact that respondent may not yet have been paid for the time he misdirected to himself – or that somehow, on his departure from the District, the Personnel Office may have discovered some kind of a discrepancy – doesn't serve to minimize the seriousness of his conduct. (Board's Exceptions at 28)

answering their inquiries in December 2005, and operated in a dishonest and untruthful manner"[,] he inexplicably concluded that respondent should only receive a penalty of six-months suspension without pay. (Board's Exceptions at 25) The Board submits that the facts and controlling law dictate that respondent be terminated from his position.

Respondent's Exceptions

Respondent maintains that the evidence in this matter amply demonstrates that there is no foundation for the finding of any misconduct on his part under any of these tenure charges. The totality of circumstances here, he argues, confirms that his behavior with respect to the issues raised in these charges was not based on an intent to defraud; rather, it was focused on purely technical violations of his employment contract – based on the parties' varying interpretations of this contract – which do not rise to the level of unbecoming conduct. However, in the event that the Commissioner should determine to uphold these violations, respondent proposes that the penalty he has already paid in defending himself against these charges has been devastating, both in terms of cost and damage to his reputation; he therefore urges that no further penalty be imposed. (Respondent's Exceptions at 36-39)

Commissioner's Determination

Upon a comprehensive review of the record of this matter – which included transcripts of the hearing conducted at the OAL on July 11, 12, 13, August 9, September 22, October 18, 2006 and January 26, 2007 – along with the parties' exception submissions, the Commissioner adopts the recommended decision of the OAL, as modified below.

Initially, the Commissioner observes that the ALJ appears to have labored to particularize the concept of "unbecoming conduct" in a universally acceptable way. Although this term may, at times, appear to be somewhat amorphous in nature, prior cases have provided

definitional clarification to assist in recognizing its applicability to specific behavior, as was noted in *In the Matter of the Tenure Hearing of Motley, State-Operated School District of Newark, Essex County,* decided by the Commissioner August 4, 1999:

> "[u]nbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services. Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." In the context of a school tenure case, *"the touchstone is fitness to discharge the duties and functions of one's office or position."* *Motley*, supra (citing *Karins v. City of Atlantic* City, 152 *N.J.* 532, 554 (1998); *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 22, 40 (App. Div. 1992); *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364, 384 (1957); *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974)), *aff'd* State Board of Education December 1, 1999 (emphasis supplied)

Turning to an examination of the charges herein in light of the above definitional construct, after full consideration of all evidentiary proofs comprising the record and exercising the requisite deference to the ALJ's assessment of the credibility of the witnesses,[3] the Commissioner concurs, for the reasons detailed in the Initial Decision, that the Board has established – by a preponderance of the credible evidence – that respondent is guilty of unbecoming conduct on Charges 2, 3, and 5.

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[3] The applicable standard of review in this regard is clear and unequivocal – the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*N.J.S.A.* 52:14B-10(c)) A reasoned review of the record, with this governing standard in mind, provides no basis for concluding that the ALJ's credibility assessments and resultant fact finding were without the requisite level of support. To the contrary, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough and that he carefully measured conflicts, inconsistencies and potential biases in deciding what testimony to credit.

However, with respect to Charge 4, the Commissioner rejects the ALJ's conclusion that the Board has not sustained its burden of establishing unbecoming conduct. In so doing, she notes that this charge accuses respondent of obtaining the unauthorized benefits of carryover of vacation days and rollover of personal days into sick leave days by providing written directives to subordinates ordering them to confer these benefits upon him, which they did. To the extent that intimidation, undue influence or coercion may be necessary for a finding of guilt on this charge, as concluded by the ALJ, the Commissioner agrees with the Board's exception advancement that – due to the disparate balance of power existing between respondent and the involved staff members – such a requirement is inherently satisfied here. As the District's Chief School Administrator and the individual vested with the authority to recommend the hiring, renewal or non-renewal, transfer or termination of every board employee, directives from the Superintendent are and must be received with recognition of the enormous power this individual possesses over district staff. Intrinsic in a directive made by this individual to a subordinate is the expectation, by both parties, that such an order will be obeyed without challenge. Indeed, proffered testimony elicited from the involved personnel establishes that they felt unwilling or unable to question or deny respondent's order, despite their personal opinions as to the legitimacy of what he was directing them to do. The Commissioner, consequently, concludes that respondent is guilty of unbecoming conduct for abusing the authority of his position as Superintendent by directing his subordinates to take actions for his financial benefit, to which he knew or should have known he did not possess entitlement.

Finally, in her consideration of Charge #1 – where the Board alleges that respondent "intentionally" failed to report vacation time taken December 27 and 28, 2005 – and its exception argument which belies the ALJ's acceptance of respondent's "after the fact" curing

of this behavior, the Commissioner agrees with the ALJ's conclusion that respondent is not guilty of unbecoming conduct on this charge. On this record, the Commissioner is unable to find purposeful intent on the part of respondent in failing to timely report planned leave time for these days. Witness testimony confirms that respondent made no secret of the fact that he was taking a vacation trip – as apparently was his custom – during this period. The Commissioner concludes that the record supports an inference that respondent's failure to report his two vacation day absences until some two weeks after his return was no more than inadvertent neglect. Absent evidentiary support of a deliberate attempt to deceive in this regard, the Commissioner is persuaded by the ALJ's analysis on this charge wherein he stated:

> it is significant that on January 10, 2006, Dr. Witmer submitted a Request To Be Absent form to the personnel office. The significance of this submission by Dr. Witmer, *no matter what his motivation may have been*, is that Dr. Witmer's vacation leave account was charged for these two vacation days. Thus, the Board's argument that by his actions Dr. Witmer accepted full payment for days upon which he was absent from his assigned duties must fail. The Board's additional argument that Dr. Witmer has conferred a benefit upon himself without authority, and at the expense of the taxpayers, must also fail because of the fact that he reported these vacation days and was charged for them.
>
> (Initial Decision at 88) (emphasis supplied)

Consequently, notwithstanding that respondent violated his contract by not providing advance notice of these vacation days to the Board President, the Commissioner concludes that to find unbecoming conduct on this charge is tantamount to placing form over substance.

In sum, the Commissioner finds and concludes that the Board has proven four charges of unbecoming conduct against respondent. Specifically, respondent knowingly violated his contract and attempted to secure for himself benefits to which he did not possess entitlement. The means by which he accomplished this was by abusing the authority of his position, providing written directives to subordinates instructing them – with the authority of the Office of

the Superintendent of Schools – to confer these benefits upon him, which they did believing that they did not have any viable alternative. The Commissioner rejects as disingenuous respondent's attempt to categorize these charges as mere technical violations of his employment contract based on the parties' differing interpretations of this document. As a 30-year seasoned school administrator, who routinely negotiated his own contracts without benefit of counsel, respondent must be presumed to know – or should have known – mandates and/or restrictions placed upon him by that document's provisions. Should interpretative clarification issues subsequently have appeared necessary to respondent, such clarification should have been sought from the Board, his employer and the other party to the contract. Instead, the Commissioner finds on this record that respondent felt he deserved benefits received by other District administrators or by Superintendents in other districts over and above those accorded him by the four corners of his employment contract. (See Exhibit P-19) That respondent has not yet realized immediate monetary gain from the benefits he impermissibly attempted to secure for himself is of no consequence here. The Commissioner finds it readily apparent that he possessed a reasoned expectation of realizing such gain at some future date. Finally, respondent failed to respond truthfully to his Board, which deserves no less than full and honest information from its superintendent, when questioned about the status of certain events occurring in the District.

In assessing the appropriate penalty to be imposed in this matter, the Commissioner has made a careful and thoughtful weighing of the charges sustained against respondent, including consideration of the nature and gravity of these offenses under all the circumstances involved; any evidence as to provocation, extenuation or aggravation; and any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J Super.* 404, 421-22

(App. Div. 1967). She was also mindful that it is without question that – as a Superintendent of Schools – respondent is held to a standard of behavior unequaled by any other school employee, being required at all times to act with the utmost integrity, good judgment and self-restraint. Having considered the proven charges and all of the above factors, the Commissioner concludes, as did the ALJ, that respondent's unbecoming conduct – although undeniably extremely serious and evidencing significantly impaired judgment and a total lack of professionalism – does not warrant his dismissal from his position.

In so concluding, the Commissioner is cognizant that termination of employment is the ultimate sanction that she may impose in a tenure matter. Imposition of such a penalty on an individual, together with the possibility of the State Board of Examiners revoking the individual's certificate(s), would effectively end his or her New Jersey educational career. Additionally, such a discipline could have detrimental effects on such an individual's pension rights. As discussed by the ALJ, the Commissioner has not hesitated to order termination of the employment of superintendents whose egregious behavior has served to engender significant deleterious consequences on the proper administration and educational operation of the District's school system, thereby rendering these individuals unfit to discharge the duties and functions of their position. (*See In the Matter of the Tenure Hearing of Louis Cirangle,* 1980 *S.L.D.* 82, *aff'd* State Board at 97, *aff'd* App. Div. 1981 *S.L.D.* 1405, *cert. den.* 87 *N.J.* 347 (1981); *In the Matter of the Tenure Hearing of Horowitz, Bridgewater-Raritan Regional School District*, 93 *N.J.A.R.* 2d (EDU) 232; *In the Matter of the Tenure Hearing of Peter J. Romanoli, Board of Education of the Township of Willingboro*, 93 *N.J.A.R.* 2d (EDU) 82, *aff'd* App. Div., April 13, 1994; *In the Matter of the Tenure Hearing of Robert R. Vitacco*, 97 *N.J.A.R.* 2d (EDU) 449, *aff'd* State Board April 5, 2000, *aff'd* App. Div. 2002; *In the Matter of the Tenure Hearing of*

John J. Howard, decided by the Commissioner April 1, 2002, *aff'd* State Board March 3, 2004). The gravamen of the proven charges in this matter establish that respondent is guilty of attempting to recoup leave time granted to him which had been forfeited, pursuant to the terms of his employment contract, for failure to use such time within a specified period. As a seasoned administrator, respondent was fully aware of the use-it-or-lose-it parameters associated with leave time in his contract, and he was fully aware that – absent approval of his Board – he no longer had any legal or moral right to this leave time. Further exacerbating the gravity of respondent's proven behavior in this regard was the fact that it was accomplished through the issuance of directives to subordinate staff members, clearly an abuse of the power of his position. It is without question that such chicanery on the part of the chief executive officer of the District, who is charged with leading by example, is reprehensible and inexcusable. However, while by no means attempting to downplay the egregiousness of or the negative effect occasioned by respondent's behavior, the Commissioner is compelled to agree with the ALJ that the instant charges are not of the same magnitude as those in the above-cited matters so as to have the significantly detrimental consequences to the District that would demonstrate respondent's unfitness to discharge the duties and functions of his position. She, therefore, determines to reject the ultimate discipline of termination from employment – with all its attendant consequences – as too harsh under the totality of the circumstances in the instant case.

Notwithstanding that termination has been rejected as the appropriate penalty here, respondent's conduct cannot be lightly dismissed. The Commissioner would be abrogating her responsibility if she did not impose a penalty severe enough to impress upon respondent the seriousness of his infractions. She, therefore, concurs with the ALJ's recommendation that respondent should suffer a six-month suspension from his position without pay.

Accordingly, the recommended decision of the OAL is adopted – as modified above – for the reasons expressed therein. The Commissioner hereby directs that respondent be suspended prospectively from his contractually tenured position – without pay – for six-months commencing on the date of this decision.[4]

IT IS SO ORDERED.[5]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 12/24/07

Date of Mailing: 12/24/07

[4] Since most of the charges herein were sustained, respondent is not entitled to reimbursement for the salary withheld pursuant to *N.J.S.A.* 18A:6-14.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 590-06

AGENCY DKT. NO. 62-2/06

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,

Petitioner,

v.

DR. DAVID L. WITMER,

Respondent.

Douglas J. Kovats, Esq., for petitioner (Kenney, Gross, Kovats & Parton, attorneys)

Frank S. Gaudio, Esq., for respondent (Miller, Gaudio, Bowden & Arnette, attorneys)

Record Closed: May 23, 2007 Decided: July 9, 2007

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the School District of the Township of Middletown, Monmouth County, brings charges of unbecoming conduct against respondent, Dr. David L. Witmer, a certificated and tenured employee holding the position of Superintendent of Schools. Petitioner has alleged that respondent is guilty of

failing to report vacation days, misdirection of vacation time, misdirection of personal leave time, misuse of personnel office staff/abuse of authority and intentional deception of the Board of Education. Petitioner is seeking respondent's termination based on these charges. N.J.S.A. 18A:6-10.

PROCEDURAL HISTORY

On February 7, 2006, the respondent Board filed the following with the Department of Education: a Certificate of Determination for filing of tenure charges, Proofs of Service, the Board's sworn Statement of Tenure Charges, and a sworn Statement of Evidence in support of tenure charges, in compliance with N.J.S.A. 18A:6-9, 6-11, and N.J.A.C. 6:24-5.2. On February 17, 2006, the respondent's answer was filed with the Department.

The Department transmitted the matter to the Office of Administrative Law (OAL) on February 23, 2006, for hearing as a contested case pursuant to N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). On February 24, 2006, the case was assigned to me and on February 27, 2006, I issued a Letter Order setting forth a proposed schedule for the hearing of this matter, citing the expedited schedule required by N.J.S.A. 18A:6-16 and N.J.S.A. 52:14B-10.1.

A prehearing conference was scheduled for March 15, 2006, and on that date, I conferred with the parties and I entered a Prehearing Order on March 16, 2006, settling the procedures to be followed in the matter. Because of the pendency of criminal charges before the Monmouth County Prosecutor's Office and based upon the representations of counsel, I included in that Order a 30-day extension of the discovery period, thus extending the date of the scheduled hearing, and I afforded to the attorney for respondent the opportunity to submit a motion for stay of the proceeding. On March 19, 2006, attorney for respondent submitted a motion for a stay based on the pending criminal charges, and the attorney for petitioner responded thereto. By Order entered on April 6, 2006, I denied the motion.

A status conference was held on April 20, 2006, and I scheduled the hearing to commence on June 21, 2006. An additional conference was held on May 1, 2006. On May 5, 2006, attorney for petitioner submitted a letter motion for depositions and attorney for respondent responded thereto. By Order entered on May 12, 2006, I denied the motion.

On March 21, 2006, attorney for respondent submitted a letter brief in support of a request for discovery of an investigation summary report authored by the attorney for the petitioner. A response raising the attorney-client privilege was submitted on March 27, 2006, by attorney for petitioner. I subsequently reviewed the materials in-camera and as a result of my review and findings, I ordered respondent's motion for discovery denied by an Order entered on May 11, 2006.

An additional status conference was held on May 30, 2006, and at that time I offered additional hearing dates of June 30 (attorney for petitioner not available), July 3 through 7 (attorney for respondent not available), July 11, 12, 13, which were accepted, July 20 (attorney for respondent not available), and July 25, 27 and 28, 2006.

On June 7, 2006, an additional status conference was held at which time attorney for respondent raised the issue of a possible conflict of interest in the event that attorney for the petitioner were to testify in the matter. As a result of the motion, Christopher B. Parton, Esq., attorney for the petitioner, withdrew as the attorney of record and Douglas J. Kovats substituted.

By letter motion dated May 9, 2006, attorney for respondent sought discovery access to the personal computers of members of the Board of Education to review e-mails exchanged between Board members and the school district personnel department and the business administrator. By Letter Order dated May 31, 2006, I denied the motion.

The hearing commenced on June 21, 2006 and was scheduled for additional hearings on July 11, 12 and 13, 2006. At the conclusion of the hearing on July 13, 2006, I offered additional hearing dates of July 20, 2006, which was not accepted by attorney for respondent and July 27, 2006, which was not accepted by attorney for petitioner, and August 8, which was not accepted by attorney for petitioner. The parties agreed on a hearing date of August 9, 2006, and the hearing continued on that date. However, prior to August 9, 2006, it was learned that the petitioner's key witness, Christopher Halpin, was unavailable for medical reasons. By an Order entered on August 7, 2006, I directed the petitioner's attorney to issue a subpoena requiring Mr. Halpin's presence or to provide medical documentation of his unavailability, and I rescheduled the matter for hearing for August 24, 2006. When Mr. Halpin presented medical documentation confirming his unavailability, the hearing of August 24, 2006, was adjourned and the matter was rescheduled for September 22, 28 and October 18, 2006.

The hearing was held on September 22, 2006. At the conclusion of petitioner's case on that date, attorney for petitioner made a motion to dismiss. I denied that motion by an Order entered on September 26, 1996. The hearing of September 28, 2006, was adjourned because of the serious illness of an attorney's family member, and the matter was continued until October 18, 2006. At the conclusion of the hearing on October 18, 2006, hearing dates were offered for October 20 and 27, 2006, but the attorneys were unavailable because of trial or hearing conflicts until December 11, 2006. At the conclusion of the hearing on December 11, 2006, an additional hearing date was required and the attorneys were offered a number of hearing dates in December 2006 and January 2007. Because of trial or hearing conflicts, the attorneys were only able to agreed to January 26, 2007, as the rescheduled hearing date, and on that date the hearing was concluded.

At the conclusion of the hearing, and in accordance with N.J.S.A. 52:14B-10.1, the attorneys requested an opportunity to submit briefs within 30 days of the conclusion of the hearing or receipt of the transcripts by the parties, whichever is later. Under the

terms of the statute, transcripts are required to be ordered by the parties immediately following the hearing and are required to be produced within 15 days. Unfortunately, there was a delay in the preparation of the transcripts. By my letter dated April 19, 2007, I advised the parties that their briefs would be due within 30 days. It was then learned that the recording of the closed session of September 22, 2006, could not be located and I prepared a reconstructed summary of that testimony. The result was that the parties submitted briefs on May 23, 2007, whereupon the record closed.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

Summary of the charges

In Charge No. 1, it is alleged that respondent is guilty of failing to report vacation days; in Charge No. 2, it is alleged that respondent is guilty of misdirection of vacation time; in Charge No. 3, it is alleged that respondent is guilty of misdirection of personal leave time; in Charge No. 4, it is alleged that respondent is guilty of misuse of personnel office staff/abuse of authority; and in Charge No. 5, it is alleged that respondent is guilty of intentional deception of the Board of Education.

Summary of the testimony and evidence

Hearings were held in this matter on June 21, July 11, July 12, July 13, August 9, September 22, and October 18, 2006, and January 26, 2007. The following is a summary of the hearing testimony and documentary evidence I have considered in deciding this matter, and is summarized herein, generally in the order of its presentation.

Testimony of William J. Doering

The petitioner's first witness was William J. Doering, the school district business administrator and Board of Education secretary. Mr. Doering has a degree in accounting

and has been employed as a school district auditor. From 1999 until 2001 he was the school district assistant business administrator and Board of Education secretary. He was appointed as the business administrator in November 2001. His duties include the oversight of school district finances, the preparation of the minutes meetings of the Board of Education and general oversight of the operations of the school district. The superintendent is his immediate supervisor.

Mr. Doering testified that the personnel office falls under one of the assistant superintendents. Until September 2005, it was under the supervision of Assistant Superintendent Christopher T. Halpin. It was then transferred to Assistant Superintendent Dan Skelton.

Mr. Doering is familiar with the system for recording sick leave, vacation leave and personal leave. Rosemarie Shopp is the personnel office confidential secretary who maintains the System 3000 database. In late July or early August, 2005, Ms. Shopp advised him that she had to do a manual override of the system because Dr. Witmer had directed her to carry over 40 vacation days on his account, even though his amended contract limited such carryover to 20 days. Dr. Witmer also instructed her to carry over his unused personal days as sick days even though the contract is silent concerning this.

Mr. Doering then discussed this with Mr. Halpin and they sought the advice of the Board attorney because of their concerns that this was a contractual violation. Mr. Doering indicated that he was familiar with the contract as the business administrator and as a signatory. Paragraph 9 originally allowed a carry-over of only ten vacation days, but an addendum to the contract was approved by the Board to allow the carry-over of up to 20 vacation days (P-1 and P-4). Thus, under the contract, the superintendent could only carry-over 20 days plus 20 current days. The contract also provided for sick leave of 12 days (P-1, page 5).

Mr. Doering did not discuss this matter with Dr. Witmer because, as the superintendent. Dr. Witmer is his supervisor and evaluator and he was not comfortable doing so. Nothing was ever done about this issue afterwards because many other issues came up at that time.

Mr. Doering testified that Dr. Witmer's directions were complied with by the personnel office because of Dr. Witmer's position as superintendent. He was unable to find any record of an action taken by the Board to increase the carry-over of vacation days or to allow the increase of sick leave by the carry-over of personal days. He admitted that no payment was ever made to Dr. Witmer based on these actions.

On cross-examination Mr. Doering admitted that in answers to interrogatories there was no specific mention of his discussion with Ms. Shopp or concerning the manual override of the system. He explained that the manual override requires someone to manually change the parameters in the computer program. He admitted that the contract allowed the carry-over of ten accumulated vacation days at any given time, and the word "maximum" is not in the contract.

Mr. Doering recalled an analysis and comparison of Salary and Benefits he did for the Board (R-1) in which he made the assumption that Dr. Witmer's personal days were "rolled" or carried over to sick, but this was an error. (R-1). He made the assumption that Dr. Witmer could carry-over personal days based on all other union and non-affiliated positions, but Dr. Witmer's contract does not address carry-over of personal days to sick days. There is also no specific Board policy dealing with this issue. He never discussed this assumption as contained in this comparison with the Board (R-1).

In December 2005, Dr. Witmer had until June 2008 remaining on his contract. On July 1, 2005, his salary was $176,604 plus fringe benefits. Mr. Doering believes that Dr. Witmer is entitled to a four percent salary increase per year. The contract is silent as to the actual salary after the 2005-06 school year because it has not yet been

negotiated. The extension of his employment to 2008 is reflected in the minutes (P-3) but is silent as to any increases. He admitted that the value of the contract was approximately $500,000 to $600,000 through June 2008, and the only way out of the contract is through tenure charges.

Mr. Doering was not aware that the Board did not want to continue working with Dr. Witmer, but he admitted that there were some difficulties between Dr. Witmer and the Board.

Mr. Doering testified he did not know if Dr. Witmer made the requests of Ms. Shopp for the carryover of leave in an underhanded way because he was not privy to the requests. He has not spoken to Dr. Witmer concerning this. He does not recall discussing it with the personnel director, Laurie Allocco, at any time. He admitted that the personnel office must follow orders from the superintendent.

With regard to Charge No 5, Mr. Doering testified that Dr. Witmer was asked about the status of litigation and lawsuits at a Board meeting, and Dr.Witmer's response was that Mr. Halpin was handling those matters. Dr. Witmer provided a report to the Board after that meeting with no mention that certain attachments to his report were not original documents. He signed the tenure charges knowing that the information provided in that report by Dr. Witmer to the Board was doctored.

Mr. Doering testified with regard to Charge No. 1, Failure to Report Vacation Days, that advance notice is required to be provided by the superintendent to the Board, and Dr. Witmer did not give such notice. If Dr. Witmer notified the Board of his absences in the weekly updates, he was not in compliance because notice must be provided to a certain designated person. He admitted that Mr. Halpin was head of the personnel office and received the weekly updates. He also admitted that the weekly update of December 23, 2004, (R-3) stated that Dr. Witmer will be leaving for Hawaii on Christmas Day and returning on New Year's Day. He also admitted that the weekly update of December 22, 2003, (R-4) stated that Dr. Witmer would be leaving for

vacation on Christmas Day and returning on January 2, 2004. He admitted that the contract does not specify the time within which notice must be given. There is a standard district request for absence form, but he admitted that it is not used by every employee of the school district.

Mr. Doering defined sick leave as leave when someone is individually ill or to take care of someone who is ill. He denied any knowledge that in 2001 administrators were carrying over vacation days they were not entitled to. He admitted that Dr. Witmer was never paid for the excess vacation days and that Dr. Witmer has never taken all of his vacation days.

There was a closed hearing at this point concerning medical leave for another employee that I **FIND** to be irrelevant to the charges in this matter.

The Salaries and Benefits Comparison (R-1) was prepared by Mr. Doering at the request of the President of the Board who asked for a comparison between the superintendent, assistant superintendent and business administrator. The reason for the request was that the Board was looking at Dr. Witmer's request to increase the amount of his carryover days for vacation. This was in preparation for Dr. Witmer's addendum to the contract (P-4). Made an assumption concerning Dr. Witmer's personal days since the terms and conditions for non-affiliated positions includes a roll over of personal days to sick days and there is a cap for unused sick leave.

Testimony of Rosemarie Shopp

Rosemarie Shopp testified that she has been employed by the school district for a little over 20 years and is a Confidential Secretary[1] in the personnel office. Among her duties is maintaining the attendance records of all school district employees. She is also responsible for knowing the contents of all collective bargaining agreements and

[1] Confidential employees are those whose functional responsibilities or knowledge in connection with collective negotiations issues would make membership in a negotiating unit incompatible with their duties. See N.J.S.A. 34.13A-3(g).

contracts because of her position. She is familiar with Dr. Witmer's contract and she reviews it each year.

Ms. Shopp testified that in early 2005, Dr. Witmer discussed with her the roll over of his personal days. He then gave the personnel office a written directive (P-11) and pursuant to that directive she carried over his personal days to sick days and carried over his vacation days in excess of the number permitted by his contract. Before doing so she mentioned this to Mr. Doering in July 2005 because she knew these actions were not provided for by Dr. Witmer's contract. She believes that if the contract is silent, there is no carryover.

Ms. Shopp identified the printout of Dr. Witmer's attendance for 2005-2006 school year (P-6, page 5). The additional handwritten note on the printout for that year is hers. She explained that entries in the system are made by her based on Requests To Be Absent forms, which are required to be submitted to the personnel office by all employees. The.45 sick days consist of 29 existing sick days, 12 new sick days and four personal days carried over in reliance on Dr. Witmer's written directive (P-11). She knew that Dr. Witmer was able to carry over 20 vacation days. This absence report does not show 60 vacation days because the system is set up with guidelines. While she has the ability to manually override the system, she does not like to do so. For her own recordkeeping she acknowledged the carryover as directed by Dr. Witmer but left the system with no change. She made the note on this report because it is not consistent with the contract and with System 3000 parameters.

Ms. Shopp also testified that there is no notation in this report (P-6, page 4) of Dr. Witmer's absences on December 28 and 29, 2004, because no Request To Be Absent forms were submitted by Dr. Witmer for those dates. There is also no listing of vacation days for Dr. Witmer on December 27 and 28, 2005 (P-6, page 5). There was a carry-over of three personal days to sick leave for 2004-2005 based on another e-mail from Dr. Witmer (P-13). Any unused vacation time is paid at a per diem rate at the end of the contract.

On cross-examination, Ms. Shopp testified that she has heard of weekly updates issued by Dr. Witmer, but has never seen them. She explained that Mr. Halpin oversees some activities of the personnel office and Ms. Allocco who is her superior. To her knowledge, all employees submit Request To Be Absent forms and they are required to be filled out every time, but she is not aware if there is a written directive to do so issued by the Board. She remembers seeing at least one such form from Dr. Witmer. She admitted that there is no requirement in the contract that the superintendent must give notice of absences to the personnel office.

While Ms. Shopp acknowledged e-mails between her and Dr. Witmer about the carryover of personal and sick days (R-7), she denied telling Dr. Witmer that her interpretation of his contract allowed the carryover personal days as sick days. She feels that Dr. Witmer's e-mail (P-13) was contrary to the contract, but she did not do anything as a result of receiving this. Dr. Witmer does get family illness days and paragraph 11 of his contract (P-1) allots five days. Despite Dr. Witmer's contention that they should be separate days, the system does not list them as separate days, and she indicated that five of his twelve sick days could be used as family illness days.

Ms. Shopp's interpretation of the contract is that Dr. Witmer could only have a total of 40 vacation days in his leave account, and the attendance report (P-6, page 4) showing 42 days is in error. She admitted that Dr. Witmer never used all of his vacation days. He took six vacation days in 2003-04 and four vacation days in 2004-05. Under his contract, Dr. Witmer can request that the Board purchase up to ten of his vacation days per year.

On re-direct examination, Ms. Shopp testified that based on Dr. Witmer's memo of June 29, 2005, (P-11) she believed that he was requesting the carryover of 40 vacation days. As a result of this belief, she noted it and prepared the July 2005 report (P-12). If there is a carryover of days, it must usually be approved by a supervisor in

writing. However, the superintendent told her to do so, and she did it. She has never previously seen the e-mail of June 14, 2004 (P-19).

Ms. Shopp admitted that to her knowledge, Dr. Witmer has not been paid for any accrued carryover days of any kind.

Testimony of Dawn Ann Diorio

Dawn Ann Diorio, a member of the Board of Education and its current President, first testified as to Charge No 5. She stated that at a closed session during the Board meeting on December 19, 2005, the then Board President asked Dr. Witmer a number of questions about two situations involving litigation. Dr. Witmer was questioned about depositions that took place earlier that day, and about an investigation leading to the dismissal of a certain teacher. Dr. Witmer responded he had no knowledge of those situations and had not been kept informed, and he would need to obtain the information from Assistant Superintendent Halpin.

Ms. Diorio testified she had a good relationship with Mr. Halpin and respected him as an education leader. Sometime after that meeting, Mr. Halpin called Ms. Diorio because he had been told what had occurred and he felt that Dr. Witmer had "sold him down the river" with the Board. He believed that Dr. Witmer had knowledge concerning these matters in litigation, but gave the indication that Mr. Halpin had not kept him advised.

On December 23, 2005, Dr. Witmer provided a weekly update to the Board members to which he attached a memo from Mr. Halpin explaining the litigation issues (P-14, pages 4 and 5). The attachment from Mr. Halpin had been changed and a number of paragraphs were cut out. Mr. Halpin had given her a copy of his original memo that had been altered by Dr. Witmer because he trusted her. Ms. Diorio testified that she was personally very disappointed in this action by Dr. Witmer. She could not believe that Dr. Witmer would alter a document to cover what he previously said.

It was later determined that Dr. Witmer had been directly involved in the two situations in question and had knowledge, but was not being honest with the Board and misrepresented his lack of knowledge. It was also found that the two writings from Mr. Halpin had been altered. Ms. Diorio believed that Dr. Witmer made misrepresentations to the Board. She did not recall if Dr. Witmer said that the individual being discussed must be given a Rice Notice and could not be discussed until that was done.

With regard to Charge No. 1, Ms. Diorio testified that she received a telephone call from Mr. Halpin about Dr. Witmer's attendance around November or December 2005. Mr. Halpin explained to her that there was an emergency at the High School South and neither he nor anyone in the school district was able to get in touch with Dr. Witmer. She had concerns that Dr. Witmer was not following proper procedures with regard to time off. She contacted Mr. Parton and then spoke to Board President Joan Minnuies and the Board directed its attorney to conduct an investigation to determine if Dr. Witmer was documenting days taken off. As a result of that investigation it was learned that Dr. Witmer did not report to the Board when he took days off.

On cross-examination, Ms. Diorio testified that her relationship with Dr. Witmer was a good relationship, but she does not trust him any longer based on the investigation of his conduct. She believed he made a misrepresentation to the Board. On December 19, 2005, she did not want to see him leave as the superintendent, but does not recall that he was asked to leave. She does recall that Dr. Witmer said he would leave if his contract was paid in full, although she only knows Dr. Witmer's response through Mr. Parton. She does recall that at one of the meetings in December 2005, Mr. Parton requested a meeting with the Board privately and then asked for a directive to conduct an investigation. She knew on December 19, 2005, that the Board and Dr. Witmer could no longer work together. However, the Board could not even consider buying out his contract and this was never an option.

On further cross-examination, Ms. Diorio testified that in their phone conversations Mr. Halpin said there were many times that he did not know where the superintendent was. He was upset on more than one occasion because he could not get in touch with Dr. Witmer concerning an evacuation. She subsequently spoke to Mr. Parton about this. She then asked the board president if Dr. Witmer reported to the board president to let her know when he was out of the office. Her specific concern was his taking time off without reporting it. As a result of the investigation, it was learned that Dr. Witmer did not report to the Board when he took days off. Mr. Halpin had submitted a resignation in 2005 and had blamed Dr. Witmer for forcing him to resign.

Ms. Diorio testified that she did not want Dr. Witmer removed and she never conveyed to Mr. Halpin that they needed to get rid of a few people. She denied saying that Dr. Witmer was incompetent or that Mr. Halpin could fix everything when Dr. Witmer was out. However, she acknowledged an e-mail of October 12, 2005 (R-12) in which she stated, "We have to get rid of a few people" and asked Mr. Halpin what he would do to correct the problems. She also identified her e-mail of September 29, 2005, addressed to Mr. Halpin in which she said that he has three days to fix everything. Ms. Diorio indicated there was a leadership problem in the school district, and prior to December 2005 she considered Dr. Witmer to be the leadership problem. Joan Minnuies, the Board President, was very frustrated with Dr. Witmer. Ms. Diorio denied that Ms. Minnuies was upset because Dr. Witmer did not rehire Ms. Minnuies' daughter. She denied that there was a concerted effort to get rid of a few people.

Ms. Diorio testified that the Board gave to Mr. Parton specific directions to conduct an investigation. She originally sent him an e-mail that he should do so, but he wanted confirmation from the Board. She admitted that she could not find the confirmation in any Board minutes. The referral to the county prosecutor was in January 2006. She gave a statement to the prosecutor, but is not sure of the date. Tenure charges were served on Dr. Witmer on January 10, 2006. She does not know if Dr. Witmer ever tried to hide his taking days off. He acknowledged that he had been away in December 2005, after he returned. She never had a problem reaching Dr.

Witmer on his cell phone, and she indicated that Dr. Witmer may have said he was having a problem with his cell phone.

On re-direct examination, Ms. Diorio denied that Dr. Witmer said that he could not discuss the questions asked because the teachers were not "Riced" or they were matters of litigation. He never said anything other than he did not know. She does not recall the intent of the statement, "three days to fix everything." It was more of a joke and it was not serious. When Dr. Witmer advised the Board that he was to be away, she assumed that he had submitted a Request To Be Absent form and was surprised that he had not. She does not know if there is a written policy on the use of these forms, however, the superintendent contract indicates that he must alert the Board President of any absences. It does not say that it must be a Request To Be Absent form. This testimony and evidence relates to the allegations of Charges Nos. 1 and 5.

Testimony of Amelia L. Allocco

Amelia L. Allocco testified that she has been employed by the school district since 1977. She became the Personnel Director in 1994 and she supervises three secretaries, including Ms. Shopp. Her responsibilities include keeping attendance records for all district employees, including administrators. She testified that administrators, including the superintendent, are all told that they must fill out a Request To Be Absent form for any absences. Dr. Witmer reviewed these procedures when he first arrived in the school district. On two or three occasions after he first arrived Ms. Allocco told Dr. Witmer that she needed paperwork for an absence. In the next year she spoke to him again about submitting Request To Be Absent forms when he was absent, or at least telling her if he was absent, and he answered in the affirmative.

In June 2005, it was necessary for Ms. Allocco to verify Dr. Witmer's 2004-2005 leave, and she e-mailed him asking if only two days absences for the year were correct. Dr. Witmer responded vaguely. She knew of other days he was not there, but she did not know where he was or the reasons. There was no deduction made at that time for

two vacation days he took in December 2004. In 2005, December 27 and 28 were workdays and she was told that Dr. Witmer was not at work. If he was absent, he did not tell the personnel office in advance. He did provide a Request To Be Absent form for these days on January 10, 2006, at 1:40 p.m., after he was served with tenure charges by the Board attorney.

With regard to carry over of vacation and personal days, Dr. Witmer told the personnel office what to do and they did it. She did not go to Mr. Halpin because he also reports to the superintendent. She discussed with Ms. Shopp how to log it in and track it. There is no provision in his contract to carry over the personal days he receives by contract, but this was done because the superintendent told them to do so. Dr. Witmer also submitted a later request to transfer three personal days to sick leave (P-13), and this was also done for the same reasons. She did not know if the Board of Education approved this.

On cross-examination, Ms. Allocco testified that she keeps the attendance books and they are the official attendance records of the school district. They are transmitted to the business administrator when someone leaves or retires for the purpose of cutting a check.

Dr. Witmer's Request To Be Absent form submitted on January 10, 2006, had the result of entering into the system of two vacation days for December 27 and 28, 2005 (R-10). That does not show in Dr. Witmer's attendance report (P-6) because that report was run on December 13, 2005.

At the time Dr. Witmer wrote his memo of June 28, 2005 (P-11) requesting the transfer of unused personal days to sick days and unused vacation days, Dr. Witmer had a balance of 35 vacation days. On that date he was allowed to carry-over 20 days based on the addendum to the contract. He was given 40 vacation days on June 30, 2005, consisting of 20 carry-over plus 20 additional days (P-6, page 5). On the page before that (P-10, page 4), he was given 42 vacation days. This does not show the

vacation days that Dr. Witmer used but is alleged not to have given notice of.

In December 2003, Mr. Halpin was the head of the personnel office, but information concerning Dr. Witmer's absence would not come through him or through Mr. Doering. She does not know where the addendum to the contract came from (P-4), but it would have been given to the personnel office since it administers the contract.

Ms. Allocco testified that, depending on the balance of his leave, there was nothing wrong with Dr. Witmer's e-mail of July 1, 2004 (P-10) stating, "please see that my 20 days are carried over." However, on that date he had 22 vacation days as a balance and if 20 are carried over, he would have a total of 42 days, and that is not correct.

Ms. Allocco was questioned about the June 29, 2005, e-mail (P-8). Dr. Witmer did not deny that he took two vacation days in September 2004. He also mentions that he took off the entire Christmas week, but he does not specify in his response whether they were vacation days, for an illness, or for some other type of leave. He did not tell her how to charge those days to his account, but she did receive an answer and she left it at that. As a result of not using those days, Dr. Witmer would be paid a per diem amount if he were to leave or retire after a review. Ms. Allocco did not recall how Dr. Witmer gave notice to the personnel office of any of the vacation days that were charged to him.

Ms. Allocco admitted that her e-mail of June 29, 2005, (P-8) questioning Dr. Witmer is not something she does with everyone, although she does send e-mails to individuals if there is a question. The contract for Dr. Witmer provides for four personal days as well as five family illness days and 12 sick days. Ms. Allocco admitted that in Dr. Witmer's memo of June 29, 2005, (P-11) he did not direct anyone to carry-over 40 of his own vacation days, but rather requested that they carry-over all unused vacation days without specifying the number.

Ms. Allocco admitted that if Dr. Witmer retires he would only be paid for unused days after a review. She also admitted that the taxpayers have incurred no expense in the payment of any unauthorized vacation days and Dr. Witmer has never gotten paid for any unauthorized vacation days. He has never asked the Board to purchase any of his vacation days.

Ms. Allocco testified that she has a high school education and her position is not a position requiring a certificate. She acknowledged that in May 2005, Dr. Witmer wanted to eliminate her position, but she tries not to take it personally. She was never told that Dr. Witmer was trying to eliminate her position because she does not have a certificate. That issue had been brought up previously. If the position were eliminated she would be placed as a confidential secretary so she would continue to be employed.

When she received the e-mail from Dr. Witmer telling her to do something allegedly improper, Ms. Allocco did not go to anyone, although she might have spoken to Mr. Doering. She never spoke to Mr. Doering concerning the carryover of personal days into sick days, and Mr. Doering never told her that Dr. Witmer was entitled to rollover his personal days into sick days. She did not go to Dr. Witmer to discuss his asking for unauthorized days because he gave her a directive.

Ms. Allocco stated that there is no written directive from the Board that mandates that the Absence Request Form is to be filled out. Dr. Witmer's contract provides that if his vacation is more than a week, he has to give two weeks notice to the Board and anything less that that, he has to advise them of it. The former superintendent, Dr. DiTalvo, did not always submit an Absence Request form. However, he would come and tell her personally every time he was absent. Ms. Allocco reviewed the weekly update of December 22, 2003 (R-4) and testified there is no indication that it was ever submitted to the personnel office and that it is not a Request To Be Absent form.

Testimony of Christopher B. Parton, Esq.

Christopher B. Parton, an Attorney at Law of New Jersey, testified that he is the attorney for the Board of Education. He confirmed that on December 19, 2005, he attended an executive session of the Board and Dr. Witmer was questioned by the Board President about depositions that day. Dr. Witmer responded he was unaware of them and would have to check with Mr. Halpin. Mr. Parton also indicated he did not know the subject of the deposition that occurred on that date, although he subsequently learned from Mr. Halpin's memo that it had to do with a guidance counselor who had been terminated. Mr. Parton indicated that he had no knowledge concerning this litigation by a former guidance counselor.

Mr. Parton testified that Ms. Caminiti, a Board member, also asked a question of Dr. Witmer concerning how the administration handled the investigation leading to the removal of a teaching staff member. Mr. Parton's own recollection was that Mr. Halpin, Dr. Witmer and two building principals handled this investigation. Writings were prepared, but he does not recall a report. Dr. Witmer and Mr. Parton briefed the Board on the factual and legal basis. Dr. Witmer responded that he would have to check with Mr. Halpin and report back to the Board because he did not know the details of the investigation process. Although Mr. Parton was also aware of the investigation, he did not brief the Board on how the investigation occurred. Because the question related to an administrative investigation by the administrative office, he was unable to discuss this issue.

Mr. Parton also testified that Dr. Witmer did not decline to respond to the question because of the lack of a "Rice Notice" to the involved teacher. He explained that a "Rice Notice" is a notice provided to a public employee when the public agency for which that employee works is going to discuss his or her status or employment in a way that could adversely affect it in executive session. The Rice Notice gives the affected employee the right to have those discussions held in public rather than in private. With regard to investigation of the teacher discussed in closed session, Mr.

Parton indicated that the individual was given a Rice Notice in the week prior to December 19, 2005, for that meeting. It was not Mr. Parton's recollection that Dr. Witmer refused to answer the question regarding the teacher because the teacher was not given a Rice notice.

Ms. Minnuies then specifically asked about any other litigation that was going on that the Board does not know about. Mr. Parton testified that the Board is constantly updated by his law office as to litigation they are handling.

Mr. Parton admitted that Dr. Witmer subsequently provided the requested information to the Board. Mr. Parton identified the weekly update of December 15, 2005, prepared by Dr. Witmer and dated December 23, 2005. These were prepared in anticipation of the next meeting.

Mr. Parton testified that on December 19, 2005, he spoke to Dr. Witmer alone in the hallway outside of the library in Middletown High School North at approximately 10:30 p.m. He approached Dr. Witmer at the direction of the Board because the Board continued to be extremely frustrated with their relationship with Dr. Witmer. He asked Dr. Witmer how to fix the relationship moving forward and asked for any suggestions and Dr. Witmer's response was, "Yeah – they can buy my ass out." Mr. Parton then asked for an explanation and Dr. Witmer explained by saying they could buy him out for any monies due on his contract. Dr. Witmer said that they could discuss the matter further with his legal representative.

On cross-examination, Mr. Parton stated that he did not know that the relationship between Dr. Witmer and the Board could not be rescued. He also did not know Dr. Witmer's position.

Mr. Parton testified there was a Board directive to him on December 12, 2005, to investigate an allegation that Dr. Witmer abused his vacation leave. He spoke to one member about this and told the member that he would need a Board directive because

of the serious nature of the inquiry. There was an e-mail sent to him in January 2006 (R-15), which confirmed earlier discussions and confirmed what was going on. Dr. Witmer was not given a Rice Notice on December 12, 2005, because there was no adverse determination and an investigation is not an adverse action. Referral to the prosecutor was made without formal Board action, and subsequent to completion of the investigation of Charges 1 through 4 and prior to completion of the investigation of Charge No. 5.

The Board meets twice per month and the next Board meeting was on January 6, 2006. At the next meeting on January 2006, Dr. Witmer was not discussed. The only Board member Mr. Parton spoke to about the charges was Ms. Diorio concerning Charge No. 5. He never spoke to Dr. Witmer during the investigation. Dr. Witmer had the opportunity to respond after the charges were filed, and he did so (P-21 for identification only). He admitted that Dr. Witmer was not paid any money for days inappropriately carried-over.

Mr. Parton explained there were 17 bomb scares in High School North and High School South and he was generally aware of dissatisfaction with Nextel cell phones. He commenced conducting his investigation and received the various documents between December 15 and December 19, 2005, and he had them by December 19, 2005, when he met with Dr. Witmer. He then reviewed these documents over Christmas week. He did not discuss the issues with Mr. Doering, Ms. Allocco or Ms. Shopp. Chris Haplin had resigned in 2005 effective August 31, 2006. He is aware that Mr. Halpin claimed he was forced to resign by Dr. Witmer, but was not aware that he blamed Dr. Witmer.

Mr. Parton indicated that the e-mail (R-15) did not launch an investigation, but was to confirm the investigation. He has no knowledge of Dr. Witmer complaining about the operation of his cell phone. He stated that the Board was not in session when referral was made to the prosecutor's office. Dr. Witmer was given no opportunity to respond prior to the referral to the prosecutor.

Testimony of Christopher T. Halpin

Christopher T. Halpin testified that he retired as Assistant Superintendent for the Middletown Township School District effective September 1, 2006. He was first employed by the school district in September 1976, as a math teacher and coach. He then became an Assistant Principal at Middletown High School North for three years and then was the Principal at Navesink Middle School for 18 years. He was an Assistant Superintendent with Dr. Witmer from 2003 through his retirement effective September 1, 2006.

Mr. Halpin testified that he went on a medical leave of absence on December 10, 2005, and did not attend the Board meeting on December 19, 2005. Subsequent to the meeting of December 19, 2005, Mr. Halpin learned from several sources that Dr. Witmer had misrepresented that Mr. Halpin failed to keep him informed about two pending matters in litigation. He testified that he had advised Dr. Witmer in ongoing conversations as to both of those matters on a continuing basis, and Dr. Witmer was fully aware of them. He also identified a written report concerning the termination of a teacher that he had provided to Dr. Witmer. In addition, he had advised Dr. Witmer that he would be in the office on December 19, 2005, to coordinate depositions involving the termination of a guidance counselor, even though he was on medical leave.

Mr. Halpin testified with regard to the termination of the teacher, that it was Dr. Witmer who wrote the memo to the teacher terminating her services and Dr. Witmer was fully aware of the situation. Mr. Halpin then responded to Dr. Witmer's inquiries about these two matters, but in the written responses he wanted Dr. Witmer to be aware that he knew about Dr. Witmer's misrepresentations to the Board.

With regard to the guidance counselor issue, Mr. Halpin explained that the father of a student had a made a complaint to the police and to DYFS about the guidance

counselor in question who was a contract employee. This had occurred in 2003 at which time he met with the employee. However, he never heard from DYFS or the police. The charges were eventually dismissed and the guidance counselor then filed a complaint against the school district for lost wages. He met with the superintendent and with Mr. Doering and he was directed to send a memo to the guidance counselor not to report to work any longer. The guidance counselor was a per diem employee and he was simply not paid any further.

The school district was notified of litigation by the guidance counselor in the spring of 2005 in which he was seeking reimbursement for salary. Mr. Halpin had ongoing conversations with Dr. Witmer, but he admitted that they were not in-depth. He provided information to the attorney and the school district insurance company, and attorneys would contact him as to interrogatories, depositions and the availability of witnesses. He would keep Dr. Witmer advised whenever this occurred. Mr. Halpin testified that the fact that the Board did not know about the original litigation alarmed him.

With regard to the teacher, Mr. Halpin explained that this teacher taught at two schools. At some point, Mr. Parton became alarmed about the content of statements made by the teacher. Mr. Halpin investigated the matter and it was decided that the teacher position would be eliminated. Mr. Parton recommended the dismissal of the teacher. Dr. Witmer gave 60 days notice of termination.

Mr. Halpin testified that he was not at the meeting of December 19, 2005. He was concerned, however, because it was Dr. Witmer who wrote the memo dismissing the teacher, and Dr. Witmer was fully aware of the situation with that teacher, but claimed no knowledge. It was reported to him that Dr. Witmer said he knew either nothing or so little that he needed Mr. Halpin to report concerning the facts of the matter.

Mr. Halpin testified that he provided a memo to Dr. Witmer on December 22, 2005 (P-15) in response to Dr. Witmer's earlier memo of December 20, 2005, requesting information. Dr. Witmer's memo only requested information about the guidance counselor case, not about the teacher. Mr. Halpin responded as to both because he was told about Dr. Witmer's claim to the Board members that he had no knowledge of these cases. Mr. Halpin wanted Dr. Witmer to be aware that he knew of the statements to the Board that he was unaware of the cases. Mr. Halpin testified that he has no authority to act unilaterally, and none of the actions of the school district in these cases were strictly his doing. Dr. Witmer was directly involved in both of these matters. Dr. Witmer authorized Mr. Halpin to terminate the guidance counselor, and Dr. Witmer wrote the memo of dismissal to the teacher.

Mr. Halpin testified that he spoke to Mr. Doering concerning the use of leave by Dr. Witmer in early fall 2005. Mr. Doering informed Mr. Halpin that Ms. Shopp came to him about Dr. Witmer's directions to her as to his leave. Mr. Doering came to him concerning this because there was some question as to who should address the concern. They then decided to call the Board attorney and did so and left a message. Mr. Doering later advised Mr. Halpin that the attorney said to wait because of other issues going on in the school district.

Mr. Halpin testified he never received a copy of the weekly updates that Dr. Witmer sent to the Board about ongoing events (P-14). He also identified a series of e-mails between him and Dr. Witmer concerning ongoing litigation before he became assistant superintendent (P-25).

On cross-examination, Mr. Halpin testified that he did not trust Dr. Witmer toward the end of their relationship. He considered Dr. Witmer to be a nemesis at some point in his career and blamed him because he was forced to resign. He was told by Dr. Witmer he would not be reappointed by him unless he resigned because the Board of Education told Dr. Witmer that Mr. Halpin had undermined him. He denied that he wanted Dr. Witmer terminated because he feels that it would be a terrible blow to the

school district. He never approached Ms. Diorio but also indicated she does not lie. His chain of command was the superintendent. He never spoke to any Board member about the superintendent's use of time. However, he did have concerns about the way the Board was operating. It was not his goal to become superintendent.

Mr. Halpin was referred to his memorandum to Dr. Witmer dated December 22, 2005 (P-16). It only indicates that it was addressed to Dr. Witmer, and he admitted he never told Dr. Witmer that it was also sent to Ms. Diorio. He admitted that he could criticize the superintendent by asking for a meeting with the Board. He admitted that in his original e-mail from Dr. Witmer to him, Dr. Witmer asked only about a single issue. He felt compelled to add the second issue because he did not trust Dr. Witmer. He explained that his memo to Dr. Witmer was not intended to be a response to the Board. As far as he was concerned, Dr. Witmer could take all or part of his report and provide it to the Board. He admitted that if he attended the December 19, 2005 meeting, he could have responded to the Board's question.

Mr. Halpin's conversation with Dawn Diorio was around December 22, 2005. He spoke to her because she was an ally of his and he told her that he had a confidential letter for her to protect himself against what the superintendent would say about him when he was not present. He never subsequently spoke to Ms. Diorio about the memo. Dr. Witmer then presented a doctored document to the Board.

Mr. Halpin testified that Dr. Witmer would normally advise him when he was out because Mr. Halpin was responsible for running the district in his absence. He was also in charge of personnel and was an overseer of the existing system. He was not familiar with Dr. Witmer's contract or the benefits he received. In his own case, he can bank up to 40 vacation days, but cannot add more to the 40 days.

On re-direct examination, Mr. Halpin testified he had no responsibility to advise the personnel office of Dr. Witmer's absences and that it was Dr. Witmer's responsibility. At the time of the first bomb threat, Dr. Witmer claimed that he was in his

office but no one contacted him. Mr. Kelly and Mr. Halpin both made phone calls and Mr. Halpin personally made phone calls to Dr. Witmer and could not reach him. He has no idea of any problems with Nextel call phones.

Testimony of Joan Minnuies

Joan Minnuies, a member of the Board of Education and its President in 2004-2005, testified that she has been a member of the Board since 2002. She recalled that in an executive session of the Board that she believed took place on December 19, 2005, Dr. Witmer was asked questions about two matters. The first question involved a teacher who had been let go and the second involved depositions held in the central office during that same day. As to the teacher who had been let go, Dr. Witmer was asked who conducted the investigation, and whether there was a meeting with the teacher's representative. She was concerned that the Board was acting without enough information. With regard to the depositions that day, Dr. Witmer was asked what case they involved. As to both questions, Dr. Witmer responded to the Board that he was not aware what was going on and he knew nothing about them. He indicated that he would have to call Mr. Halpin to find out about these matters. Ms. Minnuies testified she was angry that someone in the Central Office did not tell Dr. Witmer what was going on with respect to these matters. She originally felt that Mr. Halpin had failed to give the information to Dr. Witmer.

When Dr. Witmer subsequently provided a written response to the Board, Ms. Minnuies learned that the documents he had provided as attachments had been altered. She had no idea they had been altered until it was brought to her attention when she saw the original memo from Mr. Halpin (P-16). She felt angry and disappointed and while she has disagreed with Dr. Witmer in the past, she felt that this time he was dishonest, misled and misrepresented information to the Board and that she was being played as a fool.

On cross-examination, Ms. Minnuies testified that the teacher was given a Rice notice for the December 12, 2005, meeting and they spoke to the teacher on that date. She felt bad on December 19, 2005, because of letting that teacher go before Christmas. There were discussions concerning the teacher on December 12, 2005, and she believes there was probably a stipulation of settlement that was approved on December 19, 2005. All questions had been answered by the time she voted on this stipulation of settlement. She did not know about the deposition information until afterwards and she never spoke to Mr. Halpin about the deposition. She wanted to know what the deposition was about and why Mr. Halpin did not tell Dr. Witmer about it. She had no other questions as to that issue. Dr. Witmer said he did not know anything about it. Dr. Witmer was then asked for a summary of ongoing litigation and he responded that he would have to ask Mr. Halpin to provide that information. The information provided by Dr. Witmer was dishonest because it should have included all the information provided to him. Dr. Witmer also could have excerpted the information and put it into his own e-mail.

Ms. Minnuies did ask Mr. Parton to discuss with Dr. Witmer how they could fix the situation between him and the Board. No one asked Dr. Witmer to leave. The referral to the prosecutor was after the investigation was finished. She does not recall if there was a vote on the referral. She again stated that the Board asked Mr. Parton to speak to Dr. Witmer about how to fix things going forward from there and that was the total question. On re-direct examination she stated that any time Dr. Witmer was criticized he would say, "buy me out." There was no discussion of termination or buying him out.

Testimony of Dr. David L. Witmer

Dr. David L. Witmer testified on his own behalf. He received his Bachelors Degree and Masters Degree from Millersville University and a Doctorate from Walden University. He received his principal's certification and superintendent certification from Temple University. He has taken graduate work after his Doctorate at Temple.

Dr. Witmer started his teacher career in Lancaster County where he taught for five and one-half years. He then became a guidance counselor in a junior high school. He subsequently became the Assistant Principal and then the Principal followed by becoming the Director of Personnel. He left that position to become a Superintendent in Pine Grove, followed by a superintendent position in Mifflenberg and then in Bristol Township, all in Pennsylvania. He then became Superintendent in East Windsor Regional School District for ten and one-half years from 1992 to February 2003. In 2003, he was appointed the Superintendent in Middletown. He testified that he has received national recognition and his character and integrity have never previously been questioned.

When Dr. Witmer was appointed in Middletown he negotiated his contract with Malachi Kenney, Esq., the school board attorney. He was not represented by an attorney. The Middletown Township school district consists of 10,300 students, 17 buildings, two high schools and three middle schools. The superintendent's office is located adjacent to high school north and is in a small building. It is 30 feet in that building from the personnel office to his office. A parking space was designated from him next to Mr. Doering. The staff who worked in that building are able to see if he is present by observing his parking space near the entrance.

Dr. Witmer identified a copy of the agreement he signed when he was originally employed (P-1). A number of items were not addressed therein. He never discussed vacation time or personal time. There was no mention of personal days. There was no mention of pro-rating of benefit days. It was ambiguous as to vacation days. It addresses attendance at conventions (P-1, page 8, #19) and family leave (P-1, page 5, #11). Vacation days are ambiguous (P-1, page 3, #9). There is no mention of the personnel office or requiring notice to the personnel office when absent. There is no mention of any maximum of carry-over days. There is no mention of prorating of vacation, sick or personal days.

Dr. Witmer testified that upon leaving employment, any carry over vacation or sick leave would be reviewed by the personnel office, business office and by the Board of Education Finance Committee. He indicated that although the personnel office interprets the contract, there is no mention of the personnel office in that contract. In June 2004, there was a change to the contract that permitted Dr. Witmer to carry over 40 vacation days in his vacation bank.

Dr. Witmer testified that in his normal day he was constantly being pulled in every direction and this was because he had an open door policy. He worked 10 to 15 hours per day each day from 8:00 a.m. to 11:00 p.m. and he never had time to take the full allotment of vacation days. Part of the overload was that the Board had many committee meetings during the day. With regard to Charge No. 1, the contract allows him to have 20 current vacation days. There is no written policy on his reporting his absences, and he absolutely advised the Board President of his use of any vacation days. At one point, Laurie Allocco, met with him and he agreed to have his secretary notify her of any absences. He then spoke to his secretary, Rennie Mae, and she agreed that she would do so. He had heard of an absence request form but very few came to his office and only Bill Doering ever used it. He does not recall receiving any from Chris Halpin.

Dr. Witmer stated that if he used more than five consecutive vacation days he is required to give the Board at least two weeks advance notice and if it was less than five consecutive days he only needed to inform the Board President. He identified an e-mail he sent to his secretary on September 12, 2005, requesting the completion of a form for his absence on September 2, 2005. Every vacation day that he took was included in an update to the Board. For example, he was absent for two work days during Christmas week of 2005 and he took those as vacation days. He referred to the December 22, 2005, weekly update (R-4) in which he had indicated that he was to be absent. Updates are available to all cabinet members. He did not fill out an absence report form for December 2003, but the personnel office filled out his absences as vacation days. No one ever said anything to him about his not filling out an absence request form. With

regard to December 28 and 29, 2004, he notified the Board of his absences in an update (R-3). In December 2005, he informed the Board of his Christmas vacation in a closed session and he also talked about it at an office party attended by Ms. Allocco. Upon his return he submitted a completed form (R-10). He never attempted to hide taking a vacation day. He referred to his e-mail response (R-8) when he reported that he took four vacation days.

With regard to Charge No. 2, it was Dr. Witmer's understanding that he could have 40 vacation days in the bank after his contract was amended. Thus, the maximum vacation days would be 40 days in his bank plus 20 current vacation days. He testified that he has never requested payment for any vacation days.

Dr. Witmer testified that he has never seen the Absence Reports (P-6) prior to this matter. He testified that these listings are not accurate. On the first page, the entry for Dr. Witmer, there is no contract provision for charging family illness days to sick days. Dr. Witmer contends this is not allowed by contract as a charge against sick leave. The second page is correct. The third page is correct but Dr. Witmer testified that on the first page of the absence report listing (P-6), four family funeral days are charged to miscellaneous and he testified that his contract clearly states that they should be family illness days. He points out that the next absences for April 10 and April 11, 2003, were listed as family illness days and they are charged to sick days but there is no provision in his contract to take family illness days away from sick days. Therefore, both of these items are incorrect. As a result of that error, Dr. Witmer claims he lost two sick days. On the second page of this document (P-6) there are no errors. On the third page, it indicates that for employee number 6726, Witmer, David L., he is given no family illness days when in fact his contract allows him five family illness days. He testified that on the fourth page of the exhibit, there are errors because he took two vacation days in September 2005 and two in December 2005 and the December vacation days are not listed. Also, it did not list his attendance at professional days in July and October 2005. It credits him with 42 vacation days but it should be 36 because of the four that he took that year.

Dr. Witmer indicated the fourth page of the Absence Report (P-6) is incorrect because it did not include professional out-of-district days in the summer and at the school board convention in October, 2005. The balance in the bank of 35 vacation days is correct. He testified that the handwritten note "had 60 vacation days as of 7/1/05" has no meaning to him. He did agree that if he took the banked vacation days of 40 plus the current vacation days of 20 he would have 60.

Dr. Witmer identified a series of e-mails that he sent starting on July 1, 2004 (P-10). He sent it to the recipients because they were not at the Board meeting and he wanted to bring them up-to-date as to what happened concerning the addendum to his contract allowing him to "carry over from year-to-year unused vacation days, not to exceed a total of 20 accumulated days being carried at any given time." His e-mail was to make sure that the recipients knew about the change in his contract. He then sent a second e-mail to Ms. Allocco, "please see that my 20 days are carried over. Thanks. Dave." It was his understanding that these 20 days were unused days that he could carry over.

Dr. Witmer then referred to a memo dated June 29, 2005 (P-11). This memo was requested by Ms. Allocco and he requested the transfer of all his unused personal days to his accumulated sick days and to carry over all unused vacation days into his 2005-2006 allotment. It was his understanding that he could carry over a maximum of 20 days in the bank. Again, he indicated that he could never carry over more than 20 and he could never have more than 40 days in his bank. He notes that in his memo (P-11) he did not make reference to a specific number of days. He checked with Ms. Allocco as to what he should say in his memo and gave it to her to review before he signed it.

Dr. Witmer testified that the first time he saw the July 2005 report of his available sick, personal and vacation days (P-12) was attached to the tenure charges. He indicated that this information is incorrect because his 2004-2005 vacation days should

number 36 rather than 40 and his 2005-2006 sick days should be 44 rather than 45 and the total number of his vacation days should be 56 and not 60. He explained that by statute one can only carry over and accumulate a maximum of 15 sick days per year and the personnel office carried over 16 to make the total number of sick days 45 rather than 44.

Dr. Witmer indicated that there are obvious errors with these numbers that are developed by the personnel office. Upon retirement or termination the personnel office will come up the numbers that will be shared with the employee and will then be reviewed by the business office and then by the Board's finance committee and then approved by the Board of Education. He gave as an example the fact that two assistant principals retired but disputed their benefit days, but they finally agreed on numbers. The practice is to sit down and work out the days. That also happened with teachers. In those situations, no one ever said that the employees were trying to steal the days away from the school district and, in fact, it would be impossible to do so because a check and balance system was in place. The superintendent would also have the board attorney involved before any final settlement.

Dr. Witmer addressed Charge No. 3 involving the misdirection of personal leave time. He indicated that the contract between him and the Board (P-1, page 5, article 11) contains no provision regarding what happens to personal leave time. He testified that in June 2004, Ms. Shopp told him he could carry over personal days into sick time. In addition, a chart prepared by Mr. Doering, states that four personal days can be carried over to sick days. It was his initial understanding that he would lose them. Dr. Witmer identified a series of e-mails he sent to the personnel office inquiring as to the carry over of personal days. When these were sent no one questioned that these could not be carried over and the chart prepared by Mr. Doering showed that he could carry them over. He denied that he intimidated anyone concerning this. The chart prepared by Mr. Doering (R-1) was given to the Board at a meeting. He had no knowledge that his request was contrary to the contract. As far as intimidating Ms. Allocco and Ms. Shopp, he told them he disagreed with their interpretation that family leave was to be deducted

from sick leave and concerning the pro rating of his benefit days during his first year, but they left it that way. He testified that he never knowingly directed either Ms. Allocco or Ms. Shopp to do anything contrary to his contract. He testified that they would go to Mr. Doering and to the board attorney regularly for guidance and assistance.

As to Charge No. 5 alleging his intentional deception of the Board of Education, Dr. Witmer testified that he took personal notes of the meetings on December 12, and 19, 2005. The meeting of December 12, 2005, was a work session and that of December 19, 2005, was a formal Board meeting. A teacher was given a Rice Notice for the meeting of December 12, 2005, but she did not appear on that date. On December 19, 2005, there was a faxed memo from the board attorney of an investigation relating to that person (R-18). The investigation was started on November 15, 2005, and was forwarded to the Board of Education on December 15, 2005, following its request at the December 12, 2005, meeting. This was part of Dr. Witmer's December 15, 2005, update.

Dr. Witmer has an independent recollection of the meeting of December 19, 2005. At the first closed session there was a meeting with the teacher to finalize a settlement and a settlement agreement was then approved at the public portion of the meeting. Dr. Witmer then had a conversation with Mr. Parton at approximately 10:30 p.m. At the second closed session that evening, Mrs. Minnuies asked two specific questions. The first was what was the deposition of that morning about and the second was that she would like a list of all outstanding litigation against the school district.

Dr. Witmer explained that Maria Salas is the primary liaison with the insurance company, and Bill Doering, and Chris Halpin and the board attorney are all responsible for knowledge and information concerning pending litigation. As to the request for information concerning the deposition that morning, Dr. Witmer indicated that he had seen Chris Halpin that day and that Mr. Halpin was involved with the deposition. As to the issue of outstanding litigation, he was simply asked that a list be provided. He

memorialized these requests in an e-mail (P-15, items 4 and 5). In response, he received a memo from Chris Halpin on December 23, 2005 (P-16). However, the teacher was not the subject of any question at the meeting of December 19, 2005, and the Board attorney was primarily involved in the teacher issue. Chris Halpin did an investigation and Chris Parton gave a legal opinion on it. Dr. Witmer testified that he gave the Board a brief summary of the case involving the depositions, but he simply did not know what happened at the depositions. As to the teacher, he did not include this information from Chris Halpin because that was not one of the two questions asked of him. Chris Halpin never responded as to what happened at the depositions about that case. He responded to the Board in his weekly update of December 15, 2005 (P-14).

Dr. Witmer identified the December 12, 2005, minutes of the workshop meeting (R-22). He also identified the minutes of the closed portion of December 12, 2005 (R-23). He explained that there were two closed sessions. He also identified the minutes of the regular meeting of December 19, 2005 (R-24). He also identified the minutes of the closed session of December 19, 2005 (R-25), and the public notice of the agenda for December 19, 2005 (R-26). His submission to the Board of Education was compiled as quickly as possible and he attached it to his Superintendent's update of December 23, 2005 (P-14). In that update in paragraph II, he corrected what he said at the closed session. He acknowledged that the attachment concerning the information requested by the Board was not in its original form. He removed sections of Mr. Halpin's memo because, first, they were not related to the questions that were asked, and, second, because the Board previously had criticized him for including statements critical of others, so he removed any critical statements. He knew that Mr. Halpin would have access to this through Ms. Dioro because it was in his updates. Dr. Witmer explained that he had been criticized for including criticisms to the Board of Education and they wanted no negative comments from a subordinate about a cabinet member, and that is why he excluded those portions of Mr. Halpin's memo. He felt that the note from Chris Halpin was personal to him. He denied that he misrepresented anything to the Board. No one questioned him about the submission.

Dr. Witmer testified that he had a conversation with Chris Parton around 11:20 p.m. on December 19, 2005. He indicated that he was never given a Rice Notice before this conversation. He reviewed the public notice of the meeting of December 19, 2005 (R-25) and there is no indication that a discussion would take place with respect to requesting his resignation as superintendent. Mr. Parton took Dr. Witmer out into the hallway and told him, "The Board unanimously wants you to leave." When Dr. Witmer asked when, Mr. Parton responded as soon as possible. In response to this, Dr. Witmer stated, "I have a contract and they can buy me out," and Mr. Parton said to him, "You will need a lawyer." He further stated that the Board wants to find a better way to work with you.

Dr. Witmer testified that it was clear the Board of Education wanted him to leave. He testified that he stated to Mr. Parton, "If they buy out my contract, I will leave tomorrow." He clarified that Mr. Parton said, "Do you have a lawyer because you're going to need a lawyer."

Dr. Witmer testified to his relationship with Chris Halpin. Mr. Halpin started as Assistant Superintendent in 2003. Dr. Witmer did an observation of his work and Mr. Halpin was outraged at the negative evaluation. In December 2004, he sent Mr. Halpin a memo about not keeping him informed as the superintendent. In early 2005, he reviewed Mr. Halpin's performance again and advised Mr. Halpin he would not recommend him for tenure. At the end of November 2005, Mr. Halpin dismissed students during a bomb scare rather than bringing them to the bleachers. At the time, Dr. Witmer was in his office with his regular phone and cell phone available, but Mr. Halpin never made contact with him to discuss this issue. It has been agreed that part of the plan for such an event was for the superintendent to remain in the central office. Dr. Witmer testified that it is accurate that he forced Chris Halpin to resign. Chris Halpin could have gone back to his principal position.

Dr. Witmer testified to his relationship with Joan Minnuies. Her daughter was hired as a coach to replace a certificated coach, and the certificated coach wanted to

return. There was an extension of Dr. Witmer's contract at the end of March 2004, until June 2008, and Ms. Minues did not vote in favor of that extension.

With regard to Ms. Allocco and his conflict with her, Dr. Witmer explained that he has always had a concern about professionalism and wanted a certificated individual in that position.

Dr. Witmer testified that Mr. Parton said there was a telephone vote of the Board of Education to refer the matter to the prosecutor. Dr. Witmer identified the Middletown Township Board of Education Policy regarding voting methods and there is no authority for a telephone vote or a vote other than at a public meeting. The Board's by-laws (R-17) also indicate that Board members could only act as a body in session and not as individuals. Finally, Dr. Witmer identified Mr. Parton's report concerning the elementary teacher (R-28).

On cross-examination, Dr. Witmer admitted he was not in the school district on December 28 and 29, 2004, and that these were vacation days, but he acknowledged that there was a Request To Be Absent form that he prepared. He testified that whenever he was absent he informed the secretary, cabinet and Board. There was never any requirement for him to fill out documents, and he did not do so except for two times. On January 3, 2006, he did submit a Request To Be Absent form to his secretary, Rennie Mey. He referred to the contract (P-1, page 4) indicating it is the superintendent's responsibility to schedule vacations with the Board. His weekly updates were one of the methods he used to notify the Board of his absences. He referred to his December 13, 2003, weekly update, which indicates on page 2 of the update that he would be absent (R-3). He also sent an e-mail to Rennie Mey asking that she complete the form for his absence on Friday, September 2, 2005, after the fact (P-20).

Dr. Witmer's salary in his second year was $163,280, and in his third year was $169,800. There has never been a final personnel procedures manual for Middletown

School District. He imposed upon Rennie Mey the responsibility for recording his absences. The personnel office told him he could carry-over personal days. He referred to the e-mails in June 2004 (R-7) and admitted there was no indication that personal days could be carried over. There was a response from Rosie Shopp that he could carry-over vacation days. Nothing in the contract refers to current days and banking days, and the contract is silent as to the carry over of personal days. His request to transfer personal days dated June 14, 2004 (P-13) is not referenced in the contract. However, Rosie Shopp was standing next to him and told him what to write in that request (P-13). His right to carry-over days was confirmed by Mr. Doering by his chart, but he admitted that he does not recall if he saw the chart prior to June 14, 2004. He indicated that there is no Board policy on the carry-over of personal days, this is addressed in individual contracts. He also indicated by law an individual can only accumulate 15 sick days per year. He admitted that his employment agreement (P-1) provided in paragraph 24 that this is the entire agreement. Every employee has the opportunity to review benefit days upon leaving employment. He indicated that the personnel office reported to Chris Halpin.

Dr. Witmer identified his e-mail of June 29, 2005, to Laurie Allocco (P-8). He did speak to his secretary, Rennie Mey, in June 2005. He has no recollection of speaking to anyone prior to responding on June 29. He only recalls directing Rennie Mey to notify personnel of his absences. He took off the entire Christmas week because school was closed for teachers and students between Christmas and New Year's. He did not confirm the same understanding at that time. He admitted that Chris Halpin is not responsible for entering days off.

Dr. Witmer referred to the Salary and Benefits Comparison prepared by Mr. Doering (R-1). He used this to discuss changes in his contract to extend his vacation carry-over to 20 days, and he forwarded this to the Board on June 29, 2004. This comparison confirmed a discussion he had with Rosie Shopp on June 14, 2004. He admitted that the chart limits payments to $65.00 per day for unused sick days up to a cap of $10,000 and that the employee must serve 15 years of service to qualify. He had

also reviewed the contract between the assistant superintendents and the Board, and his request in his e-mail was based on these materials. He admitted that page 11 of his employment contract (P-1) provides four personal days per year with no cap, and that his per diem rate exceeded $65.00 per hour (P-1, paragraph 20). He did not review his request with members of the Board and never confirmed it with the attorney for the Board. The memo he wrote is dated June 29, 2005 (P-11). Ms. Shopp required a memo and he wrote it and complied with her request.

Dr. Witmer identified a draft personnel manual submitted in September 2004, by Ms. Allocco. There was a reference to a Request To Be Absent form in that draft and it was sent to the assistant superintendents for their comments. He thanked Ms. Allocco for her efforts, but never got back to her to finalize this manual.

Dr. Witmer had a less than pleasant discussion with Mr. Halpin in December 2004. There was another incident with Mr. Halpin in 2005. His evaluations do not reflect the foregoing incidents. He indicated Mr. Halpin did not apprise him of lawsuits on a regular basis and does not know what Mr. Halpin meant in his e-mail of December 22, 2005 (P-15). He admitted that he never explained to the Board of Education what portions of this e-mail were not removed. He made a mistake and did not do so in this case. With regard to his e-mail of June 14, 2004 (P-13), he never sent a similar memo because he did not know he could not do this previously.

Rebuttal Testimony

Rosemarie Shopp was called as a rebuttal witness. She was shown the e-mail of June 14, 2004 (P-13) and the e-mails of June 10 through 14, 2004 (P-7). She recalled no conversations about any of these matters and does not recall being in Dr. Witmer's office. Personal days are not earned but are given at the time of hiring. She recalled no conversations about any of these matters and does not recall being in Dr. Witmer's office.

Renate Mey was called as a rebuttal witness. She testified that she is employed at the Middletown Township Board of Education and has been secretary to the superintendent since November 1988. In November 2005, there were bomb threats at two high schools, North and South. There were quite a few and she was present. She remembers that during one of the bomb threats Dr. Witmer was not in the building. She tried to get in touch with Dr. Witmer and tried his cell phone, but it was not ringing or not working and she did not speak to him on that occasion. Other cabinet members also tried to get in touch with him, but could not locate him.

Ms. Mey testified with regard to her role of reporting superintendents' absences from the school district. Dr. Witmer he told her to get forms on occasion, and he did ask her to fill out forms. However, she denied there was ever a standing order for her to fill out forms. With regard to the question who is responsible to advise the personnel office if the superintendent is absent, Ms. Mey testified that she assumed Dr. Witmer would deal with personnel directly and she rarely did that. If the personnel office asked her, and they usually would, she would tell them.

With regard to the weekly update to Board members, Ms. Mey prepares them and they are given to the Board and cabinet members. She maintains copies of all updates in her office and they are used by the Superintendent and by her. These updates are not accessed by the personnel office or by Chris Halpin.

On cross-examination, Ms. Mey testified that she does not recall problems with Dr. Witmer's cell phone or anyone else's cell phones. She has known Dr. Witmer since February 2002, and she was his secretary, but if she was out Judy Martin was his secretary on occasion. When Dr. Witmer told her to get forms, he or she would fill them out. She remembers filling them out for him. She would tell the personnel office if he was out if they asked her. Dr. Witmer would let her know if he were out on vacation. She worked under many other superintendents, and Dr. DeTalvo would report his own absences to personnel. The personnel office countersigns the Request To Be Absent form.

Ms. Mey prepared weekly updates and kept a copy in a binder. There are six large binders and they are in a large shelf in back of her in her office. People would have to ask her to see them and no one ever did when she was there. She started in 1979 and is eligible to retire with a pension.

ANALYSIS OF THE CHARGES

AS TO CHARGE NO. 1
FAILURE TO REPORT VACATION DAYS

Petitioner's arguments

The Board of Education contends that the language of paragraph 9(a) of the Agreement between the Board and Dr. Witmer (P-1) controls Dr. Witmer's use of vacation days. The Board's position is that this requires Dr. Witmer to schedule all vacations with the Board. If the vacation is five or more consecutive days, Dr. Witmer is required to advise the Board at least two weeks in advance. In the event the vacation is less than five days, the Board argues that Dr. Witmer is also required to advise the Board president at least two weeks in advance. The Board contends that vacation of less than five days does not abrogate Dr. Witmer's responsibility to schedule vacations with the Board, nor does it relieve Dr. Witmer of the responsibility to advise the Board President at least two weeks in advance.

The Board further contends that Dr. Witmer has acknowledged he has an obligation to notify the school district's personnel office of all his vacation absences for record-keeping purposes. The Board asserts that Dr. Witmer's testimony is conflicting, sometimes indicating that he always advised the personnel office, other times stating that it was his secretary's responsibility, other times stating that notice was given in his superintendent's updates, and also stating that "everyone knew when he was out."

The Board contends that Dr. Witmer's June 29, 2005, response to Ms. Allocco (P-8) establishes that Dr. Witmer intentionally failed to report his use of vacation days. It is undisputed that Dr. Witmer was absent for two days in December 2004. Yet, in response to Ms. Allocco's June 29, 2005, e-mail, his response is vague and unclear. The Board further points out that with regard to his absences in December 2005, Dr. Witmer admitted that he did not notify the personnel office of his planned absences until he submitted a Request To Be Absent form on January 10, 2006, after his absences and immediately after he received the tenure charges.

The Board contends that Dr. Witmer's conduct was not forthright and he failed to lead by example by following the rules he wanted all other district employees to follow. The Board contends that Dr. Witmer took affirmative action to confer an unwarranted benefit upon himself by failing to report his vacation days and that this is unbecoming conduct of a superintendent of schools. The Board contends that the fact that Dr. Witmer has not "cashed out" the benefit is immaterial and that he actively allowed inaccurate records concerning his use of vacation days.

Respondent's arguments

Dr. Witmer contends that his employment agreement does not specify the type of notice that he is to give nor does it require that he give notice to the school district personnel office. Dr. Witmer's testimony is that he has reported his vacation days not only by his weekly updates, but also by submissions directly and indirectly through his secretary. Dr. Witmer contends that the petitioner's position is contradicted by their own records in view of the fact that December 29, and 30, 2003, were marked as vacation days, and the fact that he submitted a vacation request on January 10, 2006, for the December 2005 dates. Dr. Witmer relied on his updates and asserts that all of the weekly updates reported his absences. Assistant Superintendent Halpin also admitted that Dr. Witmer personally told him every time he was going to be out for any reason because Mr. Halpin was then responsible for running the school district (R-10). Thus, Dr. Witmer contends that it is clear there was no intent or conduct to deceive and that

he not only complied with the contract, but also with the policy of letting the personnel office know about his vacation day absences. With regard to the June 29, 2005, e-mail (P-8), Dr. Witmer points out that in his response he said that he took off the entire Christmas week, which would have included two working days. Thus, he would have had to have taken vacation or personal days for December 27 and 28, 2005. Even though it is claimed that Dr. Witmer did not tell the personnel office what type of days he was taking during that week, and even though it was not reported or inputted as vacation days, those two days are charged against Dr. Witmer as vacation days. Dr. Witmer points out that for those two days when there was no Absence Request form, they were properly listed in the system as vacation days. Therefore, Dr. Witmer contends that the petitioner has failed to prove any element of Charge No. 1.

Analysis of the relevant testimony and evidence as to Charge 1

It is not disputed that Dr. David L. Witmer is employed by the Middletown Township Board of Education as the Superintendent of Schools pursuant to N.J.S.A. 18A:17-20 and an individual employment contract expiring on June 30, 2008. Paragraph 9(a) of that employment contract provides Dr. Witmer with twenty (20) vacation days per school year, and further provides as follows:

> It is the Superintendent's responsibility to schedule vacation with the Board. In the event the Superintendent is planning a vacation of five (5) or more consecutive school days, he shall advise the Board at least two weeks in advance, except in the case of emergency. In the event of vacation of less than five (5) school days, the Superintendent will advise the Board President. The Superintendent shall not take more than fifteen (15) consecutive working days of vacation time without the advance approval of the Board.

There is no allegation or evidence that any vacation taken by Dr. Witmer exceeded five days. Paragraph 9(a) of the contract requires Dr. Witmer to advise the Board President of any vacations of less than five days. Despite the contention of the Board, it is clear that the contract does not require Dr. Witmer to notify the Board two

weeks in advance of any vacations of less than five days.

According to Business Administrator Doering, Dr. Witmer's weekly updates to the Board referred to his planned absences (R-3 and R-4), but did not comply with the contract because the notice must be provided to a certain designated person. Mr. Doering admitted that the contract does not specify when notice must be given.

Even though personnel office secretary Shopp testified that all employees are required to submit Request To Be Absent forms, she was unaware of any written Board directive requiring their submission. She also admitted that there is no requirement in Dr. Witmer's contract for providing notice of absences to the school district personnel office.

Board member Diorio had no direct knowledge about this issue. She only assumed that when Dr. Witmer advised the Board he was to be away, he submitted a Request To Be Absent form. She did not know if there is a written policy requiring the use of these forms.

Personnel Director Allocco admitted that there is no written Board directive that the Absence Request Form is to be filled out. She testified that all administrators, including the superintendent, were told that they must fill out a Request To Be Absent form for any absences, and Dr. Witmer agreed to do so, or at least agreed to tell her if he was absent. In June 2005, she attempted to verify Dr. Witmer's leave because there were days he was not there, but he responded vaguely. In his e-mail reply of June 29, 2005 (P-8), Dr. Witmer mentioned that he took off the entire 2004 Christmas week, but he did not specify the type of leave to be charged. He was also not at work on December 27 and 28, 2005, and did not submit a Request To Be Absent form until January 10, 2006, after he was served with the tenure charges. Ms. Allocco admitted, however, that if Dr. Witmer retires he would only be paid for unused days after a review, and that Dr. Witmer has neither asked for nor received any payment for unauthorized vacation days.

Assistant Superintendent Halpin, now retired, testified that Dr. Witmer would normally advise him when he was out because Mr. Halpin was responsible for running the district in his absence. Mr. Halpin stated he had no responsibility to advise the personnel office of these absences.

Dr. Witmer testified that his contract sets forth no written policy on his reporting his absences in writing. He testified that he complied with the contract (P-1, page 4) by advising the Board President of his use of any vacation days. His weekly updates to the Board were one of the methods he used to notify the Board of his absences, (R-3, page 2), and every vacation day that he took was included in an update to the Board. For example, he was absent two days during the 2005 Christmas week, and he took those as vacation days. The December 22, 2005, weekly update (R-4) indicated that he was to be absent. He did not fill out an absence report form for December 2003, but the personnel office reported his absences as vacation days. He notified the Board of his absences on December 28 and 29, 2004, in an update (R-3). In December 2005, he informed the Board of his Christmas vacation in a closed session, and on his return he submitted a completed form (R-10).

Dr. Witmer testified that he never attempted to hide taking a vacation day. For example, he referred to his e-mail response (R-8) reporting that he took four vacation days. Even though there is no mention of a requirement to notify the personnel office in his contract, at one point he agreed to have his secretary notify Ms. Allocco of any absences, and his secretary, Renate Mey, agreed to do so. However, Ms. Mey denied that there was any standing order to do so.

Findings of fact as to Charge 1

I hereby make the following findings as **FINDINGS OF FACT** with regard to Charge No. 1:

1. The respondent, Dr. David L. Witmer is employed by the Middletown Township Board of Education as the Superintendent of Schools pursuant to N.J.S.A. 18A:17-20 and an individual employment agreement which will expire on June 30, 2008.

2. Paragraph 9(a) of the employment agreement between Dr. Witmer and the Board of Education provides Dr. Witmer with twenty (20) vacation days per school year, and further provides as follows:

> It is the Superintendent's responsibility to schedule vacation with the Board. In the event the Superintendent is planning a vacation of five (5) or more consecutive school days, he shall advise the Board at least two weeks in advance, except in the case of emergency. In the event of vacation of less than five (5) school days, the Superintendent will advise the Board President. The Superintendent shall not take more than fifteen (15) consecutive working days of vacation time without the advance approval of the Board.

3. There is no allegation or evidence in the record that any vacation taken by Dr. Witmer exceeded five days.

4. Paragraph 9(a) of the employment agreement requires Dr. Witmer to advise the Board President of any vacations of less than five days. It does not specify the method by which Dr. Witmer is to advise the Board President nor does it require Dr. Witmer to notify the Board two weeks in advance of any vacations of less than five days.

5. Although it is customary for administrators, including the superintendent, to report the use of sick, personal, and vacation leave to the school district's personnel office for record-keeping purposes, there is no provision in the employment contract requiring Dr. Witmer to do so, and there is no written Board policy or directive requiring such reporting.

6. Dr. Witmer absented himself from school on December 29 and 30, 2003, which were work days for all twelve-month employees, including Dr. Witmer.

7. Dr. Witmer took and reported vacation days for December 29 and 30, 2003, and was charged for those days.

8. Dr. Witmer absented himself from school on December 28 and 29, 2004, which were work days for all twelve-month employees, including Dr. Witmer.

9. Dr. Witmer did not report taking these two vacation days or any other contractual leave time for December 28 or 29, 2004, to the personnel office and was not charged for those days by the personnel office.

10. When Dr. Witmer was questioned by the personnel office, he acknowledged in writing to the personnel office that he took vacation days on September 17 and 20, 2004, but was vague in his response as to whether he was also absent on December 28 and 29, 2004 (P-8).

11. Dr. Witmer did advise the Board president of the fact that he would be absent on those days in his Weekly Update of December 23, 2004 (R-3). This notification is sufficient to comply with the requirement of Paragraph 9(a) of the Dr. Witmer's employment contract requiring him to advise the Board President of any vacations of less than five days; therefore, Dr. Witmer has **NOT VIOLATED** paragraph 9(a) of his employment agreement as to December 28 and 29, 2004.

12. Dr. Witmer absented himself from school on December 27 and 28, 2005, which were work days for all twelve-month employees, including Dr. Witmer.

13. Dr. Witmer did not provide any advance notice of his taking vacation days or any other contractual leave time for December 27 or 28, 2005, but did submit

a Request To Be Absent form to the personnel office on January 10, 2006 (R-10).

14. By failing to provide notice to the Board president of the fact that he would be absent on December 27 or 28, 2005, Dr. Witmer failed to comply with the requirement of Paragraph 9(a) of his employment contract requiring him to advise the Board President of any vacations of less than five days; therefore Dr. Witmer **VIOLATED** paragraph Paragraph 9(a) of his employment agreement with regard to his absences on December 27 and 28, 2005.

AS TO CHARGE NO.2
MISDIRECTION OF VACATION TIME

Petitioner's arguments

Dr. Witmer's employment contract (P-1) as amended on June 30, 2004 (P-2, P-3 and P-4) provides that Dr. Witmer may carry-over from year-to-year unused vacation days not to exceed a total of 20 days being carried forward. The Board's position is that Dr. Witmer is entitled to 20 annual vacation days and a maximum of 20 carry-over days for an aggregate maximum of 40 days, and that no other changes to the contract had been authorized by the Board. Despite this, Dr. Witmer directed the school district's personnel office to carry-over vacation time in excess of that authorized by the agreement (P-11), resulting in the increase of Dr. Witmer's aggregate vacation bank to 60 vacation days. Neither the personnel office staff nor Business Administrator Doering felt they had any option other than to follow Dr. Witmer's directive because of his position as Superintendent.

The Board takes the position that Dr. Witmer, based on his education and experience and because he negotiated his own employment contract on at least three occasions without legal assistance, is presumed to be fully familiar with his rights under the agreement. The Board's position that the language is quite clear that the superintendent will carry-over unused vacation days, from year-to-year not to exceed a

total of 20 days being carried forward. Despite this clear limitation, the Board asserts that on June 29, 2005, Dr. Witmer directed his subordinates in the personnel office on June 29, 2005, to carry-over all of his vacation days with the result that he was credited with 60 vacation days.

The Board acknowledges that Dr. Witmer has not been paid for his unauthorized accrued vacation days, but contends that is not the issue and there is no claim of theft. Rather, the charge focuses upon Dr. Witmer's unauthorized misdirection of leave benefits to himself.

The Board contends that a superintendent is subject to an extraordinary standard of self-restraint and diligence and requires a high degree of exemplary behavior, candor and forthrightness. The effects of his conduct on the confidence and trust of the employer Board and the taxpaying public is unbecoming conduct.

Respondent's arguments

In response, Dr. Witmer points out that it is important to note the wrongdoing that is alleged. He contends that the charge is that in June 2005, by signed memorandum, Dr. Witmer directed the staff of the personnel office to transfer 40 unused vacation days into his 2005-2006 account resulting in his carrying 60 vacation days, which constitutes 20 more days than Dr. Witmer was authorized to carry by Board action. Dr. Witmer points out that the original contract allowed him to carry-over from year-to-year unused vacation days, not to exceed a total of 10 accumulated days being carried at any given time (P-1, paragraph 9). By a change to the contract, he was allowed to carry-over unused vacation days from year-to-year, not to exceed a total of 20 days being carried forward (P-4).

Dr. Witmer takes the position that once his maximum amount of 40 vacation days has been accumulated in his vacation bank, he can no longer transfer any more unused vacation days into that bank because he has reached the maximum. Since he receives

a 20 current vacation days each year, after he has reached the maximum of 40 days, if he does not use the current 20 days he loses them. Thus, his records would show the current year's 20 vacation days and 40 banked vacation days, which totals 60 vacation days. He contends that this is appropriate and consistent with the contract and the result is that it does not violate any provision of the contract. Dr. Witmer believes that the Board's position is that his June 29, 2005, memo (P-11) said to, "Carry all unused vacation days to the 2005-06 year." As a result of this memo, there were 60 days carried forward. Dr. Witmer contends that petitioner's testimony is misleading since the 60 days are not in the vacation bank, but they are the combined banked vacation days and the current vacation days.

Dr. Witmer points out that the prior e-mail dated July 1, 2004, differs because it requests that 20 days be carried over in accordance with the amendment to the contract.

Dr. Witmer contends that Ms. Shopp's interpretation conflicts with that of Ms. Allocco as well as the language of the charge because she believes that Dr. Witmer could only have 20 vacation days in the bank and 20 current vacation days or maximum of 40 vacation days. Dr. Witmer takes the position that Ms. Shopp's interpretation is erroneous.

Dr. Witmer's position is that it was his understanding pursuant to the contract that he could have 40 days in the vacation bank plus an additional 20 current days. He did not base this on the reading of the contract because the contract was ambiguous but based on two items. The first was a chart prepared by Mr. Doering and presented to the Board for their consideration on June 30, 2004 (R-1). This chart showed that he could have 40 days in his vacation bank. The second basis for confirmation of his understanding was his reading of the tenure charge confirming that allowable vacation bank was increased to 40 days. Each year he would then get his current vacation days of 20.

Dr. Witmer points out numerous errors in the absence records of the Board. Dr. Witmer explained that what he was saying in his request (P-11) was to carry-over all vacation days that he is entitled to into the 2005-06 school year. His testimony was that this memo was prepared at the request of Ms. Allocco and he showed it to her and she approved.

Dr. Witmer relies on the fact that upon retirement or termination, the numbers of vacation days would be audited or reviewed and are subject to approval by the Board's finance committee. Thus, there was never any intent to commit any wrongdoing because there would have been three levels of checks and balances. He used the example of other employees who retired and there were disputes over the amount of days, but they were resolved by negotiation rather than by filing tenure charges.

Based on the foregoing, Dr. Witmer alleges that this charge is not supported by the testimony or evidence.

Analysis of the relevant testimony and evidence as to Charge 2

Personnel Director Allocco and personnel office secretary Shopp testified that Dr. Witmer directed the personnel office to carry over 40 vacation days on his account (P-11). However, their interpretation of Dr. Witmer's amended contract was that such carryover was limited to 20 vacation days; thus when the carryover was added to his 20 current days in his vacation bank (P-4), Dr. Witmer could only have a total of 40 vacation days in his bank. Business Administrator Doering testified that he agreed with this interpretation, but did not discuss this matter with Dr. Witmer because Dr. Witmer is his supervisor and evaluator and he was not comfortable doing so. Dr. Witmer's directions were complied with by the personnel office because of his position as superintendent. Mr. Doering could find no record of an action taken by the Board to increase the carryover to more than 20 vacation days.

Based on Dr. Witmer's memo of June 29, 2005 (P-11), Ms. Shopp believed that he was requesting the carry-over of 40 vacation days. As a result of this belief, she noted it and prepared the July 2005 report (P-12).

Ms. Allocco did not know if this vacation carry-over had been approved by the Board. At the time Dr. Witmer wrote his memo of June 28, 2005 (P-11), he was allowed to carry-over 20 days based on the addendum to the contract. He was given 40 vacation days on June 30, 2005, consisting of 20 carry-over plus 20 additional days (P-6, page 5). Ms. Allocco testified that if Dr. Witmer had 20 days or less in his vacation bank, there was nothing wrong with his e-mail of July 1, 2004 (P-10), stating, "please see that my 20 days are carried over." However, on that date he had 22 vacation days as a balance and if 20 are carried over, he would have a total of 42 days, and that is not correct. However, Ms. Allocco admitted that in Dr. Witmer's memo of June 29, 2005, he did not direct anyone to carry-over 40 vacation days, but rather requested that they carry-over all unused vacation days without specifying the number.

Dr. Witmer felt that the original employment contract was ambiguous as to vacation days (P-1, page 3, #9). There was no mention of any maximum of carry over days, and the personnel office interpreted the contract even though there is no mention of the personnel office in that contract. In June 2004, there was a change to the contract that permitted him to carry over 40 vacation days in his bank plus 20 current vacation days, totaling 60 days. Dr. Witmer sent a series of e-mails starting on July 1, 2004, (P-10) to bring the recipients up-to-date concerning the addendum to his contract allowing him to carry over 20 accumulated vacation days. He then sent a second e-mail to Laurie Allocco, stating to "please see that my 20 days are carried over."

Dr. Witmer testified that his June 29, 2005, memo (P-11) was requested by Ms. Allocco, and in it he requested to carry over all unused vacation days into his 2005-2006 allotment. He did not make reference to a specific number of days in that memo. It was his understanding that he could carry over a maximum of 20 days in the bank, but

indicated that he could never carry over more than 20 and he could never have more than 40 days in his bank.

Ms. Shopp testified that any unused vacation time is paid at a per diem rate at the end of the contract. Ms. Allocco admitted that if Dr. Witmer retires he would only be paid for unused days after a review. She also admitted that the taxpayers have incurred no expense in the payment of any unauthorized vacation days and Dr. Witmer has never gotten paid for any unauthorized vacation days. Dr. Witmer has never asked the Board to purchase any of his vacation days, and Mr. Doering admitted that no payment was ever made to Dr. Witmer based on these actions. Dr. Witmer explained that upon leaving employment, the payment for any carry over vacation leave would be reviewed by the personnel office, business office and by the Board's finance committee, and then approved by the Board.

After considering all of the foregoing, I hereby make the following findings as **FINDINGS OF FACT** with regard to Charge No. 2:

1. The original employment contract between Dr. Witmer and the Board of Education provides, at paragraph 9(a), that Dr. Witmer may carry over a maximum of ten unused vacation days into the following school year, so that his maximum aggregate vacation entitlement at any time shall be thirty (30) days.

2. The same paragraph provides that upon the expiration of his contract Dr. Witmer is entitled to full payment at his then per diem rate for all unused vacation time he is carrying.

3. On June 30, 2004, the Board of Education resolved to amend paragraph 9(a) of this contract to allow Dr. Witmer to carry over unused vacation days from year to year, not to exceed a total of twenty vacation days being carried forward.

4. As a result of this amendment to the contract, the maximum aggregate vacation which Dr. Witmer could carry was increased to a maximum of forty days consisting of the current year vacation day allocation of twenty days and the carry-over of up to twenty unused vacation days.

5. By e-mail dated July 1, 2004, consistent with the above-referenced amendment, Dr. Witmer directed the staff of the Personnel Office to carry his twenty unused vacation days into 2004-2005, so that his total vacation account at that time was 40 days. This action DOES NOT VIOLATE Paragraph 9(a) of the employment agreement, as amended.

6. In June 2005, Dr. Witmer directed a memorandum to the personnel office to transfer all of his unused vacation days forward into his 2005-2006 vacation account.

7. The personnel office interpreted this directive of Dr. Witmer to mean that he directed the transfer of 20 additional, unused vacation days forward into his 2005-2006 vacation account with the result that he was then carrying a total of sixty (60) vacation days in that account, or twenty days more than Dr. Witmer was authorized to carry by the terms of his amended employment contract.

8. Dr. Witmer also interpreted this directive to mean that he directed the transfer of 20 additional, unused vacation days forward into his 2005-2006 vacation account with the result that he was then carrying a total of sixty (60) vacation days in that account.

9. Dr. Witmer relied on a number of reasons for this interpretation. They include his belief that his employment agreement is ambiguous, and that as a result of the amendment of his employment agreement he was allowed to have 40

vacation days in his account plus the current year vacation allotment of 20 days, as indicated in Mr. Doering's Salary and Benefits Comparison (R-1).

10. There is no justification for Dr. Witmer's reliance on the reasons set forth in the preceeding paragraph, and there is no basis for Dr. Witmer's interpretation that the amendment to his employment agreement permitted him to carry over 40 vacation days in his vacation account plus 20 current vacation days, for a total of 60 days.

11. In directing the transfer of all of his unused vacation days then on account, Dr. Witmer directed the personnel office to confer an unauthorized benefit upon him, and exceeded his contractual authority to carry vacation days by twenty (20) days. This is a **VIOLATION** of the employment agreement, as amended, between the Board of Education and Dr. Witmer.

CHARGE NO. 3
MISDIRECTION OF PERSONAL LEAVE TIME

Petitioner's arguments

Dr. Witmer's employment contract (P-1, page 5, paragraph 11) provides that he shall be provided with four personal days per year. The contract also provides in paragraph 24 that the agreement contains the entire understanding between the parties and that there are no representations, promises, or consideration of any nature, whatsoever, except as provided therein. The undisputed testimony was that there were no revisions to the contract as to the carry-over of personal days (P-4). While other employees have a rollover of personal days spelled out in their contract, this is not provided for in Dr. Witmer's contract.

Mr. Doering acknowledged that at one time he believed that Dr. Witmer could carry over unused personal days into his sick leave bank, and he included that in a

study comparing the terms and conditions of employment of Dr. Witmer with those of other administrators (R-1). He testified that the assumption was made in error and without having reviewed Dr. Witmer's contract.

On June 14, 2004, Dr. Witmer directed the personnel office to transfer his three earned and unused personal days into his sick days effective July 1, 2004 (P-13). Pursuant to respondent's directive in June 2005 (P-11), Ms. Shopp did so, but denied telling Dr. Witmer that he could carry personal days into his sick leave bank. As a result of his directives (P-11 and P-13) a total of seven personal days were rolled over into Dr. Witmer's sick leave bank.

The Board pointed out that Dr. Witmer's own testimony was that his contract does not say whether or not he can roll unused personal days into his sick leave account. Dr. Witmer contended that the confirmation that he could do this was provided by Ms. Shopp and after receiving direction from her, he wrote his directives. His understanding of the right to roll personal days into sick times was confirmed by Mr. Doering's June 30, 2004, Benefit Comparison Chart (R-1).

The Board points out that Dr. Witmer is relying upon directions given to him by a subordinate in order to justify his directives to that subordinate. Thus, it contends that Dr. Witmer unilaterally conferred upon himself the benefit of banking seven personal days having an aggregate value in excess of $5,000 and that in doing so, he undermined the trust relationship necessary between a public board of education and its superintendent.

Respondent's arguments

In response, Dr. Witmer contends that while his employment contract is silent as to the carry over of personal days into sick days, Dr. Witmer's request to rollover those days was not only confirmed by the personnel office staff, but by the usage and interpretation by business administrator Doering. Dr. Witmer contends that where there

is ambiguity in a contract, the ambiguity is held against the drafter. Dr. Witmer contends that he acted upon the interpretation of the contract from the personnel office as well as the business administrator and the acquiescence of the personnel office with regard to the rollover for those days for the prior years. Thus, Dr. Witmer contends that the Board is estopped from asserting the wrongdoing claimed under this charge. The staff of the personnel office acquiesced to his request to rollover personal days. Dr. Witmer argues that the personnel office interprets the contract but their interpretations are so convoluted with respect to other issues, that he is justified in his interpretation. Dr. Witmer argues that Mr. Doering also testified that the contract does not specifically speak to the disposition of personal days at the end of the year, nor does it provide for the rollover of such days into sick days. Mr. Doering made the assumption that Dr. Witmer could rollover personal days into sick days and he made an analysis which he presented to the Board wherein he claimed that Dr. Witmer could rollover his personal days.

Dr. Witmer's own testimony was that he relied upon the personnel office and Mr. Doering's interpretation because he did not have any understanding of what occurs with personal days until June 2004 when Ms. Shopp indicated to him that he was losing his personal days and that he could carry them into sick days if he requested it. He also relied on Mr. Doering's study. He then questioned Ms. Shopp and she confirmed that he could carry-over three unused personal days and all he had to do was give her an e-mail. This was confirmed by Mr. Doering's study and also by Ms. Allocco where she sent him a memo carrying-over his unused personal to sick days.

Thus, Dr. Witmer concludes that even though the contract is silent as to carry-over of personal days, it has been interpreted by the Board's own witnesses to allow for such carry-over and, therefore, he should be found not guilty of this charge.

Analysis of the relevant testimony and evidence as to Charge 3

Mr. Doering testified that Dr. Witmer's contract is silent as to the carry-over of personal days, and he and Mr. Halpin were concerned that carrying over personal days as sick days was a contractual violation. These directions by Dr. Witmer were complied with by the personnel office because of Dr. Witmer's position as superintendent. Mr. Doering admitted that no payment was ever made to Dr. Witmer based on these actions.

Mr. Doering recalled an analysis that he did for the Board in which he made the assumption that Dr. Witmer could carry-over personal days as sick days based on all other union and non-affiliated positions, but this was an error (R-1). The terms and conditions for non-affiliated positions includes a rollover of personal days to sick days and there is a cap for unused sick leave (P-17). The assumption was made, but the superintendent's contract does not address rollover of personal days to sick days. There is also no specific Board policy dealing with this issue. Mr. Doering explained that the comparison of salaries and benefits was prepared by him at the request of the Board President in preparation for Dr. Witmer's contract addendum (P-4).

Mr. Doering admitted that the personnel department must follow orders from the Superintendent.

Ms. Shopp testified that she was not aware of any provision in his contract that personal days would roll over to sick days, and believed that if the contract is silent, there is no rollover. Dr. Witmer gave her a written directive (P-11) and pursuant to that directive she carried over his three personal days to sick days for 2004-2005. The 2003-2004 carry-over was based on an e-mail about carry-over of three personal days from Dr. Witmer (P-13).

Ms. Shopp denied stating to Dr. Witmer that personal leave rolls over to sick leave. She also denied interpreting Dr. Witmer's contract to allow carry-over of

personal days to sick days and she feels that Dr. Witmer's e-mail (P-13) was contrary to the contract.

Ms. Allocco testified that Dr. Witmer told the personnel office what to do and this was done because the superintendent told them to do so. Dr. Witmer also submitted a later request to transfer three personal days to sick leave (P-13), and this was also done for the same reasons. She did not know if the Board approved this.

Dr. Witmer testified that the employment contract he signed when he was originally employed (P-1, page 5, article 11) contains no provision regarding what happens to personal leave time, and it was his initial understanding that he would lose it. However, in June 2004, Ms. Shopp told him he could carry over personal days into sick. In addition, a comparison chart prepared by Mr. Doering, stated that four personal days can be carried over to sick days. He testified that Ms. Allocco requested a memo, and he provided one dated June 29, 2005 (P-11), in which he requested the transfer of all his unused personal days to his accumulated sick days.

Dr. Witmer identified a series of e-mails he sent to the personnel office in June 2004 (R-7) inquiring as to the carry-over of personal days. When these were sent no one in the personnel office questioned the carry over of these personal days, and the comparison chart prepared by Mr. Doering (R-1) and given to the Board at a meeting showed that he could carry them over. He had no knowledge that his request was contrary to the contract, and he denied that he ever knowingly directed either Ms. Allocco or Ms. Shopp to do anything contrary to his contract. The personnel office told him he could carry over personal days.

Dr. Witmer acknowledged that his contract is silent as to the carry-over of personal days, and his June 14, 2004, request to transfer personal days (P-13) is not referenced in the contract. However, Ms. Shopp was standing next to him and told him what to write in that request. He admitted that he does not recall if he saw the comparison chart (R-1) prior to June 14, 2004. He also acknowledged there is no

Board policy on the carry-over of personal days, and this is addressed in individual contracts. He admitted that his employment agreement (P-1) provided in paragraph 24 that this is the entire agreement. Page 11 of that contract provides four personal days per year with no cap. He admitted that his per diem rate exceeded $65.00 per hour (P-1, paragraph 20). By law an individual can only accumulate 15 sick days per year.

In rebuttal, Ms. Shopp testified that she recalled no conversations about any of these matters and does not recall being in Dr. Witmer's office. She was shown the e-mail of June 14, 2004 (P-13) and the e-mails of June 10 through 14, 2004 (P-7), and She recalled no conversations about any of these matters and does not recall being in Dr. Witmer's office. She explained that personal days are not earned; they are given at the time of hiring.

After considering all of the foregoing, I hereby make the following findings as **FINDINGS OF FACT** with regard to Charge No. 3:

1. Paragraph 11 of Dr. Witmer's employment contract (P-1) provides that he is entitled to four personal days per year.

2. Paragraph 11 makes no provision for the accumulation or carrying over from year to year of such personal days.

3. The contract expressly provides for full payment for accumulated, unused sick time at the expiration of the contract, but no similar provision was negotiated or included regarding personal days.

4. Paragraph 24 of the contract provides that the contract as written is the parties' entire agreement, and there are no representations, promises, or consideration of any nature whatsoever, except as expressed in the contract.

5. By e-mail dated June 14, 2004 (P-13), Dr. Witmer directed the staff of the personnel office to transfer three unused personal days into his sick leave account.

6. In addition, by memorandum dated June 29, 2005 (P-11), Dr. Witmer directed the staff of the personnel office to transfer four unused personal days into his sick leave account.

7. Dr. Witmer contends that he directed these transfers in reliance on the advice of the staff of the personnel office, and on a Salary and Benefits Comparison chart prepared by the business administrator for submission to the Board regarding an unrelated matter; however, there is no justification for Dr. Witmer's reliance on the advice of the personnel office staff or on the chart prepared by the business administrator in view of the absence of a contract provision allowing for the transfer unused personal days into sick leave.

8. The transfers of these seven personal days into his sick leave account were accomplished at the direction of Dr. Witmer without contractual authority, and without the knowledge or consent of or notice to, the Board of Education; this is a **VIOLATION** of Dr. Witmer's employment agreement.

CHARGE NO.4
MISUSE OF PERSONNEL OFFICE STAFF/ABUSE OF AUTHORITY

Petitioner's arguments

The Board argues that as the chief school administrator, Dr. Witmer has authority over all school district employees including the school business administrator and the

personnel office staff. Thus, when Dr. Witmer appeared to be exceeding or violating his contractual rights with regard to reporting leave time and its carryover, neither Business Administrator Doering, Ms. Allocco nor Ms. Shopp discussed that matter with Dr. Witmer because of his position. So too, in June 2004, when Ms. Allocco attempted to determine Dr. Witmer's vacation days in 2003-2004, when he responded to her e-mail that "two days only" were correct, she did not challenge that answer (P-8).

In view of this, the Board contends that Dr. Witmer used his position and his authority to direct his subordinates in the personnel office to take actions on his behalf which he knew were not authorized. The Board contends that his directives are not requests but are orders and that by doing this, Dr. Witmer's conduct towards and use of the personnel office staff to seek unauthorized benefits under his contract of employment violated his obligation to adhere to the standard of exemplary behavior, self-restraint and forthrightness required of a superintendent.

Respondent's arguments

Attorney for Dr. Witmer points out that the Board has conceded that if no wrongdoing is found on Charges 1, 2 or 3, Charge 4 must fall. Dr. Witmer contends that the testimony and evidence fails to establish any intentional wrongdoing on his part with respect to his communications with the personal office.

Dr. Witmer contends, first of all, that the Board's position that his directives had to be adhered to without deviation or question is contrary to the relationship Dr. Witmer established with his staff and the personnel office. Dr. Witmer contends that based upon the record herein, there is no express or implied evidence of absolute or unquestioning obedience to his authority on the part of personnel office staff. For example, when he discussed the pro-rating of his days during the first year, the personnel office staff did not agree with his position and continued to pro-rate his days. When the personnel office advised Dr. Witmer that it charged family illness days to his sick bank and Dr. Witmer said that was incorrect, it stayed that way despite his

protestations.

Dr. Witmer contends that he did not ever knowingly and with intent direct the personnel office staff to do anything contrary to his contract with regard to his benefits. Dr. Witmer relied on other examples where the personnel office staff questioned his position on a number of issues.

Dr. Witmer further contends that it was the personnel office staff that recommended and suggested to him that his personal days and vacation days were allowed to be carried over. He further contends that his position regarding the carry-over personal days was confirmed by Mr. Doering's comparison chart which showed that he was allowed to do this. Thus, Dr. Witmer felt that he was acting correctly when he communicated with the personnel office concerning these matters.

Analysis of the relevant testimony and evidence as to Charge 4

1. As to carry-over of vacation days

Ms. Allocco and Ms. Shopp testified that Dr. Witmer directed the personnel office to carry over 40 vacation days on his account (P-11). Their interpretation of Dr. Witmer's amended contract was that such carry over was limited to 20 vacation days. Dr. Witmer's directions were complied with by the personnel office because of his position as superintendent.

Dr. Witmer felt that the original employment agreement was ambiguous as to vacation days (P-1, page 3, #9) since there was no mention of any maximum of carryover days. According to Dr. Witmer, in June 2004, there was a change to the contract that permitted him to carry over 40 vacation days in his bank plus 20 current vacation days, totaling 60 days. Based on this, Dr. Witmer directed the personnel office to carry over his unused vacation days into his 2004-2005 and 2005-2006 allotment.

It is undisputed that upon retirement any unused vacation time is paid at a per diem rate, and if Dr. Witmer retires he would only be paid for unused days after a review. It is also undisputed that Dr. Witmer has never asked the Board to purchase any of his vacation days and he has never gotten paid for any unauthorized vacation days. Dr. Witmer explained that upon leaving employment, the payment for any carry over vacation leave would be reviewed by the personnel office, business office and by the Board's finance committee, and must then be approved by the Board.

2. As to carry-over of personal days

Ms. Shopp testified that she was not aware of any provision in Dr. Witmer's contract that personal days would roll over to sick days, and she believed that if the contract is silent, there will be no roll over. However, Dr. Witmer gave her a written directive (P-11) and pursuant to that directive she carried over his three personal days to sick days for 2004-2005. The 2003-2004 carry-over was based on an e-mail about carry-over of three personal days from Dr. Witmer (P-13).

Ms. Allocco testified that Dr. Witmer told the personnel office what to do and they did it. Even though there is no provision in his contract to carry over the personal days he receives by contract, this was done because the superintendent told them to do so. Dr. Witmer also submitted a later request to transfer three personal days to sick leave (P-13), and this was also done for the same reasons. She did not know if the Board approved this.

Dr. Witmer acknowledged that his contract (P-1, page 5, article 11) contains no provision regarding what happens to personal leave time, and it was his initial understanding that he would lose them. However, in June 2004, he was told by Ms. Shopp that he could carry over personal days into sick. In addition, a comparison chart prepared by Mr. Doering stated that he could carry over four personal days to sick days. He testified that Ms. Allocco requested a memo from him in order to do so, and he

provided one dated June 29, 2005 (P-11), in which he requested the transfer of all his unused personal days to his accumulated sick days. No one questioned that these could not be carried over and the comparison chart prepared by Mr. Doering for the Board (R-1) showed that he could carry them over. He admitted that he does not recall if he saw the chart prior to June 14, 2004. He had no knowledge that his request was contrary to the contract, and he denied that he ever knowingly directed either Ms. Allocco or Ms. Shopp to do anything contrary to his contract.

Dr. Witmer admitted that the contract is silent as to the carryover of personal days, and his request to transfer personal days dated June 14, 2004 (P-13) is not referenced in the contract. He also indicated that there is no Board policy on the carryover of personal days, and this is addressed in individual contracts between the Board and school district administrators. He also admitted that his employment agreement (P-1) provided in paragraph 24 that it is the entire agreement. Page 11 of that contract provides four personal days per year with no cap.

In rebuttal, Ms. Shopp testified that she recalled no conversations about any of these matters and does not recall being in Dr. Witmer's office. She was shown the e-mail of June 14, 2004 (P-13) and the e-mails of June 10 through 14, 2004 (P-7), and She recalled no conversations about any of these matters and does not recall being in Dr. Witmer's office.

Dr. Witmer denied that he intimidated anyone concerning this. He denied knowledge that his requests were contrary to the contract. He denied that he was able to intimidate Ms. Allocco and Ms. Shopp. As an example, he testified that he told them he disagreed with their interpretation that family leave was to be deducted from sick leave and concerning proration of days, but they left it that way. In addition, they would regularly go to Mr. Doering and to the board attorney for guidance and assistance. He testified that he never knowingly directed either Ms. Allocco or Ms. Shopp to do anything contrary to his contract.

After considering all of the foregoing, I hereby make the following findings as **FINDINGS OF FACT** with regard to Charge No. 4:

1. As the Superintendent of Schools, Dr. Witmer is the Chief School Administrator for the Middletown Township Public School District.

2. As Superintendent, Dr. Witmer is vested with the right to recommend to the Board of Education, the appointment, transfer or removal of any certificated or non-certificated staff member.

3. Notwithstanding the provisions of his employment agreement with the Board of Education, Dr. Witmer attempted the carryover of twenty vacation days into his account as set forth in Charge 2, by his written directive to the staff of the personnel office.

4. Likewise, notwithstanding the provisions of his employment agreement with the Board of Education, Dr. Witmer attempted the carryover of seven personal days as sick days as set forth in Charge 3, by his written directives to the staff of the personnel office.

5. Dr. Witmer did not request approval from the Board, nor did he provide to the Board prior or later notice of his directives regarding the transfers of his personal and vacation time.

CHARGE NO. 5
INTENTIONAL DECEPTION OF THE BOARD OF EDUCATION

Petitioner's arguments

The Board contends that Dr. Witmer failed to inform the Board that, in responding to the Board's request for information, he provided cut and paste versions of certain

documents. It further contends that even though Dr. Witmer was familiar with the issues when questioned by the Board, he disclaimed any knowledge and led the Board to believe that the staff failed to keep him informed. The Board relies on respondent's contract, paragraph six, pages two and three, requiring that he faithfully and diligently perform the duties assigned to him by the Board. The Board also relies on Board Policy No. 2131.2, paragraph 6 (P-22), which requires the superintendent to be frank, honest, concise and complete in reporting to the Board. It takes the position that Dr. Witmer's responses on December 19, 2005, and his subsequent written report of December 23, 2005, (P-14) were untrue, incomplete, dishonest and misleading. The Board takes the position that the effects of the untruthful denials of knowledge and the alteration of documents supplied to the Board had a clear effect on the Board's relationship with Dr. Witmer and that they could no longer trust him. The Board contends that Dr. Witmer betrayed the trust relationship between himself as superintendent and the Board and the public. The Board contends that Dr. Witmer intentionally deceived the Board by carefully altering documents and then presenting them as complete and original reports. It contends that this adversely affected the proper operation of the school district.

Respondent's arguments

Dr. Witmer takes the position that this charge must fail since the Board's allegations lack specificity with regard to the questions asked of Dr. Witmer, when they were asked, what was asked, and what the purported response was from him. Furthermore, Dr. Witmer contends that the basis of this particular charge relies on the testimony of individuals that have improper motivation to have Dr. Witmer's employment terminated. First, Mr. Halpin gave testimony regarding the two areas of discussion when he was not even there, and he made an assumption what was discussed. In addition, Mr. Halpin admitted to his feelings that Dr. Witmer had been his nemesis and caused him to resign from his position in the school district. Dr. Witmer contends that the then-Board President Minnuies provided testimony that was unclear and less than specific with respect to the date of the questions and when the questions were asked.

Dr. Witmer argues that Board attorney Parton's testimony is in conflict with Ms. Diorio's recollection. Mr. Partons' testimony was that on December 19, 2005, Dr. Witmer responded that he did not know the details of the investigation or the process used with respect to the teacher, agreed with Mr. Halpin's testimony that Mr. Halpin was the one who conducted the investigation and interviewed the teacher. Dr. Witmer further contends that Mr. Partons' credibility is placed in doubt because of his strong motivation to have these charges upheld since they are based upon an investigation he conducted at the direction of the Board. Thus, Dr. Witmer contends that Mr. Parton is seeking to justify his conclusions and advice upon which the Board acted.

Dr. Witmer contends that his testimony established that he was not questioned with respect to the investigation concerning the removal of a teacher since that had been the subject of a stipulation of settlement that had been approved earlier that same evening. Rather, he contends that the questions related to depositions going on the morning of the meeting, and to a request for a list of ongoing lawsuits. The response to any questions regarding the removal of the teacher had been provided to the Board previously because they needed that information in order to make a decision whether to accept a stipulation of settlement on December 19, 2005.

Dr. Witmer also takes the position that he was aware there were depositions going on, but he was not aware what the depositions concerned or the outcome of the depositions. Dr. Witmer contends that when the Board asked him what happened at the deposition, he told the Board that he would have to find out from Mr. Halpin who had been present.

Dr. Witmer also takes the position that the memorandum that Mr. Halpin prepared was sent to Dr. Witmer and not to the Board. The e-mail response regarding the lawsuits was also addressed to Dr. Witmer by Mr. Halpin. These were not intended for anyone else. The memo and e-mail were not reports to the Board. Mr. Halpin himself testified that Dr. Witmer could provide the information in the e-mail and memo in any way he wanted to to the Board. Dr. Witmer testified he was not certain what Mr.

Halpin was referring to when he stated his concern that Dr. Witmer was not able to give information to the Board. In fact, one of the reponses provided by Mr. Halpin dealt with an issue that was not the subject of Dr. Witmer's initial question.

Dr. Witmer explained his deletions to Mr. Halpin's submissions by explaining that he removed those parts that did not relate directly to the questions that were asked by the Board. He did this for two reasons: one, because it did not relate to the questions asked; and two, because the Board had criticized Dr. Witmer previously for including in a report negative comments from a principal about a cabinet member. The Board had become very angry that Dr. Witmer would include anything of a negative nature so he made sure he did not include this as part of his submission to the Board. He stated that he had no intent or motive to misrepresent anything to the Board. With regard to the e-mail, he removed a portion of the e-mail that was a personal note from Mr. Halpin to Dr. Witmer. Mr. Halpin confirmed that the documents he sent to Dr. Witmer were meant only for him. Dr. Witmer explained that this was eliminated because the investigation of the teacher had been given to the Board previously.

Analysis of the relevant testimony and evidence as to Charge 5

Business administrator Doering testified that when Dr. Witmer was asked about the status of litigation at a December 19, 2005, Board meeting his response was that Mr. Halpin was handling those matters. Dr. Witmer subsequently provided the Board with a report on December 23, 2005, with no mention that attachments to the report from Mr. Halpin had been altered. Mr. Doering signed the tenure charges knowing that the information provided by Dr. Witmer to the Board in that report had been altered.

Board member Diorio also testified that on December 19, 2005, the Board President asked Dr. Witmer questions about two situations involving litigation. Dr. Witmer denied any knowledge of depositions that had been going on earlier that same day or concerning the dismissal of a certain teacher. He stated that he had not been informed and he needed to obtain the information from Assistant Superintendent Halpin.

Ms. Diorio denied that Dr. Witmer ever said that he could not discuss the questions asked because the teacher was not given a "Rice notice." He never said anything other than he did not know.

Ms. Diorio was contacted by Mr. Halpin after the meeting because he had been told what had occurred and he felt that Dr. Witmer had "sold him down the river" with the Board. He believed that Dr. Witmer had knowledge concerning these matters, but indicated that Mr. Halpin had not kept him informed.

On December 23, 2005, Dr. Witmer sent a weekly update to the Board members (P-14) to which he attached altered memos from Mr. Halpin explaining the litigation issues (P-14, pages 4 and 5). The original memo had been changed by Dr. Witmer and a number of paragraphs critical of Dr. Witmer had been cut out.

It was later determined as a result of an investigation by the Board attorney that Dr. Witmer had knowledge about, and had been directly involved with, both of the matters, but was not being honest with the Board and misrepresented his lack of knowledge. He had also altered the two writings from Mr. Halpin. Ms. Diorio was very disappointed in this action by Dr. Witmer and she could not believe that Dr. Witmer would alter a document to cover up what he previously said. Ms. Diorio testified that she does not trust Dr. Witmer any longer and believed he made a misrepresentation to the Board.

Board of Education attorney Parton confirmed that on December 19, 2005, Dr. Witmer was questioned by the Board President about depositions that day, and he responded he was unaware of them and would have to check with Mr. Halpin. Board member Caminiti also asked Dr. Witmer how the administration handled the investigation leading to the removal of a teacher, and Dr. Witmer responded that he would have to check with Mr. Halpin because he did not know the details of the investigation process. Mr. Parton's recollection was that Mr. Halpin, Dr. Witmer and the two building principals handled this investigation and that Dr. Witmer and Mr. Parton

had briefed the Board on the factual and legal issues. He also recalled that Dr. Witmer did not decline to respond to the two questions because of the lack of a "Rice Notice" to the involved teachers. Board President Minnuies then asked about other litigation that was going on that the Board does not know about. Dr. Witmer subsequently provided that requested information to the Board.

Mr. Halpin testimony was that he was on a medical leave of absence and did not attend the Board meeting on December 19, 2005. Afterwards, he learned that Dr. Witmer had misrepresented that Mr. Halpin failed to keep Dr. Witmer informed about two pending matters in litigation involving a claim by a guidance counselor and 60 days notice of termination to a teacher. Mr. Halpin had previously advised Dr. Witmer of the details of both of these issues, and Dr. Witmer was fully aware of them. In fact, Mr. Halpin had advised Dr. Witmer that he would be in the office on December 19, 2005, to coordinate the depositions involving the termination of a guidance counselor, even though he was on leave. The fact that the Board did not know about this litigation alarmed Mr. Halpin. Mr. Halpin also provided a written report to Dr. Witmer concerning the termination of the teacher (R-18), and it was Dr. Witmer who terminated the teacher with a 60-day notice, so he was fully aware of the situation.

On December 22, 2005, Mr. Halpin responded to Dr. Witmer's memo of December 20, 2005, requesting information only about the guidance counselor. In his written response Mr. Halpin addressed not only the guidance counselor, but also the teacher because he wanted Dr. Witmer to be aware that he knew about the misrepresentations to the Board and because he did not trust Dr. Witmer.

Mr. Halpin admitted that his memo of December 22, 2005 (P-16), was only addressed to Dr. Witmer, and he never told Dr. Witmer that it was also sent to Board member Diorio. This memo was not intended to be a response to the Board, and, as far as he was concerned, Dr. Witmer could take all or part of his report and provide it to the Board. Dr. Witmer then presented a doctored document to the Board. He admitted that he could only criticize the Superintendent by asking for a meeting with the Board.

Board President Minnuies recalled that on December 19, 2005, Dr. Witmer was asked who conducted the investigation of a teacher who had been let go and what case was involved with the depositions held that same day. Dr. Witmer responded to the Board that he was not aware what was going on and he would have to call Mr. Halpin to find out about these matters. Dr. Witmer was then asked for a summary of ongoing litigation and he responded that he would have to ask Mr. Halpin to provide that information. Ms. Minnuies was angry that someone in the Central Office did not tell Dr. Witmer what was going on with respect to the investigation of the teacher and the depositions. She originally felt that Mr. Halpin had failed to give the information to Dr. Witmer. Ms. Minnuies explained that she wanted to know what the deposition was about and why Mr. Halpin he did not tell Dr. Witmer about it.

When Ms. Minnuies subsequently saw the original memo from Mr. Halpin (P-16) she realized that the documents Dr. Witmer provided as a written response to the Board had been altered. She felt angry and disappointed, and while she has disagreed with Dr. Witmer in the past, she felt that this time he was being dishonest, that he misled and misrepresented information to the Board, and that she was being played as a fool. The information provided by Dr. Witmer was dishonest because it should have included all the information provided to him by Mr. Halpin in his response or Dr. Witmer could have excerpted the information and put it into his own e-mail.

In response, Dr. Witmer testified that at the first closed session on December 19, 2005, there was a meeting with the teacher to finalize a settlement and a settlement agreement was then approved at the public portion of the meeting. It was at the second closed session that Mrs. Minnuies asked what the deposition of that morning was about, and that she would like a list of all outstanding litigation against the school district. As to the request for information concerning the deposition that morning, Dr. Witmer explained that he had seen Mr. Halpin that day and that Mr. Halpin was involved with the deposition, and he would have to ask him. As to the issue of outstanding litigation,

he was simply asked to provide a list. He memorialized these requests in an e-mail (P-15, items 4 and 5).

Dr. Witmer received a memo from Mr. Halpin on December 23, 2005 (P-16). Mr. Halpin provided information concerning the teacher, but the teacher was not the subject of any question on December 19, 2005. Therefore, he did not include this information from Mr. Halpin because that was not one of the questions asked of him. Mr. Halpin never responded as to what happened at the depositions, and Dr. Witmer did not know what happened either.

Dr. Witmer's response to the Board was compiled as quickly as possible and he attached it to his update of December 23, 2005 (P-14). In that update in paragraph II, he corrected what he said at the closed session. He admitted that the attachment concerning the information requested by the Board was not in its original form. He had removed sections of Mr. Halpin's memo because they were not related to the questions that were asked by the Board. He also explained that he excluded those portions of Mr. Halpin's memo criticizing him because he had previously been criticized by the Board for including information to the Board that was critical, and they wanted no negative comments from a subordinate about a cabinet member. He knew that Mr. Halpin would have access to his response through Board member Dioro because it was in his updates. He felt that the note from Mr. Halpin was personal to him. He denied that he misrepresented anything to the Board.

Dr. Witmer indicated Mr. Halpin did not apprise him of lawsuits on a regular basis and he does not know what Mr. Halpin meant in his e-mail of December 22, 2005 (P-15). He admitted that he never explained to the Board what portions of this e-mail were removed and he made a mistake by not doing so in this case.

After considering all of the foregoing, I hereby make the following findings as **FINDINGS OF FACT** with regard to Charge No. 5:

1. As the Superintendent of Schools and Chief School Administrator of the school district, Dr. Witmer is the responsible for transmitting information between the Central Administration of the school district and the Board of Education.

2. Dr. Witmer frequently reports information to the members of the Board in "Weekly Updates" prepared by Dr. Witmer. These are written summary reports, generally with several attachments regarding information and issues discussed in previous public and executive sessions of the Board.

3. During the executive session at the Board's regular public meeting of December 19, 2005, Board members asked Dr. Witmer for information regarding the status of several matters.

4. Dr. Witmer advised the Board at that time that he was not involved in and/or had no knowledge of the matters about which they had inquired. Dr. Witmer further stated that Mr. Halpin, who was not present at the meeting, was the individual who could respond to the Board's questions.

5. There is no evidence in the record to establish the untruthfulness of Dr. Witmer's response that he had no knowledge of the subject-matter of the depositions on December 19, 2005, or what happened at the depositions, because he was not present.

6. Dr. Witmer's testimony that the question as to the investigation leading to the termination of a teacher and the settlement of that issue was raised at an earlier meeting and had been resolved before the December 19, 2005 meeting is supported by the documentary evidence in this matter (R-18, R-19 and R-24, page 7). Nevertheless, based on the testimony of Mr. Parton and Mr. Halpin and the documentary evidence, the preponderance of the evidence establishes that Dr. Witmer was fully familiar with the

details of this investigation and did not respond truthfully when questioned by the Board of Education as to this matter.

7. As the result of the questions regarding the deposition of December 19, 2005, and regarding a list of matter in litigation, Dr. Witmer prepared and distributed a Weekly Update on December 23, 2005.

8. Included in the issues addressed in Dr. Witmer's December 23, 2005 Weekly Update was Section II, "Follow-Up From Board Meeting." In that Section, Dr. Witmer referenced two documents prepared by assistant superintendent Halpin, who was absent from the December 19, 2005 Board meeting on medical leave, regarding updates on litigation and two personnel issues.

9. Referenced and attached were "Attachment B," a printed copy of an e-mail from Mr. Halpin listing active lawsuits against the District, and "Attachment C," a two-page document which purported to be a December 22, 2005 memorandum to Dr. Witmer from Mr. Halpin addressing two personnel matters.

10. The document attached to the December 23, 2005, Weekly Update as Attachment B is not a copy of the original document prepared by Mr. Halpin and received by Dr. Witmer. Rather, Dr. Witmer provided the members of the Board with a cut-and-paste version of Mr. Halpin's e-mail.

11. While the portions of the "Attachment B" document which were eliminated from the version provided to the Board address and contradict Dr. Witmer's statement to the Board that he had no knowledge of the matters at issue, the eliminated portions were irrelevant to the original question posed to Dr. Witmer by the Board and amounted to nothing more than a statement of an opinion from a subordinate employee.

12. The document attached to the Weekly Update of December 23, 2005, as Attachment C is also not the original document prepared by Mr. Halpin and received by Dr. Witmer. Rather, Dr. Witmer provided the members of the Board with a cut-and-paste version of Mr. Halpin's memorandum from which Dr. Witmer deleted three paragraphs.

13. The deleted paragraphs address Mr. Halpin's "concern, disappointment and surprise" with Dr. Witmer's handling of the matters and the information provided to the Board by Dr. Witmer. The deleted paragraphs also address Dr. Witmer's personal knowledge of the matters, and note that his directives controlled Mr. Halpin's actions.

14. The portions of the "Attachment C" document which were eliminated from the version provided to the Board address and contradict Dr. Witmer's statement to the Board that he had no knowledge of the matters at issue.

15. The portions of the "Attachment C" document which were eliminated from the version provided to the Board were irrelevant to the original question posed to Dr. Witmer by the Board and amounted to nothing more than a statement of an opinion from a subordinate employee.

16. Even though Dr. Witmer presented the Board of Education with the altered versions of Mr. Halpin's memorandum and e-mail without noting or acknowledging that changes had been made, there was no obligation on his part to do so since the purpose of providing these excerpts from Mr. Halpin's memorandum and e-mail was to respond to the Board's questions, and that purpose was complied with by Dr. Witmer.

17. Based on the foregoing, Dr. Witmer did not commit any acts of dishonesty and intentional deception against the Board for his own benefit with regard

to his presenting to the Board of Education the altered versions of Mr. Halpin's memorandum and e-mail attached to the December 23, 2005, Weekly Update.

LEGAL DISCUSSION

The petitioner contends that the legal standard for proving a tenure case against a Superintendent with contractual tenure was set forth in In Matter of Tenure Hearing of John J. Howard, EDU 1528-01, Initial Decision (Feb 6. 2002), adopted, Comm'r. (April 1, 2002) adopted State Board (March 3, 2004) ,http://lawlibrary.rutgers.edu/oal/search.html.:

> "The gravamen of each of the charges in this case is conduct unbecoming a Chief School Administrator; the Board must prove, by a preponderance of the credible evidence, that [Respondent] engaged in such conduct to the extent that he should be dismissed from his position as Superintendent."
>
> [Howard supra, EDU 1528-01, Initial Decision (Feb 6. 2002), slip opinion at 8; adopted, Comm'r. (April 1, 2002) adopted, State Board, (March 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.]

I agree and **FIND** that the standard to be applied is whether the preponderance of the evidence supports a finding of unbecoming conduct. See, also, In re Phillips, 117 N.J. 567, 574-575 (1990); In re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Decisions defining unbecoming conduct

In this matter I have found that Dr. Witmer engaged in certain actions and conduct. The actions and conduct in question are as follows:

As to Charge No. 1, I have determined that by not providing notice to the Board President of the fact that he would be absent on December 27 or 28, 2005, Dr. Witmer violated Paragraph 9(a) of his employment contract requiring him to advise the Board President of any vacations of less than five days.

As to Charge No. 2, I have found that in directing the transfer of all of his unused vacation days then on account, Dr. Witmer directed the personnel office to confer an unauthorized benefit upon him, and exceeded his contractual authority to carry vacation days by twenty (20) days, and that this is a violation of the employment agreement, as amended, between the Board of Education and Dr. Witmer.

As to Charge No. 3, I have found that the transfers of seven personal days into Dr. Witmer's sick leave account were accomplished at the direction of Dr. Witmer without contractual authority, and without the knowledge or consent of or notice to, the Board of Education, and that this is a violation of Dr. Witmer's employment agreement.

As to Charge No. 4, I have found that Dr. Witmer attempted the carryover of vacation days into his account as set forth in Charge 2, by his written directive to the staff of the personnel office, and the carryover of seven personal days as sick days as set forth in Charge 3, by his written directives to the staff of the personnel office, and that these actions were not authorized by his employment agreement and were not approved by the Board of Education.

As to Charge No. 5, I have found that Dr. Witmer was fully familiar with the details of the investigation leading to the termination of a teacher and the settlement of that issue on December 19, 2005, and did not respond truthfully when questioned by the Board members as to the investigation.

The critical issue in this matter is whether Dr. Witmer's actions and conduct rise to the level of the charge of unbecoming conduct and, if so, is his removal as superintendent or some other form of discipline appropriate under the circumstances?

There are a number of cases in which specific conduct was found to be unbecoming. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), involved the use of physical force by a teacher to maintain discipline. In re Tenure Hearing of Cowan, 224 N.J. Super. 737, 741 (App. Div. 1988), involved a teacher with an uncontrollable temper who verbally and physically abused students, and was found to have engaged in unbecoming conduct. Unbecoming conduct may be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See, Redcay v. State Board of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b., 131 N.J.L. 326 (E. & A. 1944).

The petitioner Board of Education relied on a number of cases dealing with the type of conduct that is "unbecoming." I have reviewed each of these cases in an effort to determine whether Dr. Witmer has engaged in unbecoming conduct.

In In re Emmons, 63 N.J. Super. 136 (App.Div. 1960), a non-education case relied on by the Board, a police officer was given a 90-day suspension for conduct unbecoming a police officer when he failed to cooperate in an examination to determine his sobriety following an off-duty automobile accident. It was stated therein that unbecoming conduct is "an elastic term," which is broadly defined to include "any conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services." Id. at 140. The elements of unbecoming conduct include that the employee's position is in the public eye, that the position requires the employee to uphold that which is morally and legally correct, and that the subject conduct, while on duty or off duty, demonstrates that the employee is unsuitable for his or her duties as a public servant.

Because of the position of public trust in which their profession places them, teachers are held to certain prescribed standards of behavior. In In the Matter of the Tenure Hearing of Jacque L. Sammons, School Dist. of Black Horse Pike Reg., Camden County, 1972 S.L.D. 302, a teacher engaged in unbecoming conduct by

obstructing the function of the school in hiring teachers, attempting to unfavorably influence the evaluation of the school by a school accrediting group, and refusing to comply with the school sign-in procedure. The Commissioner in speaking about teachers stated:

> [T]hey are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. ... Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.
>
> [Id. at 321.]

See, also, School District of the Tp. of Parsippany-Troy Hills v. Hess, 97 N.J.A.R.2d (EDU) 34, in which a teacher was removed because he was found to have engaged in unbecoming conduct by sending a poem to a female student stating he was "crazy" about her, and by sending another female student a Valentine card and telling her he sent it to her and not to her sisters because she had the best "buns" in the family. It was stated in the decision:

> In determining the appropriateness of a teacher's conduct, the Commissioner of Education has often stressed " . . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and must exercise a high degree of exemplary behavior."
>
> [Id. at 51 (citing, In re Tyler, 12 N.J.A.R. 297).]

In In the Matter of the Tenure Hearing of Ernest Tordo, School Dist. of the Tp. of Jackson, 1974 S.L.D. 97, the teacher was convicted of the crime of accepting a bribe. The Commissioner stated:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the

> opinions of their pupils. Pupils learn, therefore, not only what they are taught by their teachers, but what they see, hear, experience, and learn about their teacher. When a teacher violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.
>
> Id. At 98-99.

The Board contends that the higher a teaching staff member rises in the administrative structure of a school district, the higher his or her standards of conduct shall be. The Board relies on Howard, supra, in which the Superintendent was accused of using school district resources for his personal advantage and misrepresenting to the Board the costs and processes involved in relocating his own office. The Commissioner adopted the Initial Decision of the ALJ who found that a Chief School Administrator's lack of candor with both the Board and the public justified the revocation of tenure. The ALJ found that superintendent had engaged in a series of actions, or inactions, which manifested a lack of appropriate judgment, a lack of communication with the Board and with the public, and conduct which, if not criminal, was in some instances sufficiently questionable so as to raise concern as to his capacity to perform his job within the confines of legality. Howard, supra, EDU 1528-01, Initial Decision (Feb 6. 2002), slip opinion at 16; adopted, Comm'r. (April 1, 2002) adopted, State Board, (March 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. (citing In Matter of Tenure Hearing of Horowitz, 93 N.J.A.R. 2d (EDU) 232).

The Commissioner went on to state:

> The seriousness of a lack of candor and forthrightness cannot be overstated. They represent an unwillingness or reluctance to recognize the Board's role in the District, that of his employer as well as the entity which bears final responsibility to the public not only for the educational policy of the system, but for the overall educational and fiscal practices within the municipality . . . the breach of trust and confidence this lack of candor and forthrightness represents is so serious that it has severely disrupted the requisite cooperative relationship required to carry on the educational business of the District.

> [Howard, supra, EDU 1528-01, Initial Decision (Feb 6. 2002), slip opinion at 16; adopted, Comm'r. (April 1, 2002), adopted, State Board, (March 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.]

The Howard case ultimately reached the Board of Examiners on the question of whether the Respondent's Certificates should be revoked. The Board of Examiners revoked his Certificates by Order dated December 20, 2005, stating the following:

> Teachers are professional employees to whom the people have entrusted the care and custody of school children. The heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment . . . *Since the Superintendent is the highest administrative officer in the District, he must be held to the most stringent standard of behavior. . .Howard's repeated disregard for proper standards of behavior and his dishonesty and deception in his interactions with his own District Board of Education negates any claim he can have to being a role model.*
>
> [Howard, supra, EDU 1528-01, Board of Examiners Decision, December 20, 2005, slip opinion at 4 *(emphasis added)*. adopted, Comm'r. (April 1, 2002) adopted, State Board, (March 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.]

Trust is paramount in the relationship of a school superintendent and the Board of Education, which consists of lay persons serving in a public service capacity, persons who thus must place extreme reliance upon the ability, the efficiency, the judgment and the faithfulness of the superintendent. Horwitz, supra, 93 N.J.A.R. 2d (EDU) at 265. A breach of that trust by the Chief School Administrator is, itself, unbecoming conduct, and under the high standard of conduct applied to a superintendent, such a breach has been found to be grounds for dismissal.

In In Matter of Tenure Hearing of Pitch, School District of the Borough of South Bound Brook, 1976 S.L.D. 1159 (App Div.), the district filed tenure charges against its superintendent based upon his dishonesty in misrepresenting his academic credentials at the time of his initial appointment and using his office telephone for making personal

calls. Id. at 1160. The Commissioner of Education, State Board of Education, and Appellate Division held in favor of the school district, and terminated the employment of the Superintendent. In its decision, the Appellate Division stated

> "We are not persuaded that the State Board erred in its conclusion that appellant's misrepresentation of his academic credits and his misuse of his office telephone constituted unbecoming conduct.... the penalty of dismissal was fully warranted by the cumulative gravity of the offenses and is not an abuse of discretion."
>
> [Ibid.]

The Commissioner in Pitch had earlier found that the misrepresentation of educational qualifications "was a misrepresentation of fact which cannot be condoned and may be characterized as conduct unbecoming a school administrator..." In Matter of Tenure Hearing of Pitch, School District of the Borough of South Bound Brook,1974 S.L.D. 1177, 1187 (App. Div). With regard to the use of a district telephone for personal calls, the Commissioner characterized the Superintendent's actions in that regard as "self-excused insincerity" by which he failed to apply the standards he demanded of others to himself. Ibid.

In In Matter of Tenure Hearing of Louis Cirangle, 1980 S.L.D. 82, rev 'd Commissioner at 95, aff'd State Board at 97, aff'd Appellate Division 1981 S.L.D. 1405 (Oct. 22, 1981), certif. den. 87 N.J. 347 (1981), the Board filed tenure charges against its Superintendent, alleging that in response to an inquiry into an expenditure, the Superintendent provided the Board of Education with an altered version of a bill from an optometrist, and alleging that the superintendent had signed a principal's name a series of vouchers for equipment he later used for his personal gain. The ALJ found that the board had proven its case with regard to these charges, and that the essential effect of the superintendent's actions were "the loss of confidence by some members of the board of education in the judgment of its Chief School Administrator." Id. at 93. However, the ALJ recommended that the superintendent's "gross indiscretions" constituted conduct unbecoming not rising to the level punishable by termination.

The Commissioner, as affirmed by the State Board and Appellate Division, rejected the ALJ's recommendation and ordered the Superintendent's termination, stating:

> The Commissioner cannot accept such conduct as being appropriate to the person who serves as the Chief School Administrator . . . The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers, and pupils alike.
>
> [Cirangle, supra, Commissioner of Education, 1980 S.L.D. at 96.]

On appeal to the Appellate Division, Cirangle argued that his actions were, at most, merely negligent, and that such actions could never be the basis for tenure termination. The Appellate Division rejected that argument, and affirmed his dismissal, holding:

> Cirangle's argument implies that "just cause" for dismissal encompasses only intentional conduct and not mere negligence. Just cause for dismissal has never been so narrowly interpreted, however. Rather, dismissal may be predicated upon any dereliction of duty touching upon one's "fitness to discharge the duties and functions of one's office or position."
>
> [Cirangle, supra, Appellate Division, 1981 S.L.D. 1405, 1409 (quoting In re Tenure Hearing of Grossman, 127 N.J.Super. 13 (App.Div. 1974), certif. den. 65 N.J. 292 (1974)).]

In In Matter of Tenure Hearing of Guma, School District of Secaucus, 1982 S.L.D. 1100, rev 'd Commissioner at 1113, a tenured principal was accused of using school monies for personal expenditures. The ALJ found that the Board had proven its case, but found that the respondent had been operating under the stresses of family illnesses and criminal prosecution, and recommended reinstatement of the respondent with a monetary penalty. The Commissioner rejected the ALJ's recommendation,

holding that dishonest conduct in such a position of trust required termination. Id. at 1116.

In In Matter of Tenure Hearing of Horowitz, Bridgewater-Raritan Regional School District, 93 N.J.A.R.2d (EDU) 232, aff'd Commissioner at 273, the superintendent was accused of deceiving the board in the preparation and presentation of a referendum to the public, specifically by passively or actively misinforming the board and public with regard to the costs of the proposed project. The ALJ addressed the pivotal nature of the office of superintendent, and the corresponding standard by which the actions of persons in that position must be judged. Regarding the related issues of the referendum project and communication with the board of education, the ALJ stated,

> . . . [T]he Superintendent, faced with the growing knowledge that the . . . project was a more complex and expensive affair than the Board and its committees had thought, apparently did not understand that . . . it was absolutely imperative that he take clear and affirmative steps to advise his full board and to seek their input and advice . . . in exercising his authority as Superintendent in respect to how to proceed, Dr. Horowitz demonstrated a serious lack of professional judgment.
>
> Id. at 264-65.

The ALJ continued,

> Trust is a key element in any employment relationship, trust is vital in the relationship between public officials and the public, trust is paramount in the relationship of a school Superintendent who is the chief operating officer and professional employee of a school district, and the board of education, which generally consists of lay persons serving in a part-time public service capacity, persons who thus must place extreme reliance upon the ability, the efficiency, the judgment and the faithfulness of the superintendent.
>
> [Horowitz, supra, 93 N.J.A.R.2d (EDU) at 265; See also In Matter of Tenure Hearing of Dr. Frank J. Napoli, 1988 S.L.D. 284, 288 ("The standard of behavior required of teachers is stringent, the standard for high administrative personnel

must be even more stringent.").]

The Commissioner held that the situation created by Dr. Horowitz's actions and inactions - even if aggravated by the Board - had created a climate to which the Commissioner could not subject a New Jersey public school district, stating:

> Dr. Horowitz, through his actions, created a climate of disharmony, loss of confidence, and mistrust in which the Bridgewater-Raritan school district should not be required to operate.
>
> [Id. at 273.]

In In Matter of Tenure Hearing of Robert R. Vitacco, 97 N.J.A.R.2d (EDU) 449, aff'd for other reasons, Commissioner at 454, aff'd State Board April 5, 2000, aff'd App.Div. 2002, a tenured superintendent was convicted of underreporting his income, and his employer board of education sought his tenure dismissal. The Commissioner found conduct unbecoming and ordered termination, and in so doing, addressed the evidenced contradiction between the superintendent's motivations and obligations:

> The Commissioner is persuaded that the within record is abundantly clear that Vitacco utilized his position as Superintendent of Schools dishonestly, evidencing a total lack of the integrity and personal responsibility requisite to such a position....motivated by greed, pure and simple. A desire to rip off the system, carry out your very important responsibilities in terms of the education and the educational health of the school district in, to say the least, a hypocritical manner obviously constitutes an appalling breach of the high level of trust required by his position and a violation of the fiduciary duty owed to his Board and the members of the community.
>
> [Vitacco, supra, 97 N.J.A.R.2d (EDU), Commissioner at 456.]

In Tenure Hearing of Peter J. Romanoli, Board of Education of the Tp. of Willingboro, 93 N.J.A.R. 2d (EDU) 82, aff'd App.Div. April 13, 1994, one of the charges against the Superintendent was that he absented himself from his post during the

months in which the annual Budget was being prepared. The absences were charged to him, were duly reported to the Board President (Id., slip opinion at 17), and were legitimate vacation time to which the Superintendent was entitled. Nevertheless, the ALJ and Commissioner found such absences to constitute conduct unbecoming the Superintendent. The Commissioner held that presence in the District, especially in times of stressful and volatile issues, is one of the Superintendent's "most basic responsibilities," and that the failure to exercise reasonable discretion in scheduling legitimate vacation leave could still be conduct unbecoming. Id. at 14.

The dishonest actions of the Superintendent in Howard, supra, provide a similar factual pattern and offer insight into both the Commissioner of Education's and Board of Examiners' view of such actions. In the Howard case, the Superintendent of was accused, at Charge 10, of directing the relocation of his office at District expense and without Board approval, at District expense of approximately $30,000. The respondent argued that although he directed that work, he did not take anything, but merely relocated and improved a district facility. Dr. Howard claimed that he had not realized any benefit from those actions, that such actions were within his authority, and that the Board of Education had no place in such decisions nor any right to object to his determinations.

The ALJ, who was subsequently affirmed by the Commissioner and State Board, rejected that claim, stating:

> Once again, respondent fails to understand the true nature of the charge he is facing. Once again, I detect a lack of candor and honesty on the part of Dr. Howard in his dealings with the Board which employs him. He may very well have the authority to move his office without seeking approval; that however, is not the determination with which I am faced. I must determine whether, in his dealings with Petitioner, he displayed a patent disregard for the negative consequences of his act upon the proper administrative and educational operation of the school district.
>
> On this charge, I **FIND** that Petitioner has proved, by a

> preponderance of the evidence, that Dr. Howard exhibited a lack of forthrightness, candor and failed to communicate with the Board.
>
> Howard, supra, EDU 1528-01, Initial Decision Feb. 6, 2002, at 115-16, adopted, Comm'r. (April 1, 2002) adopted, State Board, (March 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.]

As may be seen from the foregoing discussion, there is, unfortunately, no single definition of the term unbecoming conduct. There is no question that it is unbecoming conduct if a teaching staff member is convicted of a crime such as bribery or underreporting income. Also, it is certainly unbecoming conduct to use school monies for personal expenditures, to alter bills and sign a principal's name to vouchers for personal gain, to use physical force, or verbally and physically abuse students, to make suggestive and inappropriate communications with students, or to misrepresent academic credentials and use the office telephone for personal calls. Unbecoming conduct may also consist of failing to cooperate in a sobriety test following an off-duty accident, obstructing a school's efforts to hire teachers, obtain accreditation and record teacher attendance, failing to fully advise the Board of and public with regard to the costs of a proposed referendum project, failing to communicate with the Board of Education prior to relocating the Superintendent's office at school district expense, and being absent during the annual budget preparation. Regardless of the label placed on the charge seeking the dismissal of a teaching staff member, the touchstone of any charge is fitness to discharge the duties and functions of one's office or position. See, Laba v. Newark Board of Education, 23 N.J. 364, 384-389 (1957); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 28-29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

Where a teaching staff member is found guilty of violating the public trust, factors to be considered in assessing penalty include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. In re Fulcomer, 93

N.J.Super. 404, 420-422 (App.Div. 1967). Courts recognize that even a single instance of misconduct is enough to justify removal of an unfit teacher, if it is sufficiently flagrant. Redclay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affd. 131 N.J.L. 326 (E&A 1944).

As to Charge No. 1, concerning Dr. Witmer's failure to provide notice to the Board President of his absences on December 27 or 28, 2005, it is significant that on January 10, 2006, Dr. Witmer submitted a Request To Be Absent form to the personnel office. The significance of this submission by Dr. Witmer, no matter what his motivation may have been, is that Dr. Witmer's vacation leave account was charged for these two vacation days. Thus, the Board's argument that by his actions Dr. Witmer accepted full payment for days upon which he was absent from his assigned duties must fail. The Board's additional argument that Dr. Witmer has conferred a benefit upon himself without authority, and at the expense of the taxpayers, must also fail because of the fact that he reported these vacation days and was charged for them. Therefore, while Dr. Witmer violated the contract by not providing advance notice, I **FIND** that it does not constitute unbecoming conduct because Dr. Witmer obtained no benefit as a result of this violation of the agreement.

As to Charge Nos. 2 and 3, I have found that Dr. Witmer attempted to confer unauthorized benefits upon himself and exceeded his contractual authority by attempting to carry 20 more vacation days than that authorized by his employment agreement, and by attempting to transfer seven personal days into his sick leave account despite the fact that this is not permitted by his employment agreement. While it is true that, at the present time, Dr. Witmer has realized no benefit from his attempts, at the conclusion of his employment contract, he would have been entitled to full payment for any accumulated and unused vacation days and sick leave. While the present value of these days based on his current per diem is in excess of $19,000, it has certainly been established by the testimony of all witnesses that the likelihood of this occurring is minimal. Dr. Witmer's testimony, as confirmed by the business administrator and personnel office staff, is that when an employee leaves the school

district, any claims for reimbursement for benefit days are fully reviewed by the personnel office, the business administrator and the finance committee of the Board, and must then be approved by the Board. These clear apparent violations of the agreement would most certainly have failed. In view of this, it is puzzling that Dr. Witmer even attempted to obtain these additional benefit days on his record.

Nevertheless, his conduct and actions do amount to an attempt to obtain something of value to which he was not entitled, and I **FIND** that his actions do amount to unbecoming conduct. However, I have serious reservations as to whether this is sufficient to justify his removal as a superintendent. Clearly, these actions and this conduct do not compare in their nature and gravity to the examples of unbecoming conduct set forth in the above analysis. Although there is an element of an attempt at personal gain involved, Dr. Witmer's actions are clearly not criminal in nature and are not analogous to the other examples of unbecoming conduct discussed above. Most importantly, I **FIND** that the foregoing findings do not establish Dr. Witmer's unfitness to discharge the duties and functions of his office or position as superintendent. Therefore, I **FIND** that his removal as a superintendent is not justified by these findings.

As to Charge No. 4, I have found that notwithstanding the provisions of his employment agreement with the Board, Dr. Witmer attempted to increase his vacation account by 20 days in excess of that allowed by contract, and attempted to carry over seven personal days as sick days. There is no question that Dr. Witmer attempted to do this by issuing written directives to the staff of the personnel office.

If all that is necessary to establish unbecoming conduct with regard to Charge No. 4 is the fact that Dr. Witmer sent written directives to the personnel office staff, he would be guilty of unbecoming conduct. However, I believe that an element of intimidation, coercion or improper influence is necessary. There is no testimony or evidence in the record of this matter that the staff of the personnel office voiced their objection to or unwillingness to comply with these directives regarding the transfers of his personal and vacation time, and that Dr. Witmer forced them to carry out his bidding.

There is also no testimony or evidence in the record of this matter to establish that Dr. Witmer otherwise intimidated or coerced the personnel office staff concerning these transfers of his personal and vacation time.

Dr. Witmer's denied that he was able to intimidate Ms. Allocco and Ms. Shopp. This testimony is supported by examples in the record that support this denial. These examples include the fact that the personnel office staff deducted Dr. Witmer's family leave from his sick leave, despite his contention that this was not permitted. They also pro-rated his benefit days during his first year of employment despite his disagreement with their doing so. In addition, they were regularly seeking the advice and guidance of Mr. Doering and the Board attorney.

Dr. Witmer also testified that he never knowingly directed either Ms. Allocco or Ms. Shopp to do anything contrary to his contract and denied any knowledge that his requests were contrary to his contract. While I previously determined that it was not reasonable for Dr. Witmer to rely upon the advice of the personnel office staff concerning these issues, I have no way of judging whether this was simply a contrived explanation or whether Dr. Witmer truly believed that their advice was correct.

Based upon these circumstances, I **FIND** that the evidence in the record fails to establish that Dr. Witmer used his office and apparent authority to confer an unauthorized benefit upon himself so as to amount to unbecoming conduct requiring that his employment in the school district be terminated.

As to Charge No. 5, I have found that Dr. Witmer failed to respond truthfully to the Board when questioned by the Board members as to the details of the investigation leading to the termination of a teacher. Certainly, honesty and truthfulness are required of a superintendent when dealing with the Board of Education since the superintendent holds a position of public trust. Therefore, I **FIND** that Dr. Witmer's failure to respond truthfully to the Board is conduct that is unbecoming of an individual holding the position of superintendent.

However, I am puzzled as to Dr. Witmer's motivation in responding the way he did and why he did not respond truthfully. He certainly gained no benefit from his untruthful response. There is also no indication in the record that the Board was accusing Dr. Witmer of any wrongdoing in connection with the investigation of the matter. In addition, by the time Dr. Witmer was questioned about the investigation, the termination matter had been or was about to be resolved. Because of these same factors, that is, the lack of benefit to Dr. Witmer, no indication of wrongdoing, and the resolution of the underlying matter, I **FIND** that the nature and gravity of this offense is such that it does not support Dr. Witmer's removal. Dr. Witmer's deception does not rise to the level of that in the Horowitz or Howard cases cited above. Its sole effect was to delay a response to the Board concerning the details of the investigation until Dr. Witmer's Weekly Update on December 23, 2005. While any untruthfulness between a superintendent and board of education is a matter of serious concern since it negatively impacts on a relationship that must be based on trust, I **FIND** that the foregoing findings do not establish Dr. Witmer's unfitness to discharge the duties and functions of his office or position as superintendent. The subject-matter of the untruthful response was simply not that important. Therefore, I **FIND** that his removal as a superintendent is not justified by this finding.

Since I have determined that Dr. Witmer engaged in acts amounting to unbecoming conduct in Charges Nos. 2 and 3 involving his attempts to confer unauthorized benefits upon himself, and in Charge No. 5 by failing to respond truthfully to the Board, the question arises whether these three separate acts, when taken together, are sufficient to justify Dr. Witmer's removal or some lesser form of discipline? I am uncertain at what point multiple acts of unbecoming conduct, each of which are insufficient to establish unfitness to discharge the duties and functions of the office of superintendent, become sufficient. However, I **FIND** that in the present case, these three infractions, even when taken together, do not establish Dr. Witmer's unfitness necessitating his removal. The nature and gravity of these offenses does not rise to the level of the conduct in the cases discussed above justifying his removal as

superintendent.

Nevertheless, I **FIND** that, as a direct result of Dr. Witmer's unbecoming conduct with respect to these three Charges, some discipline is justified and required. I make this fanding because if it were not for Dr. Witmer's unbecoming conduct in these three instances, the Board of Education and the taxpayers of the school district would not have had to engage in the costly and time-consuming proceeding in this matter. Additionally, I **FIND** that it is necessary to remind Dr. Witmer of his obligation and responsibility to deal with the Board of Education and the public it represents in an honest and truthful manner and to avoid conduct which is motivated by self gain rather than service to the best interests of the public. Under these circumstances, I **FIND** that a six-month suspension from duty without pay is an appropriate discipline in view of the fact that the infractions were not egregious. I **FIND** that such suspension is sufficient to remind Dr. Witmer that trust is paramount in the relationship of a school superintendent who is the chief operating officer and professional employee of a school district, and the board of education, which must place extreme reliance upon the ability, the efficiency, the judgment and the faithfulness of the superintendent. Horowitz, supra.

DECISION AND ORDER

As to Charge No. 1, I have found that the respondent, Dr. David L. Witmer violated his employment contract by failing to provide notice to the Board President of his absences on December 27 or 28, 2005. However, I have also found that this failure does not constitute unbecoming conduct because Dr. Witmer obtained no benefit as a result of this violation of the agreement.

As to Charge Nos. 2 and 3, I have found that the respondent Dr. Witmer attempted to confer unauthorized benefits upon himself and exceeded his contractual authority by attempting to carry 20 more vacation days than that authorized by his employment agreement, and by attempting to transfer seven personal days into his sick leave account despite the fact that this is not permitted by his employment agreement.

However, I have found Dr. Witmer's conduct in these matters was unbecoming, but that the foregoing findings do not establish Dr. Witmer's unfitness to discharge the duties and functions of his office or position as superintendent, and that his removal as a superintendent is not justified.

As to Charge No. 4, I have found that notwithstanding the provisions of his employment agreement, the respondent Dr. Witmer issued written directives to the staff of the personnel office attempting to increase his vacation account by 20 days in excess of that allowed by contract, and attempting to carry over seven personal days as sick days. However, I have determined that in the absence of a showing of intimidation, coercion or improper influence, Dr. Witmer's conduct did not amount to unbecoming conduct. Therefore, his unfitness to discharge the duties and functions of his office or position as superintendent has not been established, and his removal as a superintendent based on this finding is not justified.

As to Charge No. 5, I have found that Dr. Witmer engaged in unbecoming conduct when he did not respond truthfully when questioned by the Board members as to the details of the investigation leading to the termination of a teacher. However, I have determined that the nature and gravity of this offense is such that it does not support Dr. Witmer's removal.

Therefore, I **ORDER** that the respondent, Dr. David L. Witmer, is **GUILTY** of the charges of unbecoming conduct as to Charges Nos. 2, 3 and 5, but only to the extent specified above. I further **ORDER** that all other charges of unbecoming conduct are **DISMISSED**. I hereby **ORDER** that the respondent, Dr. David L. Witmer, shall receive a six-month suspension from duty without pay as an appropriate discipline for these three charges of unbecoming conduct for the reasons expressed above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 9, 2007
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Date Received at Agency:

Mailed to Parties:

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

William Doering
Rosemarie (Rosie) Shopp
Dawn Diorio
Amelia (Laurie) Allocco
Christopher B. Parton, Esq.
Christopher T. Halpin
Joan Minnuies
Renate (Reni) Mey

For respondent:

Dr. David L. Witmer

LIST OF EXHIBITS:

For petitioner:

P-1	Employment Agreement between Board of Education and Dr. David L. Witmer, dated December 18, 2002
P-2	December 3, 2003, Memorandum from Maria Salus to respondent confirming health insurance waiver amendment to contract
P-3	Minutes of April 2004, Board Meeting including Item 10, approval of extension of respondent's contract to end on June 30, 2008
P-4	Minutes of June 2004 Board Meeting including Item 6.A.4, increasing respondent's contractual vacation time carryover rights
P-5	Twelve Month Employees' Calendar 2003-2004

P-6	Respondent's Absence Reports for February 2003 through December 2005, run on December 13, 2005
P-7	Twelve Month Employees' Calendar 2004-2005
P-8	June 29, 2005 e-mail from Laurie Allocco to respondent and respondent's response regarding 2004-2005 vacation time
P-9	Twelve Month Employees' Calendar 2005-2006
P-10	E-mails dated July 1, 2004, re: increased vacation carryover
P-11	June 29, 2005, memorandum from respondent to Laurie Allocco directing transfer of personal days and carry over of vacation days
P-12	July 2005 memorandum to respondent from Personnel Office confirming leave balances
P-13	June 14, 2004, e-mail from respondent to Rosie Shopp and Laurie Allocco directing transfer of personal days
P-14	December 23, 2005, Weekly Update from respondent to "Board of Education (Only)," with attachments
P-15	December 22, 2005 e-mail from Christopher Halpin to respondent
P-16	December 22, 2005 memorandum from Christopher Halpin to respondent
P-17	Non-affiliated terms and conditions (for identification only)
P-18	[Exhibit withdrawn]
P-19	June 14, 2004, e-mail from respondent to Board members re: "Personnel issue-Superintendent"
P-20	September 12, 2005 e-mail from respondent to Reni Mey regarding submission of form for September 2, 2005, absence
P-21	Six-page January 25, 2006, from Mr. Gaudio on behalf of Dr. Witmer (for identification only)
P-22	Board Policy No. 2131.2, Board-Superintendent Relationship (limited to paragraph 6)
P-23A	Petitioner's request for admissions
P-23B	Respondent's responses to requests for admissions
P-24A	Petitioner's supplemental requests for admissions

P-24B	Respondent's responses to supplemental requests for admissions
P-25	September 6-7, 2005, e-mails regarding update on litigation
P-26	December 2, 2002, letter from respondent to Malachi Kenney, Esq., requesting revisions to "Draft" Employment Contract
P-27	Draft Employment Contract, December 2002
P-27A	December 2, 2002 cover memorandum to P-27, from Malachi J. Kenney, Esq., to respondent
P-28	July 8, 2005 e-mail from respondent to Reni Mey regarding July 8 Weekly Update (for identification only)
P-29	June 11, 2004 e-mail re: 2003-2004 sick and vacation days [Excluded from evidence]
P-30	Draft general guide for personnel procedures (undated)
P-31	September 28, 2004, cover memorandum from Laurie Allocco to respondent re: draft personnel procedures "handbook"

For Respondent:

R-1	Salary and Benefits Comparison chart prepared by William Doering (undated)
R-2	February 6, 2004, letter from William Doering to the Board of Education regarding his compensation and benefits
R-3	Weekly Update - December 23, 2004
R-4	Weekly Update - December 22, 2003
R-5	July 2004 Memorandum to respondent from personnel office confirming leave balances
R-6	December 7, 2005, Prescription Blank excusing Christopher T. Halpin from work 12/16/05 through 1/19/06
R-7	June 10-14, 2004, e-mails between respondent and Rosie Shopp regarding leave rights
R-8	Board Policy No. 4151.1, Personal Illness and Injury, Health and Hardship

R-9	N.J.S.A. 18A:30-1, Definition of sick leave
R-10	January 10, 2006, Request to Be Absent Form submitted by respondent for December 27 and 28, 2005
R-11	May 6, 2005, e-mail from Christopher T. Halpin to respondent
R-12	October 12, 2005, e-mails between Christopher T. Halpin and Dawn Diorio
R-13	September 29, 2005, e-mail from Dawn Diorio to Christopher T. Halpin
R-15	January 4, 2006, e-mail from Dawn Diorio to Christopher Parton, Esq.
R-16	Interrogatories and Answers by Christopher Parton, Esq. (for identification only)
R-17	Board Policy No. 9010, Authority and Powers
R-18	December 5, 2005, memorandum from Chris Halpin to Christopher Parton, Esq. re "Investigation at Ocean Avenue"
R-19	December 19, 2005, e-mail from Christopher Parton, Esq. to Dawn Diorio, Joan Minnuies and respondent re "I.V."
R-20	September 29, 2004 Education Week article
R-21	September 12, 2005 e-mail from respondent to Reni Mey (also entered into evidence as Exhibit P-20)
R-22	Minutes of December 12, 2005, Board of Education Meeting
R-23	Minutes of December 12, 2005, Closed Session
R-24	Minutes of December 19, 2005, Board of Education Meeting
R-25	Minutes of December 19, 2005, Closed Session
R-26	Public Notice of December 19, 2005 Board of Education Meeting
R-27	Board of Education Bylaw No. 9325.4, "Voting Method"
R-28	December 13, 2005, letter from Christopher B. Parton, Esq. to respondent re: I.V.

#494-07

494-07

IN THE MATTER OF THE TENURE HEARING OF STEPHANIE E. BAILEY, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In June 2007, petitioning school district certified tenure charges against respondent – a tenured clerk typist – alleging unbecoming conduct and insubordination for behavior that included, *inter alia*: unsatisfactory work products, poor time management, and problems working with teachers, administrators, and staff. The petitioner attempted to serve respondent with the tenure charges through regular mail, certified mail, and subpoena service; the certified mail was refused, the regular mail was not returned, and the subpoena service indicated that the respondent was evading service. The respondent has denied receiving tenure charges since September 2007, declined to participate in a telephone conference on the matter, and failed to appear for both the pre-hearing conference and the subsequent hearing.

The ALJ found that: the facts in this matter have not been disputed; the testimony of petitioner's witnesses was credible; the actions of the respondent constituted insubordination and conduct unbecoming; respondent's conduct was sufficiently flagrant to justify her dismissal; and respondent declined to participate in the hearing. Accordingly, the ALJ deemed all tenure charges admitted, and ordered that respondent be dismissed from her tenured employment.

Upon independent review of the record, the Initial Decision of the OAL, and the respondent's exceptions thereto, the Commissioner adopts the Initial Decision as the final decision for the reasons expressed by the ALJ, and rejects the respondent's exceptions as without merit. The respondent is terminated from her tenured employment.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 26, 2007

#494-07

OAL DKT. NO. EDU 6985-07
AGENCY DKT. NO. 243-8/07

IN THE MATTER OF THE TENURE HEARING OF STEPHANIE E. BAILEY, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter,[1] the Initial Decision of the Office of Administrative Law, and the respondent's exceptions have been reviewed. The Commissioner adopts the Initial Decision as the final decision in this case – for the reasons articulated by the Administrative Law Judge – and rejects respondent's exceptions as without merit.

Respondent is terminated from her employment in petitioner's school district.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/26/07

Date of Mailing: 12/26/07

[1] The record does not include a transcript of the hearing.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6985-07
AGENCY DKT. NO. 243-8/07

IN THE MATTER OF THE
TENURE HEARING OF STEPANIE E. BAILEY,
SCHOOL DISRICT OF WILLINGBORO,
BURLINGTON COUNTY.

Joan Kane Josephson, Esq., for petitioner (Parker, McCay & Criscuolo, attorneys)

Stephanie Bailey, petitioner, failed to appear

Record Closed: November 2, 2007 Decided: November 14, 2007

BEFORE **DONALD J. STEIN,** ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges brought by petitioner, the Willingboro Township School District Board of Education (Board), against Stephanie Bailey, (Respondent) for unbecoming conduct, insubordination, and just cause.

PROCEDURAL HISTORY

On August 27, 2007, the Board adopted a resolution finding that probable cause supporting the tenure charges, and the charges were sufficient to warrant the respondent's dismissal from her tenured position.

The respondent has denied receiving tenure charges since September 5, 2007 (R-1). On June 25, 2007, the petitioner attempted to serve respondent the tenure charges through regular mail, certified mail, and subpoena service. The certified mail was refused, the regular mail was not returned, and the subpoena service indicated that the respondent was evading service (P-1). On September 5, 2007, respondent acknowledged that this action was pending and indicated she was not in receipt of tenure charges, but had made no attempt to obtain them. In addition, respondent received a letter on January 23, 2007, advising her that she was being suspended and that dismissal proceedings would be initiated (P-2 and P-3).

This matter was transmitted to the Office of Administrative Law (OAL) on September 13, 2007. An attempt was made to schedule a telephone conference in this matter, but the respondent declined to participate (C-1). As a result of the respondent's refusal to participate in a telephone conference, an in-person pre-hearing conference was rescheduled for October 23, 2007. The attorney for the petitioner appeared but the respondent failed to appear. As a result of her failure to appear, a hearing was scheduled October 29, 2007, at the OAL (Trenton), and the petitioner was instructed to personally serve Ms. Bailey with the hearing notice. On October 25, 2007, the respondent wrote to the undersigned and indicated that she would not appear in this hearing unless she received a signed order compelling her appearance. My secretary informed the respondent that Ms. Bailey had a right to appear and participate in the hearing but there would be no order compelling her appearance. Ms. Bailey did not appear and the hearing was conducted in her absence, and the record closed on that date.

STATEMENT OF FACTS

Lorene W. Moore testified she was the Interim Human Relations Director at the Willingboro Board of Education from October 25, 2007, until July 2007, and is familiar with the respondent.

Respondent was hired in 1993 as a full-time clerk typist and worked until 2002 as an attendance officer in the district. In 2002 she was transferred to another department but the job was terminated and she was transferred back to the position as attendance clerk at the high school. The position had the same duties as the job she held for nine years. The duties included organizing and entering all absences, tardiness and lateness, as well as generating bi-monthly reports and daily reports. The daily reports were required to be submitted by 11:00 a.m. to all teachers.

Respondent was given the opportunity for support and assistance, including training by Ms. Etheridge who has been experienced 30 years in this field. Ms. Etheridge was given permission to go over to the high school any time to help the respondent with her duties. Arrangements were also made with computer and programming personnel (John Mero and Dennis Devlin) to help her. Numerous meetings were set up but the respondent would either not show up at the meeting or tell Mr. Devlin or Mr. Mero that she was not available.

Ms. Moore testified about several incidents involving the respondent. On September 29, 2006, Friday, at 2:50 p.m., respondent came to Principal Tull's office and told him that she was unable to have the daily reports. Mr. Tull advised her that she had to get this done and her response was it's not possible unless she stays overnight. The principal directed her to get the attendance reports completed by 3:00 p.m. She had not completed the reports by the start of Monday, October 2, 2006 (P-6).

On October 3, 2006, the principal went to see the respondent to ask if she needed assistance. Respondent replied, "Did you read my e-mail?" and when the

principal answered, "No," respondent said, "You need to read my e-mail before you talk to me." (P-7).

Respondent also had issues with time management. Ms. Moore testified that everyone must adhere to a schedule and the clerical staff must coordinate lunch so that phones and other duties can be covered. Despite this requirement, the respondent would take lunch between 2:00 to 3:00 p.m. every day and not return to work. Respondent was informed on more than one occasion that she cannot take her lunch hour at 2:00 p.m. and that all staff must return from lunch by 1:30 p.m. because the school receives students, and parents need information assistance at the end of the day (P-9).

Ms. Moore testified that numerous attempts were made to help the respondent but she made no progress and displayed an unwillingness to work. Her performance deteriorated over time and she did not want to work. After her transfer, respondent initially refused to report to the high school and then missed the first two weeks of school because she decided to take a vacation.

Respondent had scheduling issues with Mr. Devlin and Mr. Mero, including not showing up when they came in for meetings. In addition, respondent failed to file monthly reports with the registrar's office. There were also incomplete postings of early dismissals for the main office and nurse's office. The attendance clerk was required to collect data from the two offices and post the data to the following day's attendance cover sheet. On many days, she did not record early dismissals.

There were problems with the attendance bulletin and students have been suspended based on the inaccuracies of the attendance bulletin. Assistant Principal Scott indicated mistakes were becoming commonplace and student loss of credit is and will be a major issue in the coming months.

Ms. Moore testified that the respondent was insubordinate. She disregarded the directives of her supervisors, including continually taking her late lunch at 2:00 p.m.

despite being told not to do so. She has also had verbal confrontations with the administrators, teachers and staff, who were asked to assist her. Teachers have asked not to have duty in the attendance office (P-10).

Mr. Scott supplied a list of issues because the administration had exhausted all efforts to help the respondent and she had become an unwilling employee (P-10). These issues included failure to file monthly reports, incomplete postings of early dismissals, attendance bulletin thoroughness, insubordination, and a problem working with teachers, administrators, and staff (P-11).

During this time Ms. Moore saw deterioration, not improvement. On October 11, 2006, Interim Principal Kelly indicated that Ms. Bailey had left the building at 11:00 a.m. and did not return (P-12).

Ms. Moore testified the respondent was experienced to do the job but was unwilling to do so. The Board attempted to assist her and such help was not successful.

FINDINGS OF FACT

The facts in this matter have not been disputed. Ms. Moore was an intelligent, articulate witness. The responded declined to participate in this hearing. Thus, the preceding information is undisputed and is thus **FOUND AS FACT**.

CONCLUSIONS OF LAW

Tenure is intended to protect teachers from dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause," but only after a hearing in compliance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -30.1.

In order to dismiss a tenured teacher, the underlying charges must be filed with the local Board of Education, N.J.S.A. 18A:6-11. The teacher is given an opportunity to submit a written statement in defense of the charges. After the Board has considered the charges, it must determine by majority vote whether there is probable cause to believe the charges are true. If so, the Board must decide whether the charges warrant dismissal or a reduction in salary. If the Board determines that the charges warrant either of these penalties, it must certify and forward the charges to the Commissioner of Education for a hearing.

If the Commissioner determines the charges are sufficient to warrant dismissal or a reduction in salary, the case is forwarded to the Office of Administrative Law for disposition, N.J.S.A. 18A:6-16, where the burden shall be on the Board to prove the charges by a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). Ultimately, it will be the State Board of Education that makes the final decision. In re Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990).

Unbecoming conduct and the lack of fitness to discharge the duties of a teacher are grounds for dismissal. N.J.S.A. 18A:6-10; In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974) (citing Laba v. Newark Board of Education, 23 N.J. 364 (1957)). Unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); Pietrunti v. Bd. of Educ. of Brick Tp., 128 N.J. Super. 149 (App. Div. 1974), certif. denied, 65 N.J. 573 (1974).

Insubordination has been held to mean the willful disregard of an employee's instructions" or "an act of disobedience to proper authority." Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45-46 (App. Div. 2001). Webster's New International Dictionary (2d Ed. 1943) defines insubordinate as "not submitting to authority; disobedient; mutinous." Respondent's conduct clearly falls within the above definitions. She has refused to take her lunch hour at the directed time and failed to

submit reports when told to do so. Respondent has demonstrated a willful refusal to work with her co-workers and supervisors, and has refused to meet deadlines and carry out her duties as directed by her supervisors.

For the above reasons, I **FIND** the actions of the respondent constitute insubordination, and conduct unbecoming. I further **FIND** that her conduct was sufficiently flagrant to justify her dismissal.

DECISION AND ORDER

The petitioner has, by a preponderance of the credible evidence, proven that the respondent has engaged in insubordination and conduct unbecoming.

It is therefore **ORDERED** that the respondent, Stephanie Bailey, be dismissed as a tenured employee in the School District of Willingboro.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 14, 2007
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: NOV 14 2007

Mailed to Parties: [redacted]

NOV 15 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/bdt/mh/cs

WITNESSES

For petitioner:

Lorene W. Moore

For respondent:

None

EXHIBITS

For court:

C-1 Letter from Stephanie Bailey, dated October 15, 2007

C-2 Letter from Stephanie Bailey, dated October 25, 2007

C-3 Letter from Stephanie Bailey to Department of Education, dated September 5, 2007

For petitioner:

P-1 Affidavit of Service

P-2 Letter to Stephanie Bailey dated January 23, 2007

P-3 Letter to Stephanie Bailey dated December 27, 2006

P-4 Personnel file of Stephanie Bailey

P-5 Statement of Charges

P-6 Letter to Stephanie Bailey dated October 2, 2006

P-7 Memorandum to Stephanie Bailey dated October 4, 2006

P-8 Email from Stephanie Bailey dated October 3, 2006

P-9 Memorandum from Interim Principal Elizabeth Kelly to Michael Scott, dated December 14, 2006

P-10 Memorandum from Interim Principal Elizabeth Kelly to Michael Scott, dated December 18, 2006

P-11 E-mails regarding assistance

P-12 Memorandum from Interim Principal Elizabeth Kelly to Edward A. Kern, Interim Superintendent, dated November 2, 2006

496-07

#496-07R

OAL DKT. NO EDU 8848-07
(EDU 727-06 ON REMAND)
AGENCY DKT. NO. 392-12/05

JENNIFER BOYCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, AND CAPE MAY COUNTY SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed consent order, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the terms of settlement which are memorialized in the consent order, and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/26/07

Date of Mailing: 12/27/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8848-07
(On Remand from EDU 727-06)
AGENCY DKT. NO. 392-12/05

JENNIFER BOYCE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, AND CAPE MAY COUNTY SUPERINTENDENT,
Respondent.

Ned P. Rogovoy, Esq., for petitioner

Michael P. Stanton, Esq., for respondent (Taht, Stanton & McCrosson, attorneys)

Record Closed: November 13, 2007 Decided: November 19, 2007

BEFORE **LILLARD E. LAW,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on November 7, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 19, 2007
DATE

Lillard E. Law
LILLARD E. LAW, ALJ, T/A

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

NOV 27 2007

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

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2007 AUG 13 P 1:11

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Petitioner

JENNIFER BOYCE

Petitioner

v.

OCEAN CITY BOARD OF EDUCATION and CAPE MAY COUNTY SUPERINTENDENT OF SCHOOLS

Respondents

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DOCKET NO. EDU 727-06
AGENCY DOCKET NO. 392-12/05

CONSENT ORDER

This matter having been opened to the Court by the filing of a Petition on behalf of Jennifer Boyce specifically alleging three different counts for relief, and the matter having been tried before Lillard E. Law, ALJ, T/A, with Ned P. Rogovoy, Esquire representing the petitioner; and Michael P. Stanton, Esquire representing the respondent, Ocean City Board of Education, and the record having been closed on March 5, 2007 and decided by Judge Law on April 11, 2007, and the Commissioner having remanded the decision on May 21, 2007 on the basis of the violation of the 60-day notice clause;

It is on this 13th day of November, 2007 STIPULATED as follows:

1. Count Two of the Petition was known by all parties and the Court to allege a violation of the 60-day notice clause and was always intended to demand that petitioner be paid for those 60 days.

2. The parties hereto acknowledged that Count Two always demanded a claim for the 60 days of pay and it is a fact that there was not 60 days worth of payment after termination. Therefore, the respondent should pay $12,320.80 representing the proper remuneration for 60 days, post termination.

Lillard E. Law

LILLARD E. LAW, ALJ, T/A

We hereby consent
to the within.

Ned P. Rogovoy, Esquire
Attorney for Petitioner,
Jennifer Boyce

Michael P. Stanton, Esquire
Attorney for Respondent,
Ocean City Board of Education

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782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Petitioner

JENNIFER BOYCE

Petitioner

v.

OCEAN CITY BOARD OF EDUCATION and CAPE MAY COUNTY SUPERINTENDENT OF SCHOOLS

Respondents

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DOCKET NO. EDU 727-06
AGENCY DOCKET NO. 392-12/05

CONSENT ORDER

This matter having been opened to the Court by the filing of a Petition on behalf of Jennifer Boyce specifically alleging three different counts for relief, and the matter having been tried before Lillard E. Law, ALJ, T/A, with Ned P. Rogovoy, Esquire representing the petitioner; and Michael P. Stanton, Esquire representing the respondent, Ocean City Board of Education, and the record having been closed on March 5, 2007 and decided by Judge Law on April 11, 2007, and the Commissioner having remanded the decision on May 21, 2007 on the basis of the violation of the 60-day notice clause;

It is on this 16th day of August, 2007 STIPULATED as follows:

1. Count Two of the Petition was known by all parties and the Court to allege a violation of the 60-day notice clause and was always intended to demand that petitioner be paid for those 60 days.

2. The parties hereto acknowledged that Count Two always demanded a claim for the 60 days of pay and it is a fact that there was not 60 days worth of payment after termination. Therefore, the respondent should pay $12,320.80 representing the proper remuneration for 60 days, post termination.

Lillard E. Law

LILLARD E. LAW, ALJ, T/A

We hereby consent
to the within.

Ned P. Rogovoy, Esquire
Attorney for Petitioner,
Jennifer Boyce

Michael P. Stanton, Esquire
Attorney for Respondent,
Ocean City Board of Education

495-07

#495-07

OAL DKT. NO EDU 11392-06
AGENCY DKT. NO. 313-9/06

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS CRANDALL,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF ELMWOOD PARK, BERGEN COUNTY.	:	DECISION

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the Board President and the Board Secretary/Business Administrator signed the settlement agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement[1] and further designating these individuals to sign the agreement on its behalf, nor – in the alternative – is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, this matter is hereby remanded to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

Lucille T Day

COMMISSIONER OF EDUCATION

Date of Decision: 12/26/07
Date of Mailing: 12/27/07

[1] It is noted that the agreement, on its face, is specifically contingent on such approval (Term #12).

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11392-06

AGENCY REF.NO.313-9/06

IN THE MATTER OF THE TENURE HEARING OF THOMAS CRANDALL, SCHOOL DISTRICT OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY.

Matthew P. DeMaria, Esq., for petitioner Elmwood Park Board of Education

Alfred F. Maurice, Esq., (Springstead & Maurice, attorneys) for respondent Thomas Crandall

Record Closed: November 8, 2007 Decided: November 14 2007

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on October 11, 2006 for determination as a contested case. A hearing was scheduled for March 12, 2007, which was adjourned by the respondent's attorney in order to allow CDS testing. The matter was rescheduled for July 16 and 18, 2007, which were adjourned due to a possible settlement. A telephone conference was rescheduled to July 26, 2007. A hearing was scheduled for November 21, 2007.

On November 8, 2007, the undersigned received the original copy of the Stipulation of Settlement. See attached copy.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signature of the parties and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

11/14/07
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 11-16-07

Mailed to Parties: Leslie Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 16 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
(201) 487-1414
Attorneys for Respondent

2007 NOV -8 P 5:18
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF THOMAS CRANDALL, ELMWOOD PARK SCHOOL DISTRICT, BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Agency Docket No. 313-9/06
OAL Docket No. EDUTH 11392-2006N

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Elmwood Park Board of Education (hereinafter referred to as the "Board"), and Thomas Crandall (hereinafter referred to as the "Crandall"), (hereinafter collectively referred to as the "Parties").

WHEREAS, Crandall has been employed by the Board as a custodian/bus driver since on or about September 1, 1997 and has obtained tenure and seniority in that position; and

WHEREAS, on September, 2006, the Board acted to suspend Crandall without pay and to initiate charges against him with respect to his employment by filing a proceeding with the Commissioner of Education, bearing Agency Reference No. 313-9/06; and

WHEREAS, on or about October, 2006, Crandall filed an Answer to the above-referenced charge denying the Board's allegations; and

WHEREAS, the matter was transmitted to the Office of Administrative Law as a contested case, and was assigned OAL Docket No. EDUTH 11392-2006N

WHEREAS, after a through investigation of the facts upon which the charges were made, it appears that the charges are not supported by the facts as initially alleged; and

WHEREAS, the Parties find it to be in their best interests to reach an amicable resolution so as to avoid the time and expense associated with litigation.

NOW, THEREFORE, in consideration of the promises and mutual covenants, understandings and mutual agreements contained in this Stipulation of Settlement, it is hereby agreed by and between the Board and Crandall as follows:

1. The Board shall immediately withdraw, with prejudice, the charges asserted under Agency Docket No. 313-9/06 OAL and Docket No. EDUTH 11392-2006N.

2. The Board shall immediately pay Crandall, in a lump sum, the 4-month salary withheld from him following the filing of the subject charges. The Board shall also make all appropriate pension contributions and pay any other benefits to Crandall as if he was fully employed at his regular position during said time. Crandall will submit a certification to the Board indicating that he did not engage in full-time employment during the 4 month suspension period. He engaged in sporadic part-time bus driving duties as he had prior to and following his suspension.

3. The Board agrees to reinstate Crandall his position without loss of pay, seniority or benefits. The Board may assign Crandall to the second shift as a custodian in its discretion and will pay Crandall in accord with the agreement between the Elmwood Park Education Association for services actually performed;

4. Crandall agrees to submit to regular or random drug testing, as the Board my direct, during the term of his employment. Any such testing shall be at the Board's expense.

5. In the event Crandall has a confirmed positive drug test for an illegal substance (not a prescription drug) as the result of such a test, Crandall may be immediately suspended without

pay and the Board may take such other action respecting Crandall's employment as it deems appropriate. Any drug tests ordered by the Board will be by a licensed, recognized testing agency which shall comply with all applicable regulations and standards applicable to conducting said tests.

6. In the event that Crandall successfully completes all such tests for a period of one year, the Board may reassign Crandall any position it deems appropriate including bus driving duties.

7. Crandall agrees to voluntarily retire from the district on or before October 29, 2009. If, however, the Board is satisfied with Crandall's performance, the Board may extend Crandall's employment in its discretion and with Crandall's consent. Crandall shall notify the Board prior to submitting his application for retirement so that the Board can make this determination.

8. Until the effective date of his retirement, Crandall shall continue to serve and be paid on the salary guide as a custodian for the Board commensurate with his length of service with the Board including the four-month suspension period referenced in paragraph 2. Nothing contained herein, however, shall be construed to restrict the Board's right to assign and/or transfer Crandall to any position within the District for which he is appropriately licensed or certified. It is expressly agreed that any such assignment and/or transfer shall not be considered disciplinary under N.J.S.A2. 34:13A-25 or N.J.S.A. 34:13A-27.

9. Nothing in this Stipulation of Settlement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Stipulation of Settlement should there be a default in performance.

10. Should any part, term or provision of this Stipulation of Settlement be declared or determined by a Court of competent jurisdiction, applying New Jersey law, to be illegal, invalid or unenforceable, the legality, validity or enforceability of the remaining parts, terms or

provisions, shall not be affected thereby. The provisions regarding Crandall's reinstatement and pay are deemed to be of the essence of this agreement without which this agreement is unenforceable.

11. The Parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Stipulation of Settlement and that each signs this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

12. The Parties acknowledge that this Stipulation of Settlement shall be submitted to the Board for its review and approval, and that the terms of this Stipulation of Settlement are expressly made subject to and contingent upon such review and approval. In the event that the Board disapproves and/or rejects any of the terms contained herein, this Stipulation of Settlement shall be null and void and the Parties shall return to the same positions which they held prior to this Stipulation of Settlement.

13. This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

14. This Stipulation of Settlement and compliance with this Stipulation of Settlement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

15. This Stipulation of Settlement sets forth the entire agreement between the Board and Crandall and fully supersedes any and all prior agreements or understandings, written or oral, between the Parties pertaining to the subject matter hereof.

16. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

17. All terms of this Stipulation of Settlement are deemed material. This document may not be altered, amended, modified or revoked, except by an instrument executed in writing by the Parties.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS: ELMWOOD PARK BOARD OF EDUCATION

Board Secretary/Business Administrator BY: Board President

Dated: 11-1-07 Dated: 11-1-07

WITNESS: BY: Thomas Crandall
THOMAS CRANDALL

Dated: 8/20/07 Dated: 8-20-07

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
(201) 487-1414
Attorneys for Respondent

IN THE MATTER OF THE TENURE HEARING OF,
THOMAS CRANDALL,
ELMWOOD PARK SCHOOL DISTRICT,
BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

Agency Docket No. 313-9/06

THOMAS CRANDALL, being of full age certifies and says:

1. I am the respondent in the above referenced proceeding.

2. I have entered into a settlement agreement with the Board that provides for the payment of my salary that was withheld during a four-month period in 2006-2007 in which I was suspended.

3. I was not employed on a full-time basis at any time during the suspension period.

4. I did engage in sporadic, part-time employment in the evenings and on weekends as I had done prior to my suspension and which I expect to do in the future.

I certify that the forgoing statements made by me are true. I am aware that if they are willfully false, I am subject to punishment.

Dated: August 20, 2007

Thomas Crandall

Thomas Crandall

497-08

#497-07S

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW GALL,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF HUMAN SERVICES, NEW LISBON	:	
DEVELOPMENTAL CENTER.	:	
	:	

SYNOPSIS

The New Jersey State Department of Human Services (DHS) certified tenure charges of unbecoming conduct against respondent – a tenured teacher in an institution for the developmentally disabled – for allegedly committing physical abuse of a resident client following an unprovoked attack on respondent by the client. Respondent contends that he struck the client in self defense after he received a blow to his chest, near his implanted defibrillator.

The ALJ adopted the parties' stipulation of facts, and found that there were internal inconsistencies in the testimony of petitioner's two witnesses, but that respondent's testimony was credible. The ALJ concluded that respondent's reflexive action to protect himself does not constitute client abuse; that respondent's testimony that he did not intend to strike the client, but to shield himself from a fatal blow was credible; and that the tenure charges against respondent should be dismissed. The ALJ ordered that respondent be reinstated to his former position.

The Commissioner rejected the Initial Decision, finding that: the respondent's own credible testimony states that he struck the client from behind after unsuccessfully attempting to shield himself from a blow to the chest; respondent's strike to the client was not defensive, but rather a "spontaneous reactive assault" which cannot be fairly characterized as self-defense; respondent violated the DHS's policy that unequivocally prohibits the striking of clients, and classifies even the least of such actions as client abuse; and that the DHS policy requiring dismissal for even one substantiated instance of abuse is clear on its face, and has been applied and upheld elsewhere in the interest of ensuring the safety of the uniquely vulnerable clientele served by the Division of Developmental Disabilities. The Commissioner directed that respondent be dismissed from his tenured teaching position, and that a copy of this decision be transmitted to the State Board of Examiners for action as it deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 26, 2007

OAL DKT. NO. EDU 2953-07
AGENCY DKT. NO. 114-4/07

RECORD SEALED[1]

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW GALL,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF HUMAN SERVICES, NEW LISBON	:	
DEVELOPMENTAL CENTER.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the Department of Human Services' (DHS) exceptions and the respondent's reply, both duly filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

On exception, the DHS urges the Commissioner to reject the Initial Decision as fundamentally flawed because the Administrative Law Judge's (ALJ) findings of fact are based on inaccurate recollection and reporting of hearing testimony[2] and thus cannot be found to be based on sufficient, competent or credible evidence. Specifically, the DHS asserts, the ALJ erroneously discounted the testimony of DHS witness Marsha Bush because it was (purportedly) internally inconsistent and also inconsistent with her prior written statement (Exhibit P-12); according to the DHS, however, examination of the hearing transcript at T85, 7-8 and T90, 17-24[3] shows that

[1] Although not referenced in the Initial Decision, a Consent Confidentiality and Protective Order – issued on August 8, 2007 and duly executed by the parties – is included within the case file. (See also the transcript of hearing, at 4-6.) To ensure the confidentiality of all information about DHS clients, the Commissioner deems the record of this matter sealed in its entirety.

[2] The DHS notes that the ALJ's decision was prepared without benefit of a transcript, which was ordered subsequent to issuance of the Initial Decision. (DHS's Exceptions at 4-5)

[3] These and all subsequent similar citations refer to the transcript of the hearing held on August 8, 2007, indicating page number(s), followed by line number(s).

Ms. Bush – who was the only eyewitness to the actual contact between the respondent's hand and the back of D.K.'s head, and whose testimony is thus integral to the DHS's ability to prove that the respondent affirmatively struck a client – was entirely consistent and unwavering in her assertion that she saw the respondent hit D.K. (Petitioner's Exceptions at 3-7) The DHS contends that "the misrepresentation of Ms. Bush's testimony as to whether or not she saw Respondent hit D.K. corrupts the entire initial decision," and entitles the Commissioner to make new or modified findings of fact pursuant to *N.J.S.A.* 52-14B-10(c) and (d). (*Id.* at 6-7)

Because the ALJ discounted Ms. Bush's testimony, the DHS asserts, he did not consider that time must necessarily have lapsed between D.K.'s striking of the respondent (which Ms. Bush did not see) and the respondent's striking of D.K. (which she did), leading him to conclude – without sufficient credible evidence in the record – that the respondent's action was "reflexive," an automatic response to a stimulus in order to defend himself. (Petitioner's Exceptions at 8-12) In addition to the time that must have lapsed in order for Ms. Bush to have missed D.K.'s action but seen the respondent's, the DHS observes, the respondent was sitting when D.K. struck him but standing when he struck D.K., and the respondent himself admitted at several points that he hit D.K. because D.K. hit him. Clearly, the DHS reasons, the respondent was no longer defending himself when he slapped D.K., and his action was not a reflexive defensive reaction as found by the ALJ, but a separate act of physical abuse in response to being punched by D.K. The DHS explains:

> D.K.'s body position (back toward Respondent) demonstrates that he was no longer a threat to Respondent. Slapping an individual with a developmental disability in the back of the head as that person is turned to walk away cannot be construed as a reflexive

> action of self defense. The evidence supports [the DHS's] position because when Respondent struck D.K., D.K. was no longer a threat to Respondent. Respondent's reaction was not to defend himself; Respondent had already unsuccessfully defended himself. Respondent went after D.K. to get back at him. The fact that Respondent was concerned for his personal safety and has a pacemaker/defibrillator does not justify Respondent hitting a client who has his back turned to Respondent. (*Id.* at 9)

The DHS additionally renews its argument, set forth in the Initial Decision at 14-17, that even if the respondent's action is found to have been reflexive in nature or in self-defense, termination is still mandated under controlling agency policy as set forth in Administrative Order 4:08 and Supplement 3. The DHS reiterates that the "physical abuse" for which this policy permits no tolerance expressly: 1) includes slapping; 2) need not result in physical harm to the victim; and 3) does not require the perpetrator to have acted with intent to harm the victim, or indeed, even to strike the victim. Citing, as it did before the ALJ, the upholding of employee terminations in *In the Matter of Joshua Famakinwa, Hagedorn Gero-Psychiatric Hospital, Department of Human Services*, decided by the Merit System Board on July 14, 2004, and *In the Matter of Monica Romans, North Jersey Developmental Center, Department of Human Services*, decided by the Merit System Board on February 9, 2005, the DHS notes that many clients receiving services from the Division of Developmental Disabilities tend to be violent, and that the referenced Administrative Order and Supplement – with which the respondent was undisputedly familiar – have been promulgated precisely so that employees are aware of what is considered abuse and understand that they cannot respond in certain ways when a client engages in physical aggression. (Petitioner's Exceptions at 12-19)

In reply, the respondent first takes issue with the DHS's contention that the Initial Decision is fatally flawed due to the ALJ's recollection of testimony and

assessment of witness credibility. The respondent contends that: 1) the ALJ's confusion about – and consequent dismissal of – Ms. Bush's testimony is not a "critical error" as claimed by the DHS, since the respondent never denied slapping D.K.; 2) the ALJ's conclusion that Ms. Jones' testimony was incredible was entirely correct based on its internal inconsistencies and its conflict with her prior written statement; and 3) the ALJ's assessment of the respondent's credibility is fully supported by the record and cannot be shown to be – in any way – arbitrary, capricious or unreasonable, as is required in order to be reversed pursuant to *N.J.S.A.* 52:14B-10(c). Therefore, the respondent contends, his version of events must be accepted as found by the ALJ, who concluded that the respondent's action was one of reflexive self-defense in response to D.K.'s unexpected and potentially life-threatening blow. (Respondent's Reply at 3-5)

The respondent then dismisses as "absurd" the DHS's contention that – even if taken reflexively in self-defense as found by the ALJ – respondent's action still constituted abuse of a client. According to the respondent, an unthinking reflex under the circumstances here present – especially in a man who has worked at New Lisbon for over 40 years without ever hitting clients, even when they hit him – cannot be viewed as similar to cases where there was no threat to the staff member's life; nor can it be viewed as a failure to apply the self-defense policies and procedures in which DHS staff members are trained, since nothing therein "directs an employee how to handle a situation where a client embarks on a surprise attack and punches an employee in the chest area where a life-saving device is implanted." Simply stated, the respondent concludes, the incident underlying the DHS's tenure charge must be viewed as "an aberration in a career of more than 40 years in a most unusual circumstance," so that the

ALJ's decision reinstating the respondent with full back pay and benefits is correct and should be adopted by the Commissioner. (Respondent's Reply at 6-7, quotations at 7)

Upon careful review and consideration, the Commissioner has determined to reject the Initial Decision.

Initially, the Commissioner concurs with the DHS that several of the ALJ's credibility determinations are subject to question. As to Ms. Bush, the DHS is correct in its contention that the Initial Decision does not accurately reflect her testimony as recorded in the hearing transcript, and that the inconsistency on which the ALJ relies in discounting such testimony does not, in fact, exist. As to Ms. Jones – although some of her responses do, indeed, reveal a lack of precision in recollection and articulation, and a questionable sense of time – during the course of her testimony on direct and cross-examination, it became clear that when she said she "saw" the respondent hit D.K., what she meant was that – while in the vicinity, but turned away from the two men – she heard a slap that caused her to turn back toward them, whereupon she saw the respondent's hand retreating from behind D.K.; thus, although she did not, in fact, "see" the actual physical contact between the two men, she clearly witnessed its sound and immediate aftermath, and her account of these events is consonant with those of other witnesses, including the respondent. As to Mr. Waite, his reliance on the accounts of others without independent investigation or inquiry is not at all inappropriate, since, once the fact that the respondent struck D.K. was established – as it was by the respondent's own admission – Mr. Waite's actions were guided by policies that did not allow for consideration of circumstances or mitigating factors, so that no further inquiry or investigation was required; indeed, the primary import of his testimony lies in his

descriptions of applicable DHS policies and procedures, rather than in his personal knowledge of the event underlying the charges.

However, even assuming *arguendo* that the ALJ erred in his credibility determinations, the Commissioner finds no need to rely on the testimony of any external witness in order to reconstruct the events underlying the DHS's tenure charge because there is no dispute about the credibility of the respondent, and his account is both internally consistent and substantially corroborated by the record.

There is no doubt – based on the testimony of all witnesses, including the respondent – that: 1) the respondent was seated when D.K. unexpectedly came up to him and punched him in the chest, in the area of his implanted pacemaker and defibrillator; 2) the respondent did not see D.K. coming and was unable to shield himself from the blow, although he had raised his arms in a last-minute attempt to do so; 3) the respondent was shocked by the blow and horrified by its potential consequences to his implant; 4) after D.K. had turned and begun to walk away from the respondent immediately after punching him, the respondent – who by now was standing with arms still raised – struck D.K. by smacking him from behind. In the respondent's own words on direct examination:

Q. And what was your reaction when you saw D.K. coming towards you with a closed fist?
A. I put my arms up to block him, but he got through anyway, and then he turned and I smacked him on the back.
Q. Okay. And why did you do that?
A. Why?
Q. Why did you slap him on the back?
A. It was a defensive reaction.
Q. Okay. And were you at all concerned that he would come back to you?
A. Yes, but he didn't.

Q. Okay. And when you say "defensive reaction," describe what you mean by that.
A. Well, I was concerned, you know, being hurt, being punched. I wanted to stop him.
Q. And what was your concern?
A. My safety.
Q. And—
A. My life even, maybe.
Q. What – well what did you – what did you think could have happened as a result of being punched?
A. Well, if he caught me in the defibrillator, he might detach a wire and I don't know what would happen then.

....

Q. Okay. And in your view, were you protecting yourself on that day?
A. Yes.

....

Q. ...Was there any period of time between – any significant period of time between when Mr. K punched you in the chest and when you put your hands up and slapped him?
A. This all went in a second.
Q. Okay. And could you describe why, when you slapped him, shoved him, whatever you want to call it, why it was in the back?
A. It was in the back, not in the head.
Q. Right, but why was it – if he's punching you why –
A. Yeah, he punched me and turned immediately.
Q. Can you do a description of that for the Judge, how this happened? Just show him how D.K. hit you?
A. Yeah. He punched me and turned around to go.
Q. Show the Judge again.
A. Yeah. He punched me and turned to flee.
Q. And then you?
A. Yeah.
Q. And this was all within a matter of seconds?
A. Two seconds at the most.

Ms. Manus: Your honor, I just want to reflect for the record that Mr. Gall raised his hand and made a slapping motion in the air for the record....After Mr. D.K. turned around the respondent raised his hand and made a slapping motion in the air for the Court to see.

The Court: Thank you.

Ms. Cipparulo: And I would just like to clarify Mr. Gall was demonstrating what occurred. He showed D.K. punch him in the chest and turn.

....

Reading from R-2: "I was struck by an individual, D.K., on my chest, just missing my pacemaker defibrillator. I put my arm up to block his strike but was struck anyway. My first reaction was to slap him on his back. I did not punch him.

...

Reading from R-6: "My slapping was not premeditated, it was a reaction of self-defense."

(T106-114)

On Cross-Examination:

Q. And isn't it true that after the incident, when questioned by Ms. Jones, you're still in the cottage, Ms. Jones asked you "Why have you hit him?" You responded, "Because he hit me?"
A. Yes.
....
Q. ....as D.K. came towards you, you put your hands up to defend yourself, but you got hit anyway. Is that correct, that you stated that?
A. When he was right there I put my arms up.
Q. Hands up and you got hit?
A. I didn't realize what he was going to do until that point.
Q. But you got hit anyway?
A. Yes.
Q. So weren't there two different things going on here? One was the putting your hands up to defend yourself, and the second part was that – after Mr. D.K. turned around, you slapped him? So first, you defended yourself, but unfortunately, you got hit. And then you turned around and slapped D.K., isn't that really what happened?
A. My arms were still up and I came down as he turned around and slapped him.

(T117-119)

On Redirect Examination:

Q. When your hand came down on D.K., what was your intention?
A. Just a reaction, it was.

(T119)

In the Initial Decision, the ALJ concluded that the respondent "did not intend to strike D.K., but rather, attempted to shield himself from what could have been a fatal blow." (Initial Decision at 19) However, the record provides no basis whatsoever for this conclusion; to the contrary, what the record shows instead is that the respondent

struck D.K. from behind *after* having unsuccessfully attempted to shield himself, and that he did so – as he himself stated at the time of the event – because D.K. hit him. Although respondent maintains that his slapping of D.K. was to protect himself, that assessment is belied by his own account of events – wherein he states that D.K. immediately turned to flee after punching him and was heading away from him at the time of the slap; thus, there was no reason for a defensive counter-strike, even assuming such a tactic were allowed under DHS policy (which it is not). The Commissioner also notes that, although the respondent's arms were still in the air from his attempt at shielding himself while seated, the respondent does not claim that his striking of D.K. was the result of inadvertent bodily contact. Indeed, what the record clearly shows to have transpired is that – all within the space of a few seconds – the respondent was unexpectedly struck in an area of his body susceptible to serious, possibly even life-threatening injury, and, once the shock of the blow had registered, he instantly responded with what has elsewhere been aptly termed a "spontaneous reactive assault." (*Famakinwa*, supra, at 3)

In the present context, then, regardless of whether it was on the head (as charged by the DHS based on the statement of Ms. Bush) or on the back (as stated by the respondent), the salient fact is that the respondent slapped D.K under circumstances where the contact was not accidental and D.K. no longer posed a clear and immediate threat so as to enable the respondent's action to be fairly characterized as self-defense.[4] Therefore, in order to prevail in its charge of unbecoming conduct, the DHS need not show that sufficient time passed between D.K.'s punch and the respondent's slap in order for the respondent to have made a conscious decision to smack D.K. in retaliation for

[4] Indeed, even if D.K. *had* posed a threat, DHS policy clearly precluded the respondent from striking him in self-defense.

being struck: However instantaneous or instinctive his action may have been, and however understandable the urge to lash out under circumstances where he had just been attacked in a vital area and feared he might possibly be attacked again, the fact remains that by losing control and slapping D.K. as he did, the respondent violated the DHS's policy unequivocally prohibiting the striking of clients and classifying even the least of such actions as client abuse.

Having thus found that the DHS has proven its charge of unbecoming conduct against the respondent, the Commissioner must now consider whether the respondent's action requires his dismissal from tenured employment. Unfortunately, the Commissioner perceives little room for discretion in this regard, in light of operative DHS policy that is clear on its face and has been applied and upheld elsewhere in the interest of ensuring the safety of vulnerable Division of Developmental Disabilities (DDD) clients.

The DHS, as the agency responsible for and having expertise in institutions serving the developmentally disabled, has stressed that it "must protect its clients because they are extremely vulnerable to physical abuse in light of the fact that they can, at times, be both aggressive and violent and they do not comprehend their actions," and that the "nature of the population served necessitates that [the DHS] strictly abide by its prohibition against abuse and terminate all employees [who] have committed an act of physical abuse" as defined in the applicable policy. (Initial Decision at 16, quoting DHS's Post-hearing Summation at 12) Moreover, in the developmental disability environment – where both parties and all witnesses freely acknowledge that clients are frequently and unpredictably violent – a reaction that is understandable and

even tolerable in other contexts necessarily takes on a different import and raises questions about the employee's ability to function henceforth in the performance of his or her duties with the full faith, trust and confidence of the DHS in accordance with the agency's strict client protection policies – particularly where, as here, similar situations are almost certain to arise in the future. Given, then, that the policy in question in this matter is rooted in a compelling public interest, has been consistently applied, and reflects the reasoned judgment of the agency of expertise as to the heightened standard of employee self-control that must be maintained in institutions serving the developmentally disabled, *In the Matter of Tammy Herrmann*, 192 *N.J.* 19 (2007), the Commissioner cannot – as the respondent suggests she should, as evidenced by the cases cited in support of his position – judge this matter by norms and precedents arising in the altogether different context of the public school setting.

In so holding, the Commissioner recognizes that termination is an extremely harsh penalty for a single instance of loss of control by a teacher who has provided over 41 years of otherwise satisfactory service, and she sincerely regrets the necessity to impose it here.[5] However – notwithstanding that the Legislature has placed jurisdiction over tenure proceedings against teachers in State institutions with the Commissioner of Education – in deciding such matters, the specific rules and special considerations unique to the setting in which the charged teacher is employed, the views

[5] Given that termination of employment through tenure charges of unbecoming conduct – in addition to having serious consequences in its own right – raises the possibility of action against a teaching staff member's certificate by the State Board of Examiners and detrimental impact on the member's pension, the Commissioner is somewhat perplexed by the absence (at least on record) of any attempts by the parties to explore alternatives such as retirement or assignment to duties without direct client contact. This is particularly so in light of the respondent's long service with the agency and the existence of a unique physical vulnerability which places him at heightened risk in an environment where staff are frequently and unpredictably struck by violent clients.

of the appointing authority with expertise in such settings, and the prior determinations of the Merit System Board with respect to non-teaching employees in the same setting, cannot be ignored – even where similar conduct in a different context might well have resulted a lesser penalty.

Accordingly, for the reasons set forth above, the Commissioner rejects the Initial Decision of the OAL and directs that the respondent be dismissed from tenured employment. Pursuant to *N.J.A.C.* 6A:9-17.6(a)1, this matter shall be forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 12/26/07

Date of Mailing: 12/27/07

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2953-07
AGENCY DKT. NO. 114-4/07

IN THE MATTER OF THE TENURE HEARING OF ANDREW GALL, NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, NEW LISBON DEVELOPMENTAL CENTER

Laurie P. Manus, Deputy Attorney General, for petitioner (Anne Milgram, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esquire, for respondent (Weissman and Mintz, attorneys)

Record Closed: August 31, 2007 Decided: September 11, 2007

BEFORE LILLARD E. LAW, ALJ t/a

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey State Department of Human Services (petitioner), alleges that Andrew Gall (respondent), a tenured teaching staff member employed by the New Lisbon Developmental Center, committed physical abuse of a resident client and, therefore, is guilty of conduct unbecoming a teaching staff member. Petitioner seeks to terminate respondent's employment status to which respondent appeals.

Petitioner attempted to introduce into evidence a Confidential Incident Statement of Mr. Mac Williams, respondent's immediate supervisor, (Exhibit 8), to which respondent objected. Mr. Mac Williams was not present at the hearing and, therefore, not subject to cross-examination by respondent's attorney. Petitioner asserted that the business rule exception (N.J.R.E. 803 (c) (5)), together with the application of the AOL's Residuum Rule (N.J.A.C. 1:1-15.5), would apply and that the hearsay evidence was admissible. The statement by Mr. Mac Williams was admitted, which states, in pertinent part, as follows:

> I received a call from Rekita McNeil that Andy Gall was to come to P.R.S. She said that Andy hit an Individual and Tracy Hopkins had reported. I asked Andy what happened? He said he hit me and I hit him back.
>
> He did not say how or where he hit him. No one else was present when he told me that. (Exhibit 8)

Mr. Waite testified respondent was then placed on "no contact" with clients and was suspended from his employment position with pay. Subsequently, respondent was suspended without pay on February 23, 2007, by Deborah A. Cormier, Assistant Superintendent (Exhibit 4). On April 20, 2007, Donald Mangus submitted to the Commissioner of Education the Certificate of Determination by the Director of Labor Relations, Tenure Charges constituting Unbecoming Conduct and, Statement of Evidence and Appendix of Exhibits (Exhibit 7).

Mr. Waite testified that the progressive discipline policy was not applied in this matter because the first infraction of abuse of a client called for the employee's dismissal. He asserted that any mitigating circumstances were not taken under consideration when imposing the penalty against respondent.

On cross-examination, Waite admitted he did not know respondent, however he was familiar with respondent's employment record. Mr. Waite

described respondent's prior disciplinary record as de minimis and admitted he had not observed any prior disciplinary action by respondent.

Mr. Waite admitted he did not talk with any one about the alleged incident, nor, did he talk with respondent concerning the incident. He further admitted that he did not know that respondent had a pacemaker/defibrillator implanted in his chest. He admitted he did not consider the fact that D.K., the resident client, had hit respondent on respondent's chest near the implanted pacemaker/defibrillator. Waite admitted that employees may protect themselves for attacks by resident patients.

Mr. Waite asserted that, based upon other investigations, he made the recommendation to terminate respondent.

Francillia Jones, Supervisor of petitioner's Cedar Cottage, testified that in January 2007, she was the supervisor at the institution's Vine Cottage, where the alleged incident between patient D.K. and respondent occurred. She was in the Vine Cottage Activities with Daily Living Room (ADL) with D.K. and respondent. Ms. Jones asserted that D.K. came into the ADL, approached respondent and struck respondent. As she turned around to leave the ADL, she saw respondent hit D.K. She testified she told D.K. that, " it was not nice" and D.K. "should not hit Mr. Gall." Ms. Jones admitted, however, she did not see respondent's actual contact with D.K. She immediately reported the incident to her supervisor.

Ms. Jones testified that she immediately completed reporting the incident on petitioner's Confidential Incident Statement form (Exhibit 10), where, among other things, she set forth her observations. She testified that D.K. was subsequently observed by the nurse on duty at the time and that D.K. was "o.k."

Ms. Jones asserted she and other employees are trained to deal with aggressive clients by blocking a strike or hit. The employee is trained to move away from the aggressive client when the client attempts to hit or strike.

On cross-examination, Ms. Jones testified, among other things, that D.K. was approximately 5 feet, 10 inches tall with an aggressive behavior. She asserted that she too had been hit by D.K. in the past. She stated that she instinctively puts her hands up in front of her body when she observes D.K. coming towards her to protect herself from his aggressive behavior.

Ms. Jones prepared a Confidential Incident Statement (Exhibit 10), which read on the hearing record, as follows:

> On Tuesday 1-30-07 at approx. 1:00 p.m. staff (Ms. Bush) asked me to help her with Mr. [K] whom had left ADL FAS #207 during activities for leisure. Mr.[K] was in the lobby headed towards the back lounge. I redirected Mr. [K] back into FAS #207, which he went without any problem (willingly). Mr. [K] went in FAS 207 first I entered next & Ms. Bush entered after me. Upon entering the room I saw staff Mr. Gall sitting in the chair by the yard door. Mr. [K] suddenly hit Mr. Gall. I counsiled [sic] Mr. [K] by telling him not to hit anyone. I turned to walk out of the room. I then turned back around and witnessed Mr. Gall hit Mr. [K] from the back. I said to Mr. Gall, why did you hit him? He stated to me, "He hit me first." I said to him don't hit him again. I then had Mr. [K] seen by the nurse and notified my HCTS. Mr. Gall was then asked to leave the building. I did not see exactly where on the body Mr. [K] was hit because Mr. [K] was facing me and Mr. Gall was behind Mr. [K]. (Exhibit 10)

Ms. Jones testified, among other things, that she observed D.K. approach Mr. Gall and with a closed fist, D.K. struck Mr. Gall on Mr. Gall's chest. Ms. Jones asserted that D.K. is strong. She further asserted that she did not actually see Mr. Gall hit D.K. She admitted that D.K. is aggressive and that she has put her hands up in front of her body to protect herself from D.K.'s behavior.

Marsha Bush, Cottage Training Technician at petitioner's Vine Cottage, testified that she knows D.K. and witnessed the incident between D.K. and respondent. She asserted that she has had experience with aggressive clients, has been hit by clients,

and received training in how to deal them. She executed a Confidential Incident Report (Exhibit 12) following the incident between D.K. and respondent. She stated that she observed respondent hit D.K. Ms. Bush read her statement on the Confidential Incident Report into the hearing record.

On cross-examination, Ms. Bush testified, among other things, and admitted she did not see respondent hit client D.K. She asserted that she observed respondent's hand raised, which could have been to protect respondent, and then heard a hit, which she described as "skin-on-skin." She did not witness a blow to D.K. and asserted that D.K. was not hurt as a result of the incident. She also testified that she did not observe Ms. Jones counsel D.K. after the incident. Ms. Bush stated that D.K. was the most aggressive person in the room at the time of the incident.

Respondent testified on his own behalf asserting, among other things, that he was first employed by petitioner on or about September 1965, as a physical education teacher. He has since held four different positions with petitioner. His most recent employment consisted of conducting a workshop and group assembly.

Respondent referred to his Performance Assessment Review (R-1), asserting that he had never received a poor job evaluation. He asserted that he held a satisfactory rating and the assessment was an accurate evaluation of his performance.

Respondent testified that on January 30, 2007, he was assigned to the Vine Cottage for lunch duty, between 12:15 p.m. and 1:00 p.m. He stated that he was familiar with D.K. who has been a resident client for 35 years. Respondent knew D.K. to be aggressive since D.K.'s early childhood.

On January 31, 2007, respondent was sitting by the doorway when, he asserted, D.K. came out of nowhere and hit respondent in his chest with a closed fist, near respondent's implanted pacemaker/defibrillator. Respondent contended that he had an immediate defensive reaction to D.K.'s action and, as a result, struck D.K.

At the hearing, respondent removed his shirt to show the pacemaker/defibrillator to the undersigned. It was observed that the implant was oblong, approximately 3-1/2 to 4 inches long and approximately 2-1/2 inches wide. It protruded from the layer of his skin, approximately ¼ to ¾ inches on the upper left side of respondent's chest.

Respondent asserted he was concerned because he had passed out in the year 2000 with an irregular heart beat. He stated that the defibrillator will shock him to revive him when, or if, he does pass-out. Respondent stated that the incident involving D.K. happened in a few short seconds. After D.K. hit respondent, D.K. immediately turned his body around and with respondent's reactive response, struck the back of D.K.'s head.

Respondent admitted he had received petitioner's document entitled, "Handle With Care," its behavior management system policy. He asserted, moreover, that the policy does allow an employee to protect him/her self.

Respondent asserted that he did not see anyone attempt to stop D.K. Respondent stayed in the lunchroom area until after the lunch concluded. He did not see Ms. Jones counsel D.K.

Respondent read on the hearing record the Confidential Incident Report he generated on January 30, 2007, as follows:

> I work at E.I. (Esteem Industries). I am assigned to Vine cottage between 12:15 PM to 1:00 PM. On Tues. 1-30-07 while in a Vine classroom, I was struck by an individual, [D.K], on my chest, just missing my pacemaker-defibrillator. I put my arm up to block his strike, but was struck anyway. My first reaction was to slap him on his back. I did not punch him. The shift supervisor (I don't know her name) was standing at the doorway & saw me slap him. She told me not to do that again. I said I would not do that again. While (AG) this was happening, the individuals were watching a soap opera on TV, The Young & Restless. I was not asked to leave, so I stayed until 1:00 P.M. then left & went to E.I. I estimate that this incident occurred about 12:45 P.M. (R-2, Exhibit 6)

In his answer to the tenure charges lodged against him, respondent replied to Anita Pinkas, in pertinent part, as follows:

> This communication is in response to the communication from you on March 15, 2007, concerning my striking an individual on Jan. 30, 2007.
>
> 1. I did not strike the individual on the back of the head as stated by Miss Bush.
>
> 2. I do not recall being asked to leave Vine Cottage after the Incident as stated by Miss Jones.
>
> 3. There was no lapse of time between Mr.[K] punching me and my slapping him on his back as stated by Miss Jones.
>
> 4. I agree with Miss Jones that I would not hit anyone, after she told me not to hit him again.
>
> 5. My slapping him was not premeditated. It was a reaction of self-defense.
>
> 6. I have worked at New Lisbon Developmental Center for 41 1/2 years and have a clean record, including no abuse. (R-6, Exhibit 6)

Respondent asserted that this description of the event was true and accurate. He stated that he was very upset over the incident and sorry he did it. However, D.K. was not injured and respondent testified that he reacted in self-defense to an aggressive action of D.K.

SUMMATION BY THE PARTIES

Respondent's Position

Respondent concedes that petitioner's progressive discipline policy is not applicable in the instant matter.

Respondent has serious heart problems with two medical implants in his chest. He has known D.K. since D.K. was placed in the Developmental Center as a child. Respondent raised his hand to defend against D.K.'s strike directed toward respondent's left front side of his body where the medial implants are located. Respondent argues that his defensive reaction to D.K.'s attack was not abuse but, rather, an act of self-defense.

Respondent seeks to have the tenure charges against him dismissed and that he be reinstated, with full back pay, to his teaching position with petitioner.

Petitioner's Position

Petitioner asserts that this case arises from the termination of respondent for conduct unbecoming a teacher, specifically, the physical abuse of D.K. Petitioner filed tenure charges pursuant to N.J.S.A. 18A:60-2 and N.J.A.C. 6A:3-5.4. Don Mangus, the Director of Employee Relations for petitioner, reviewed the affidavit of Joseph Waite, the Employee Relations Coordinator at New Lisbon Developmental Center (NLDC) detailing the charges of "Conduct Unbecoming," and Mr. Mangus determined that the charges warranted dismissal. N.J.A.C. 10:11-1.8 (D). Mr. Mangus forwarded the tenure charges along with a certificate of determination to the Commissioner of Education. N.J.A.C. 6A:3-5.4 (c). Respondent filed an answer contesting the charges, and the Commissioner transmitted the matter to the Office of Administrative Law.

At the hearing, petitioner presented the following witnesses: Mr. Waite, Francillia Jones, cottage training supervisor at NLDC; and Marsha Bush, cottage training technician. Respondent testified on his own behalf, but offered no other witnesses. In this summation, petitioner relies on the exhibits entered at the hearing, the "Handle With Care" manual was requested by the ALJ at the conclusion of the testimony, and the applicable statutes and regulations.

Background

Petitioner's Division of Developmental Disabilities (DDD) provides specialized services for the social, personal, physical or economic habilitation of eligible individuals with developmental disabilities. N.J.S.A. 30:6d-24 to 27. NLDC is a DDD facility which provides active treatment services to developmentally disabled individuals who live in cottages on NLDC's grounds. Services to the developmentally disabled must be "provided in a manner which respects the dignity, individuality and constitutional, civil and legal rights of each developmentally disabled person." N.J.S.A. 30:6d-2. The New Jersey Legislature has recognized that persons with developmental disabilities are "vulnerable to abuse, neglect and exploitation in the community unless appropriate safeguards are established and necessary services are delivered to them in a wholesome environment." N.J.S.A. 30:6D-13. Further, one of petitioner's primary goals within DDD is, "[t]o ensure and advocate for the rights of individuals served, to provide for their health, safety and welfare, and to protect individuals served from abuse, neglect and exploitation." N.J.A.C. 10:40-1.1.

As such, petitioner is vested with the responsibility of assuring D.K., a developmentally disabled person residing at NLDC, is safeguarded from physical abuse and is living in a wholesome environment. Petitioner promulgated Administrative Order 4:08, Supplement 3 on December 6, 2000, "[i]n order to clarify and be certain that all employees understand and are aware of what is considered abuse." DHS Exhibit 2, Disciplinary Action Program, at p. 18. Supplement 3 of Administrative Order 2:08 defines physical abuse as a,

> physical act directed at a client, patient or resident of a type that could tend to cause pain, injury or anguish, and/or suffering. Such acts include but are not limited to the client, patient, or resident being kicked, pinched, bitten, punched, slapped, hit, pushed, dragged, and/or struck with a thrown or held object.
> Id. (emphasis added)

The definition of physical abuse does not contain an element of intent on the part of the perpetrator of the abuse. Further, the definition of physical abuse does not require the victim to have suffered actual physical injury; rather, the physical act only must be "of a type" that could "tend to cause pain, injury or anguish, and/or suffering." Id.

Supplement 1 of Administrative Order 4:08 is a "Table of Offenses and Penalties" which represents the "Department's policies of corrective rather than punitive actions, [and] progressive discipline, a progressive range of penalties for a specific type of offense." Id. at p.3. Respondent signed an acknowledgement of receipt on May 14, 2001, of petitioner's prohibition against abuse policy. The "Table of Offenses and Penalties" in petitioner's Disciplinary Action Program (DHS Exhibit 2) directs the Court that removal is the only penalty for the first infraction of physical or mental abuse of a patient, client or resident. Id. at p.7. Administrative Order 4:08 does not provide for the application of progressive discipline in instances of physical or mental abuse; terminating an employee that is found to have committed physical abuse is petitioner's best means of protecting its clients from further physical abuse.

As part of petitioner's efforts to safeguard its clients, petitioner trains all of its staff that have contact with patients how to properly handle NLDC residents who may become violent or aggressive with staff or other residents. The training program, which is entitled "Handle with Care," trains petitioner's employees to use specific techniques in response to acts of physical aggression. As the name implies, the purpose of "Handle with Care" is to provide safe alternatives to acts of physical abuse. Respondent was trained in the "Handle with Care" protocols in 2004, 2005, and most recently in August of 2006. Despite respondent's multiple "Handle with Care" training sessions, respondent physically abused D.K. after he struck respondent in the chest on January 30, 2007.

According to the testimony, D.K. is a medium-sized man whom at times becomes aggressive with NLDC staff. D.K. does not understand the consequences of his actions when he physically assaults someone, and D.K. did not appear as a witness

in this matter because he is unable to express himself to the Court because of his developmental disability. Both petitioner and respondent agree that D.K. approached respondent in his cottage and struck respondent in his chest with a closed fist near respondent's pacemaker/defibrillator.

After being struck by D.K., respondent struck him with an open hand in the back of his head. Rather than slapping D.K., respondent should have implemented one of the "Handle with Care" protocols in which respondent had been trained in 2004, 2005, and 2006. Respondent admitted in his testimony several times that he hit D.K. Respondent also admits to hitting D.K. in the Confidential Incident Statement (Exhibit 2) that he wrote and signed on February 1, 2007, at 2:31 p.m. According to respondent's Confidential Incident Statement, "The shift supervisor [Ms. Jones] was standing at the doorway, and saw me slap him. She told me not to do it again. I said I would not do it again." Petitioner also admitted during the direct examination that he felt very badly about what occurred. When questioned during the cross-examination as to why he felt very badly, respondent explained to the court that he did not respond appropriately when D.K. hit him.

The court gained a clear view of the events that occurred on January 30, 3007, between 12:30 p.m. and 1:00 p.m. in the Vine Cottage from the testimony of the two eye-witnesses and respondent's own testimony. Francillia Jones testified that she saw respondent's hand retracting after hitting D.K., and Marsha Bush testified that she saw respondent's hand as he slapped D.K. in the back of the head. Both Ms. Bush and Ms. Jones heard the noise created by the slap. Respondent's testimony clarified what actually occurred. Respondent stated that D.K. approached him; respondent put his arm up to defend himself; D.K. struck him even though respondent raised his arms to protect himself; D.K. turned away from respondent to retreat; and respondent slapped D.K. with the hand that he had raised to defend himself. It is clear from respondent's description of the incident and from his Confidential Incident Statement that respondent did, in fact, hit D.K. and that the act of defending himself was separate from the act of slapping D.K.

After the incident, D.K. was sent to the nurse and respondent was transferred to a building where he would have no client contact. Fortunately, D.K. did not suffer any serious physical injury.

Argument

For the reasons further described below, the preponderance of credible evidence presented in this case demonstrates that respondent physically abused D.K. Petitioner is permitted to terminate an employee, including a tenured teacher that physically abuses a client. N.J.S.A. 18A:60-2. The statute, N.J.S.A. 18A:60-2 protects those employees who have acquired tenure in a position, from being dismissed from that position or being reduced in compensation except for "inefficiency, incapacity, conduct unbecoming a teacher, or other just cause. . ." N.J.S.A. 18A:60-2. In this case, respondent, a "teacher 2" who had tenured status for approximately 20 years, was found to have committed conduct unbecoming a teacher. Removal from respondent's tenured position was warranted.

Petitioner clearly demonstrated to the court that the act of defending himself and the act of slapping were two separate and distinct acts. Respondent tried to persuade the court that his actions were intended to defend himself and were reflexive in nature. If the court accepts respondent's "defensive/reflexive" position, the court may still support termination in this matter. The Office of Administrative Law has upheld terminations in similar cases where an employee claimed his/her actions was reflexive or defensive.

In the administrative law case, In the Matter of Joshua Famakinwa, OAL Dkt. No. CSV 4394-02, S.M., a patient of Hagedorn Psychiatric Hospital (Hagedorn), spit in the face of Joshua Famakinwa, a Human Services Assistant. Hagedorn, which is also run by petitioner provides training to its employees to prevent acts of physical retaliation when employees are attacked by patients. Mr. Famakinwa slapped S.M. after S.M. spit on him. Mr. Famakinwa claimed that the slap was reflexive in nature and that S.M. did not suffer any injuries. After hearing all of the testimony, the Honorable John Schuster

III, ALJ, found that the "appellant struck S.M. by slapping him in the face and that this action was not accidental but was spontaneous reaction to being spit upon." Id. at p. 5. Relying on the Department of Human Services Administrative Order 4:08, Judge Schuster stated:

> Under the circumstances, a spontaneous reactive assault may have mitigating effect in a disciplinary action, especially if it is in response to a prevocable (sic) attack. Under the circumstances in this matter, however, the penalty required pursuant to Administrative Order 4:08, is mandated as being removal and therefore no consideration can be given to mitigating factors. Id. at pg. 6.

The Merit System Board on July 14, 2004, issued its final administrative action accepting the decision of ALJ Schuster and upholding removal of the employee. Consequently, if this court accepts the respondent's position that his acts of slapping D.K. was a reflexive action stemming from an act of personal defense, the court is still guided by Administrative Order 4:08 which mandates termination of respondent.

Similarly, the Merit System Board on February 9, 2005, accepted the decision of the Honorable Jesse H. Strauss, ALJ, to uphold termination of the New Jersey Developmental Center employee In the Matter of Monica Romans, OAL Dkt. No. CSV 3902-04. The appellant, Monica Romans, claimed that when she hit A.N. in the head with a plastic dessert bowl, she was defending herself from A.N. who was trying to hit her in the face. A.N. did not suffer any injuries.

The Department of Personnel asserted its authority pursuant to N.J.A.C. 4A:2-2.3(a) to impose major discipline on Ms. Romans for conduct unbecoming a public employee. Conduct unbecoming a public employee is :

> . . .any conduct which adversely affects the moral or efficiency of a public entity, conduct which has a tendency to destroy respect for public employees and their appointing authorities, or conduct which destroys confidence in public service. Washington v. John J. Montgomery Medical Home, 96 N.J.A.R. 2d. CSV 100, 102

Administrative Law Judge Strauss relied on the definition of physical abuse found in petitioner's "Disciplinary Action Program," Administrative Order 4:08, when he concluded that physical abuse had occurred and that Ms. Roman's actions constituted conduct unbecoming a public employee. Like in Romans where appellant claimed self-defense, respondent has tried to convince the court that he should not be terminated for slapping D.K. because he was hit first by D.K. However, in accordance with Romans and Famakinwa, the circumstances surrounding the physical abuse of D.K. constitute conduct unbecoming a public employee in violation of Administrative Order 4:08, Supplement 3, which warrants termination.

Respondent relied on Town of West New York v. Bock, 38 N.J. 500 (1962); In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange Township, Essex County, OAL Docket No. EDU 3876-05 (2006), and In the Matter of Tammy Herrmann, 192 N.J. 19 (2007), in support of his argument that termination is not warranted in this case. However, this court should not look to those cases for guidance because the courts in those cases were not guided by petitioner's Administrative Order 4:08 and the corresponding disciplinary action policies that are specific to petitioner. The issue of lateness in West New York v. Bock and the issue of physical altercations and the use of foul language by public school employees in Poston are distinguishable from the facts of the instant matter. The petitioners in West New York and Poston were not obligated by N.J.A.C. 10:40-1.1, as petitioner is "to protect individuals served from abuse, neglect and exploitation," N.J.A.C. 10:40-1.1. Pursuant to Administrative Order 4:08, Supplement 3, "it is essential for petitioner to treat its clients, patient and resident with respect and dignity."
Petitioner must protect its clients because they are extremely vulnerable to physical abuse in light of the fact that they can, at times, be both aggressive and violent and they do not comprehend their actions. The nature of the population served necessitates that petitioner strictly abide by its prohibition against abuse and terminate all employees that have committed an act of physical abuse.

Respondent also relied on the 2007 New Jersey Supreme Court decision in In the Matter of Tammy Herrmann, 192 N.J. 19 (2007) in support of the theory that

termination is only appropriate for the most flagrant violations. The Court in Herrmann ultimately upheld the termination of the Division of Youth and Family Services (DYFS) employee who waved a cigarette lighter retrieved from her purse in the face of a five year old child in a room that contained oxygen tanks. The Supreme Court in Herrmann recognized:

> . . .that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when the application of the principle would be contrary to the public interest. Id. at 28

The Supreme Court explained that progressive discipline has been bypassed when an employee engages in severe misconduct, "especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." Id. As a teacher for the developmentally disabled in a DDD facility, respondent's act of slapping D.K. in the back of the head is, without question, severe. Further, respondent's position involves ensuring the safety of developmentally disabled individuals, and the misconduct that occurred caused risk of harm to D.K., a person that the State has specifically recognized as vulnerable to abuse. Therefore, this court has the authority to bypass the steps of progressive discipline and focus on the petitioner's guidelines laid out for physical abuse in "The Table of Offenses and Penalties."

Petitioner concludes that the preponderance of the credible evidence presented at the hearing supports termination of respondent. Petitioner requests for the foregoing reasons that its decision to terminate the respondent should be affirmed.

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, **I FIND** the following **FACTS** in this matter:

First, I adopt those Stipulation of Facts set forth hereinbefore by the parties.

Second, I **FIND** that petitioner's two witnesses to the incident on January 30, 2007, to be in conflict with their sworn testimony offered at the hearing. Ms. Jones testified on direct examination that she witnessed respondent slap D.K. However, she later changed her testimony that she did not see respondent actually strike D.K. but, rather, that she heard the sound of a slap on skin.

Ms. Bush testified on direct examination that she too saw respondent hit D.K. Later, in her testimony, Ms. Bush stated she did not see respondent hit D.K.

The testimony reveals that Joseph Waite made the decision to terminate respondent based solely on the documents presented to him and investigation by others. Mr. Waite admitted he did not talk with anyone concerning the incident, including respondent. Mr. Waite did not make any independent inquiry of the allegations but, rather, relied upon the reports of other individuals. Mr. Waite admitted he does not know respondent but was familiar with respondent's employment record. Mr. Waite described respondent's prior disciplinary record as de minimis.

Petitioner admits that he did, in fact, strike client D.K. However, he asserts that the strike was a reflexive action to protect himself from a blow by D.K. to his chest area where a pacemaker/defibrillator is implanted. A blow to the implants could have had serious consequences, even life threatening. I **FIND** respondent's testimony to be credible.

CONCLUSIONS OF LAW

Where petitioner seeks to discipline an employee by termination of the employee's tenured position, it is required to prove the charges against the employee by the standard of the preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to the given conclusions. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a

case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. Lowe v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) cert.den. 31 N.J. 75 (1959).

The facts of this matter clearly demonstrates that D.K. was an aggressive client under petitioner's care. D.K. was prone to strike out at employees who were there to provide him with the necessary services and attention demanded of a client with his degree of disability.

The facts also clearly demonstrate that respondent had a clean record with minimum disciplinary actions against him during the more than 41 years of his employment with petitioner. The facts also demonstrate that respondent has a heart condition which required the implantation of a pacemaker/defibrillator in his upper right chest area. A blow to the implantation could be fatal to respondent.

I CONCLUDE, therefore, that respondent's reflexive action to protect himself from D.K.'s blow, does not constitute client abuse. **I CONCLUDE** that, under the circumstances of this matter, respondent's testimony was clearly credible that he did not intend to strike D.K. but, rather, attempted to shield himself from what could have been a fatal blow.

I CONCLUDE, therefore, that the tenure charges against respondent should be **DISMISSED** and that he be reinstated to his former position with all back pay and emoluments due him, subject to mitigation or offsets for any earned income.

ORDER

Accordingly, it is **ORDERED** that respondent, Andrew S. Gall, be reinstated to his former tenured teaching position with all back pay and other emolument due him.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 2007
DATE

Lillard E. Law Jr
LILLARD E. LAW, ALJ t/a

Date Received at Agency:

9-11-07

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 13 2007

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

WITNESSES:

For Petitioner:

Joseph Waite
Francillia Jones
Marsha Bush

For Respondent:

Andrew S. Gall

EXHIBITS:

For Petitioner:

Exhibit 1	Affidavit of Waite
Exhibit 2	Disciplinary Action Program
Exhibit 3	Prohibition Against Abuse, Supplement #3
Exhibit 4	Suspension with pay
Exhibit 6	Introduced as R-6
Exhibit 7	Certificate of Determination
Exhibit 8	Statement of Williams
Exhibit 10	Confidential Incident Statement
Exhibit 11	Action Treatment Notes
Exhibit 12	Confidential Incident Statement, Handle with Care Behavior Management System

For Respondent:

R-1 Performance Assessment

R-2 DHS Exhibit 6

498-07

#498-07

DONALD SLOAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a custodian employed in respondent's district for over 33 years – challenged his termination pursuant to a reduction in force, alleging that he had acquired tenure. Respondent board contends that petitioner did not attain tenure, as petitioner had been consistently employed for fixed annual terms, precluding automatic tenure pursuant to *N.J.S.A.* 18A:17-3. In addition, the district's policy does not provide tenure status to persons employed in a custodial-maintenance category.

The ALJ found, *inter alia,* that: petitioner had been employed by the respondent for a series of fixed terms, none of which exceeded twelve months; respondent's witnesses presented credible testimony; and petitioner had failed to meet his burden of proving that he had acquired tenure in the district. The ALJ recommended that the petition be dismissed with prejudice.

Upon a thorough and independent review of the record, the Assistant Commissioner concurred with the ALJ that petitioner has no tenure rights, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Assistant Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Assistant Commissioner.

December 27, 2007

OAL DKT. NO EDU 956-07
AGENCY DKT. NO. 21-1/07

DONALD SLOAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner worked as a custodian in respondent's district for over thirty-three years. Four months into the thirty-fourth year, petitioner's employment was terminated pursuant to a reduction in force. Petitioner challenges the termination, alleging that he had acquired tenure. Upon review of the record of this matter, including the hearing transcripts and exhibits, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions and reply-exceptions, the Assistant Commissioner[1] adopts - as the final decision in this case - the Initial Decision dismissing the petition.

After presiding over two days of testimony, reviewing 100 or more exhibits, and considering the parties' post-hearing submissions, the ALJ summarized the case:

> [C]onsistent with the BOE's policy against tenure for janitorial employees and the policy requiring annual contracts of employment, the BOE annually approved contracts for employment of the petitioner as a non-tenured janitor or in a similar title for terms not in excess of twelve months (July 1 to June 30), and the parties executed a series of contracts with such fixed terms. Contracts for some of the years that the BOE employed the petitioner are not in evidence. However, the BOE presented other evidence to show that it repeatedly and routinely

[1] This matter has been delegated to the Assistant Commissioner, pursuant to *N.J.S.A.* 18A:4-34.

> distinguished tenured employees from non-tenured employees such as those employed as janitors or in similar titles and approved employment of those employed as janitors or in similar titles only for fixed terms not in excess of twelve months. The absence of signed contracts for certain years does not necessarily require the finding that during such years the BOE employed the petitioner without a fixed term. The petitioner admitted that he did not believe he had tenure and he did not prove that the BOE employed him without a fixed term. Considering all of the evidence, consistent with the BOE's routine practice, it employed the petitioner only for a series of fixed terms and did not employ him without a fixed term or permanently. *N.J.R.E.* 406. Further, there is no competent or credible evidence that the BOE's reduction in force of its janitorial staff was for reasons other than for good faith reasons of economy.
>
> Initial Decision at 19-20.

The Assistant Commissioner cannot disagree with the ALJ's conclusions. The numerous exhibits and testimony offered by respondent's representatives reveal that petitioner was appointed for separate terms of twelve months or less for each of the thirty-three years of his employment with respondent. For at least 24 of those years respondent was able to enter into evidence copies of the contracts that the parties had executed. For seven of the nine school years for which respondent could not produce copies of executed contracts, respondent offered copies of the minutes of the meetings at which respondent had clearly approved contracts for petitioner - for fixed terms.

The Assistant Commissioner is satisfied that such Board actions constituted 'appointments' for fixed terms, and thereby met the criterion set forth in *N.J.S.A.* 18A:17-3 for establishing non-tenured janitorial positions.[2] Executed contracts are not expressly required by

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[2] *N.J.S.A.* 18A:17-3 provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. (Emphasis added.)

the statutory language. And where contracts do not resolve the issue, other indicia of the nature of the appointment – including board minutes and resolutions – may be examined. *Charles Sharpe v. Board of Education of the Township of Wyckoff, Bergen County,* Commissioner Decision March 22, 1993, at 5.

Thus, the contracts and board minutes produced by respondent eliminate the possibility that petitioner attained tenure in any of his thirty-three years of service – save for two of the academic years: 1988-89 and 2003-04. As to the 1998-89 school year, a former Board Secretary employed by respondent from 1983 to 1991 – Claire Mazurak – testified that each year of her service she gave respondent's employees, including petitioner, contracts with fixed terms corresponding to the school year. Unless the employees returned executed copies they were not paid. No evidence was presented to the OAL that petitioner had not been paid for his service in the 1988-89 school year.

The ALJ found Mazurak to be credible, and the Assistant Commissioner finds nothing in the record to overturn that credibility determination. While petitioner testified that respondent employed him without a contract in the late eighties, he conceded that he was not good at recalling dates. Because of this admission of imprecise memory, because the ALJ reasonably concluded that the achievement of tenure should have been a very memorable date for petitioner, because of Mazurak's credible testimony about the annual distribution of contracts with fixed terms and because of the pattern of contract approval and distribution evident in the documentary evidence leading up to 1988, the Assistant Commissioner agrees with the ALJ that petitioner did not show that it was more likely than not that he attained tenure in 1988 or 1989.[3]

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[3] This conclusion is buttressed by the fact that Respondent's Exhibit 25 (R-25) shows that on April 24, 1989, respondent approved a contract for petitioner with the fixed term of July 1, 1989 through June 30, 1990.

The other school year for which respondent produced no executed contract was 2003-04. The Assistant Commissioner finds it unlikely that petitioner would have been awarded tenure in that year. As revealed in Respondent's Exhibit 1 (Exhibit R-1) – an October 31, 2002 letter to petitioner from then-superintendent of schools Elizabeth Nastus, which accompanied a contract for petitioner for the 2002-03 school year – petitioner was put on notice in the fall of 2002 that continued excessive absences and performance deficiencies could result in increment withholding or dismissal. The Assistant Commissioner declines to find that six months after such a warning the superintendent would have recommended that petitioner be awarded tenure.

Further, as the ALJ found, respondent had a long-standing policy of designating janitorial/custodial/maintenance positions as non-tenured. That designation was evidenced by formal written policy, *e.g.* Exhibit R-3 and R-4. Both witnesses for respondent testified that during their tenures in respondent's district, respondent followed that practice. (Hearing Transcript, July 19, 2007, at 19-20, 53)

In addition, the minutes of the board actions approving employment contracts reveal that the district superintendent's annual staff appointment recommendations were presented to the respondent Board in groupings. For instance, tenured teachers were grouped together and so designated. Teachers about to attain tenure were designated as a discrete classification, and untenured teachers comprised yet another separate group. Tenured administrators were recommended for contracts as a group, as were non-tenured administrators.

Similarly, the employment recommendations for custodial/maintenance employees were usually presented as a separate group, or as part of a group entitled 'non-teaching personnel,' 'non-certified staff' or 'support staff.' Fixed terms accompanied the

recommendations and the designation "tenured" was never applied.[4] To the contrary, some meeting minutes expressly identified custodians as non-tenured personnel. *See,* Exhibits R-30, R-31, R-33, R-34, R-37, R-39, R-40, and R-41.

In summary, the factual record does not support petitioner's contention that he acquired tenure in respondent's district. Nor do the cases to which petitioner cites in his exceptions.

Zielinski and Brown v. Board of Education of the Township of East Brunswick, Middlesex County, 96 *N.J.A.R.* 2d (EDU) 3 (App. Div. 1996), is not apposite to this case. In *Zielinski*, the East Brunswick Board of Education had passed a resolution establishing a policy to bestow tenure upon 'efficient' janitors after three years of service. Thus, the question of whether the petitioning janitors had attained tenure after three years of fixed-term contracts had to be examined against the backdrop of the Board policy allowing tenure after three years. Since the only policy articulated by the board of education in the present case clearly rejects tenure for custodians, *Zielinski* does not help petitioner.

Reinertsen v. Board of Education of the Township of East Brunswick, Middlesex County, OAL Dkt. No. EDU 10328-97, Commissioner Decision 1998 – which petitioner cites for the proposition that once a janitor attains tenure he or she retains it, even if promoted, demoted or transferred within the general category of maintenance/custodial positions – can only help petitioner if he shows that he achieved tenure at some point in his thirty-three plus years of service. As mentioned above, petitioner was not able to make such a showing.

The remaining case upon which petitioner relies is also distinguishable from the instant controversy. The janitor in *McCullough v. Board of Education of the City of Trenton,*

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[4] *See,* Exhibits R-15, R-16, J-14, R-19, R-20, J-15, R-21, R-25, R-26, J-16, R-27, R-28, J-17, R-29, R-45, R-46, R-47, R-51, R-52, J-29, R-60, R-61, R-62

Mercer County, was initially employed as a substitute. In January 1998, he was offered and accepted a permanent position with the respondent board of education. The first contract for this permanent position – as well as the accompanying letter and some subsequent board minutes – identified a starting date for McCullough, but clearly provided no terminus. Only the salary adjustment notices referenced fixed dates.[5] These facts stand in stark contrast to the present case, where the overwhelming documentary and testamentary evidence shows a practice (and policy) by respondent – over a period of thirty-plus years – of offering petitioner fixed term employment for twelve months or less.

In light of the foregoing the Assistant Commissioner adopts the Initial Decision, as supplemented, as the final decision in this matter. The petition is dismissed.

IT IS SO ORDERED.[6]

Barbara Gantwell

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/27/07

Date of Mailing: 12/28/07

[5] Salary agreements, by themselves, do not constitute appointments with fixed terms. *See, e.g. Smith v. Board of Education of the Township of East Brunswick,* Commissioner Decision August 15, 1983, *aff'd* State Board, April 4, 1984.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 956-07
AGENCY DKT. NO. 21-1/07

DONALD SLOAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

Thomas Johnston, Esq., and **Kerri Wright**, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: September 14, 2007 Decided: September 27, 2007

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Donald Sloan alleges that the respondent Board of Education (BOE) of the Township of Clinton, Hunterdon County, employed him as a janitor "without a fixed term" and,

based on that allegation, he asserts that he obtained tenure under the school laws. N.J.S.A. 18A:17-3. The BOE reduced the number of persons employed as janitors or in similar titles and employed others in such titles and the petitioner claims that, based on his asserted tenure and seniority, under the school laws the BOE should be ordered to reinstate him in such a title with back pay and benefits. See N.J.S.A. 18A:17-4. The BOE submits that the petitioner has not proven that he obtained tenure and the BOE submits that his case should be dismissed.

The case can be summarized. N.J.S.A. 18A:17-3 states, "Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure." Beginning in 1973 the BOE employed the petitioner as a janitor or in a similar title for a series of fixed terms, each not in excess of twelve months, as shown by the parties' contracts. In 1978 the BOE adopted policies that stated that it was not its intent "to provide tenure status to any person hired in a custodial-maintenance category including supervisory personnel," and that required that each "nontenured, noninstructional staff member . . . sign an annual contract." R-2; R-3. Thereafter, the BOE annually approved contracts with its employees for the succeeding school years (from July 1 to June 30) and, in doing so, the BOE distinguished employees, by titles, as tenured or nontenured. From 1995 until 1998, pursuant to contracts signed by the parties, the petitioner accepted employment as the BOE's acting superintendent of Buildings and Grounds and then as supervisor of Buildings and Grounds. From 1998-1999 until 2006 the BOE again employed the petitioner as a janitor or in a similar title. In 2006 the BOE reduced the number of persons it employed as janitors or in similar titles and terminated the petitioner's employment. The petitioner testified that whenever the BOE submitted proposed contracts to him, he signed and returned them, but the BOE has not presented contracts for all of the years it employed the petitioner. The petitioner contends that the absence of such contracts in the record requires the finding that for several years the BOE employed him without a contract and without a "fixed term," so that under the above-cited statute he attained tenure. N.J.S.A. 18A:17-3. Further, based on his asserted tenure and seniority, he claims that the BOE should be ordered to reinstate him and to provide him with back pay and benefits. See N.J.S.A. 18A:17-4. The BOE submits that the petitioner did not credibly testify that the BOE employed him without a fixed term and the BOE points out that he testified that he never even believed that he had tenure. The BOE submits that, given its policy against tenure for employees employed as janitors in or similar titles, the contracts in the record,

the testimony of its witnesses, its meeting minutes, and other documents in the record, it has proven a repeated and routine practice of identifying the petitioner as a non-tenured employee and employing the petitioner only for successive fixed terms, each not in excess of twelve months. The BOE submits that, balancing all of the competent and credible evidence, the petitioner did not prove that it employed him without a fixed term, so that it must be concluded that he did not obtain tenure and his claims must be dismissed.

PROCEDURAL HISTORY

On January 23, 2007, the petition was filed with the Department of Education, and on February 16, 2007, the answer was so filed. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on March 1, 2007. N.J.S.A. 52:14B-2(b). On June 1, 2007, the hearing began (but it was not completed due to a death in the petitioner's family and to allow for discovery), and on July 19, 2007, the hearing was completed. The parties' written summations and comments were received by August 20 and September 14, 2007.

THE RECORD

1973-74: The BOE's employment of petitioner began according to an employment contract, dated August 14, 1973, and signed by the parties (the BOE's president and the petitioner). The contract used a form with details to be entered, including the parties' names; the petitioner's title, "custodian"; his salary, $5,500; and the term (period of time) of employment, from August 17 to August 31, 1973, and from September 1, 1973, to June 30, 1974. J-1.

1974-75: The parties' signed employment contract, dated May 14, 1974, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" for a term beginning on July 1, 1974, and ending on June 30, 1975, i.e., twelve months, at a salary of $6,995. (The BOE's custodians and maintenance men worked all twelve months of the year and the contract's term was by school year.) An addendum to the contract (signed by the BOE's business administrator (BA)/secretary) showed the petitioner's annual salary, a "salary adjustment for 1974-75 only," and a "total" salary of $7,355. J-2.

1975-76: The parties' signed employment contract, dated April 22, 1975, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1975, to June 30, 1976, at a salary of $8,215. J-3.

1976-77: A "Superintendent's Report, [dated] April 13, 1976," from Patrick McGaheran, then the BOE's superintendent, recommended that, for 1976-77, certain named teachers and other staff receive tenure; recommended that the BOE award contracts to named tenured teachers; and recommended that the BOE approve contracts for named "non-teaching personnel," including the petitioner. R-14. The parties' signed employment contract, dated April 13, 1976, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1976, to June 30, 1977, at a salary of $9,290. J-4.

1977-78: The minutes for the BOE's meeting of April 18, 1977, show that the superintendent advised the BOE of laws relating to tenured and non-tenured staff, including N.J.S.A. 18A:17-3, relating to janitorial employees. The BOE approved motions providing that, for 1977-78, certain named teachers and other staff would receive tenure; providing that the BOE approved contracts for named tenured teachers; and providing that the BOE approved contracts for other categories of personnel, including custodians. After the relevant category, the employees' names were listed. Relative to custodians, the minutes stated, "Custodians — Contract to read: 7/1/77 to 6/30/78," and the petitioner's name was among the custodians listed. R-15. The parties' signed employment contract, dated April 18, 1977, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1977, to June 30, 1978, at a salary of $9,290, and an addendum to the contract showed the petitioner's annual salary for 1977-78, a "salary adjustment," and a "total" salary of $10,025. J-5.

On February 21, 1978, the BOE adopted Policy "403" for "Noninstructional Staff," which is maintained in the BOE's policy book and which stated:

EMPLOYMENT CONTRACT

The Board requires for the mutual protection of each regularly employed nontenured, noninstructional staff member and for the district that each such employee be required to sign an annual contract. Such employment contract shall specify:

a. the salary at which the person is employed

b. the intervals at which the salary will be paid

c. a provision for termination of contract on 60 days notice duly given.

Should an employee be offered in error a contract for a salary which differs from that approved by the Board, the salary approved by the Board shall be the salary paid. Should an employee terminate without giving the contractually specified notice, s/he shall be paid only for the days worked.

[R-2, emphasis added.]

On February 21, 1978, the BOE also adopted Policy "406" for "Noninstructional Staff," which is maintained in the BOE's policy book and which stated:

NONINSTRUCTIONAL EMPLOYEES
WHICH ARE NOT TENURED

It is not the intent of the Board to provide tenure status to any person hired in a custodial-maintenance category including supervisory personnel. Nor is it the intention of the Board to provide tenure to any other employee for whom tenure provision is not made by law.

[R-3, emphasis added.]

1978-79: The minutes for the BOE's meeting of April 10, 1978, show that the BOE approved motions providing that, for 1978-79, contracts be awarded to named tenured teachers and to other categories of personnel, including custodians. After the relevant category, the employees' names were listed. Relative to custodians, the minutes stated that the BOE approved contracts for 1978-79 for "non-teaching personnel," including "Custodians — Employment

Dates of each Contract - - 7/1/78 to 6/30/79," and the petitioner's name was among the custodians listed. R-16. The parties' signed employment contract, dated April 10, 1978, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1978, to June 30, 1979, at a salary of $10,850. J-6.

1979-80: A letter to the petitioner dated April 24, 1979, signed by the BOE's president, stated that the BOE had voted to employ the petitioner for the 1979-80 school year; that after the 1979-80 salaries were established, a contract would be issued; that any increment would be retroactive to July 1, 1979, or September 1, 1979; and that the dates of employment (term) would be July 1, 1979, to June 30, 1980. The petitioner signed the letter to acknowledge that he would accept employment with the BOE on the above-described conditions for 1979-80. J-7. The parties' signed employment contract, dated June 27, 1979, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1979, to June 30, 1980, at a salary of $11,610. An addendum to the contract showed that the petitioner's annual salary for 1979-80, plus a boiler license adjustment of $100, totaled $11,710. J-7.

1980-81: The parties' signed employment contract, dated April 28, 1980, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1980, to June 30, 1981, at a salary of $12,540, plus $100 for his black seal boiler license. An addendum to the contract showed a "Salary Adjustment," "$12,540 + $100 to $12,740 + $100." J-8.

1981-82: The parties' signed employment contract, dated April 20, 1981, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1981, to June 30, 1982, at a salary of $14,015, plus $100 for his black seal boiler license. J-9.

1982-83: The parties' signed employment contract, dated April 19, 1982, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1982, to June 30, 1983, at a salary of $15,206. An addendum to the contract showed his 1982-83 salary of $15,206, plus $100 for his black seal boiler license. J-10.

Claire Mazurak testified that from 1983 until 1991 she served as the BOE's BA/secretary. As BA/secretary, she was responsible for making and maintaining BOE records, including those related to BOE policies, meetings, staff contracts, staff attendance, payroll, and purchases. She was responsible for all BOE records that did not relate to curriculum.

Ms. Mazurak testified that, as BA/secretary, she was present for BOE meetings and she took notes. Thereafter, her notes were typed and proposed minutes were prepared and submitted to the BOE for approval. She signed the approved, official minutes and secured them in binders in her office, as shown by page numbers stamped on (the upper right corner of) each page and as shown by the binder holes punched in the side of each page. See, e.g., R-19; R-20. She testified that, in general, the BOE's minutes were an accurate record of the BOE's actions during its meetings.

Ms. Mazurak testified that she provided a copy of the BOE's policy book to each BOE member. She testified that (while she was BA/secretary) the BOE's approvals of proposed contracts of employment were recorded in the BOE's minutes. She testified that photocopied employment contract forms were completed to prepare proposed contracts for each person to be employed. See, e.g., J-13. Two copies of the proposed contracts were provided to each such person with notice that he or she should sign them, retain one, and return one for the BOE's records. She testified that employment contracts for persons employed as janitors and in similar titles were annual and she always issued the contracts to those employees, including the petitioner, whom she knew, and he received such contracts. Her practice was to confirm that an employee had signed and returned the contract before the BOE issued a paycheck to the employee. The signed, returned contract was placed in the employee's personnel file.

1983-1984: The parties' signed employment contract, dated April 11, 1983, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1983, to June 30, 1984, at a salary of $16,499. An addendum to the contract showed a 1983-84 salary of $16,499, plus $150 for his black seal boiler license. J-11.

1984-85: In a letter to the petitioner dated April 18, 1984, the BOE's president wrote that

the BOE intended to issue a contract to the petitioner for 1984-85 and, on April 19, 1984, the petitioner signed the letter to acknowledge receipt. (R-17 is a copy of "Minutes" of a purported BOE meeting on June 25, 1984, stamped "NOT OFFICIAL." The BOE did not present minutes of such a meeting with the indicia that they were official. The petitioner's attorney did not accept R-17, so it was marked for identification only.) The parties' signed employment contract, dated June 25, 1984, used the above-described form, completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1984, to June 30, 1985, at a salary of $17,736. An addendum to the contract showed the petitioner's annual salary, plus $150 for his black seal boiler license. In a memorandum to the petitioner, the BOE's superintendent wrote that at the September 10, 1984, meeting, the BOE approved a motion to increase salaries of certain staff for 1984-85, that the petitioner's "revised 1984-85 salary" would be $17,901.42, and that his dates of employment were July 1, 1984, to June 30, 1985. J-12.

1985-86: The minutes of the BOE's meeting on April 24, 1985, show that the BOE approved motions to award contracts for 1985-86 to named non-tenured teachers, to named tenured teachers and other staff, and to named "support personnel," including the petitioner, whose name was followed by, "Custodian — . . . (7/1/85 – 6/30/86)." R-18. That is, custodians were not shown as tenured. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. The parties' signed employment contract, dated April 24, 1985, used a form completed to show that the BOE would employ the petitioner as a "custodian" from July 1, 1985, to June 30, 1986, at a salary of $19,369. J-13.

1986-87: The minutes of the BOE's meeting on April 14, 1986, show that the BOE approved motions to award contracts for 1986-87 to named non-tenured teachers, to named tenured teachers and other staff, and to named "non-teaching" personnel, including the petitioner, whose name was followed by, "Custodian (7/1/86 – 6/30/87)." J-14; R-19. The minutes of the BOE's meeting on April 21, 1986, also show that the BOE approved motions to award contracts to "non-teaching personnel," including the petitioner, whose name was followed by, "Custodian — . . . (7/1/86 – 6/30/87) – [$]20,981," i.e., showing his salary. R-20. The BOE did not present a contract for 1986-87.

The BOE employed petitioner for the 1986-87, 1987-88, 1988-89, 1989-90, and 1990-91

school years, but the BOE's records do not now include written, signed contracts with the petitioner for those years. Ms. Mazurak (employed by the BOE until 1991) could not explain why those contracts are absent. The petitioner testified that, whenever he received a contract in his school mailbox, he signed and returned it (to the BOE's administrators). The petitioner's recollections of the circumstances related to whether contracts were submitted to him in the late 1980s were vague and not credible.

1987-88: The minutes for the BOE's meeting on April 27, 1987, show that the BOE approved motions to award contracts for 1987-88 to named non-tenured teachers, to named tenured teachers and other staff, and to named "non-teaching personnel," including the petitioner, whose name was followed by, "Custodian (7/1/87 – 6/30/88)." J-15; R-21. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. As noted above, the BOE presented no contract for 1987-88.

1988-89: Ms. Mazurak's "Board Notes" relative to an "April 25, 1988, Special Meeting" show that the BOE approved motions to award contracts to tenured staff, to non-tenured staff, and to "all non-teaching staff." R-22. The BOE presented "Minutes" relative to a "Special Meeting" on "September 26, 1988," which stated that the BOE approved a motion to award to the petitioner a contract "for [the] position of Maintenance Man . . . positions to become effective on the date replacements are hired" (with no period of such employment shown). R-23. The "Minutes" were stamped "NOT OFFICIAL" and did not bear the above-described indicia of approved, official minutes. R-23. The BOE presented no minutes with the above-described indicia of approved, official minutes for such a meeting. (Both R-17, marked for identification only, and R-23, allowed into evidence, are copies of "Minutes" of a purported BOE meeting and both are stamped "NOT OFFICIAL." Petitioner's attorney stated that, despite being so stamped, based on Ms. Mazurak's testimony that R-23 was accurate, he had no objection to its admission. However, petitioner's attorney did not make such a statement relative to R-17, so it was not admitted.) As noted above, the BOE presented no contract for 1988-89.

1989-90: In the "Superintendent's Report [dated] April 24, 1989," then superintendent McGaheran recommended that the BOE award contracts for 1989-90 to named non-tenured teachers, to tenured teachers, and to "non-teaching personnel," including "Donald Sloan –

Maintenance Man," and the BOE's official minutes for a meeting on April 24, 1989, show that the BOE approved a motion to award contracts for 1989-90 to named non-tenured teachers, to tenured teachers, and to named "non-teaching personnel," including "Donald Sloan — Maintenance Man (7/1/89 – 6/30/90)." R-24; R-25. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. As noted above, the BOE presented no contract for 1989-90. The BOE's official minutes for a meeting on December 18, 1990, show that the BOE approved a motion "to approve salary increases for non-bargaining personnel," including "Maintenance, Donald Sloan, [$]28,805 (7/1/89 to 6/30/90)." J-16; R-26.

1990-91: The BOE's minutes for a meeting on April 2, 1990, show that the BOE approved motions to award contracts for 1990-91 to named tenured teachers, to named non-tenured staff, and to named "non-certified personnel," including the petitioner, whose name was followed by "(7/1/90 – 6/30/91)." R-27. The BOE's minutes for a meeting on April 23, 1990, show that the BOE approved motions to award contracts for 1990-91 to named tenured teachers, to named non-tenured teachers, to named tenured personnel, and to named "non-certified personnel," including the petitioner, whose name was followed by "(7/1/90 – 6/30/91)." R-28. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. The BOE's minutes for the meeting of May 23, 1990, show that the BOE approved motions to "establish the 1990-91 salaries of custodians and cafeteria workers" whose names, including the petitioner's, were listed, and petitioner's name was followed by "(7/1/90 – 6/30/91) $31,397." J-17; R-29. The BOE's minutes for the meeting of December 18, 1990, show that the BOE approved a motion to "approve salary increases for non-bargaining personnel" whose names, including the petitioner's, were listed, and the petitioner's name was followed by "(7/1/89 – 6/30/90)." J-16; R-26. As noted above, the BOE presented no contract for 1990-91.

In 1991, Ms. Mazurak ended her employment with the BOE.

1991-92: The BOE's minutes for a meeting on May 20, 1991, show that the BOE approved motions to award contracts for 1991-92 to named tenured staff, to named non-tenured staff, and to named "non-certified, non-tenure personnel," including the petitioner, whose name was followed by "(7/1/91 – 6/30/92)." R-30. The BOE's minutes did not show such a fixed term

after the names of staff who were tenured or eligible for tenure. The BOE presented an unsigned contract, using the above-described form, completed to show that the BOE would employ the petitioner as a "maintenance person" from July 1, 1991, to June 30, 1992, at a salary of $34,191. J-18.

1992-93: The BOE's minutes for a meeting on April 27, 1992, show that the BOE approved motions to award contracts for 1992-93 to named tenured teachers, to named non-tenured teachers, and to named "non-certified, non-tenure personnel," including the petitioner, whose name was followed by "(7/1/92 – 6/30/93)." R-31. The BOE presented an unsigned contract, using the above-described form, completed to show that the BOE would employ the petitioner as a "maintenance person" from July 1, 1992, to June 30, 1993, at a salary of $36,756. J-19. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. The BOE presented no signed contract for 1992-93. The BOE's minutes for a meeting on July 13, 1992, show that the BOE approved a motion to approve salary increases for certain maintenance personnel, including the petitioner, for 1992-93. R-32.

The petitioner testified that he did not recall seeing the above-described letters and unsigned contracts. Had he received the letters and contracts, he would have read, signed, and returned them. No one from or on behalf of the BOE has asked him for a copy of such a contract. No one from or on behalf of the BOE explained to him what signing the contracts would mean, and no one from or on behalf of the BOE notified him that the BOE would meet to consider whether to re-employ him for the upcoming year.

1993-94: The BOE's minutes for a meeting on May 10, 1993, show that the BOE approved motions to award contracts for 1993-94 to named tenured teachers, to named non-tenured teachers, and to named non-tenured custodial/maintenance personnel, including the petitioner, whose name was followed by "(7/1/93 – 6/30/94) [$]39,145." R-33. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. The parties' employment contract, dated May 10, 1993, used a form (different than the above-described form used for the 1973 contract), completed to show that the BOE would employ the petitioner as a "maintenance person" from July 1, 1993, to June 30, 1994, at a salary of $39,145. J-20.

1994-95: The BOE's minutes for a meeting on May 2, 1994, show that the BOE approved motions to award contracts for 1994-95 to named tenured teachers and other staff and to non-tenured personnel, such as custodial/maintenance personnel, including the petitioner, whose name was followed by "(7/1/94 – 6/30/95) [$]42,081." R-34. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. The parties signed a contract, dated May 2, 1994. The contract showed that the BOE would employ the petitioner as a "maintenance person" from July 1, 1994, to June 30, 1995, at a salary of $42,081. J-21. The parties also signed an employment contract, dated December 12, 1994, that showed that the BOE would employ the petitioner as acting superintendent of Buildings and Grounds from January 1, 1995, to June 30, 1995, at a salary of $48,000 prorated. J-21A. The petitioner testified that the BOE's superintendent of schools notified him that the BOE would meet and consider appointing him to serve as acting superintendent of Buildings and Grounds and that, later, the superintendent notified him that the BOE would meet and consider returning him to his maintenance title (as it did for the 1998-99 school year).

1995-96: The BOE's minutes for a meeting on May 8, 1995, show that the BOE approved motions to award contracts for 1994-95 to named tenured teaching staff and to non-tenured teaching staff, and that it approved a motion to award contracts for the 1994-95 school year to non-tenured personnel, including the petitioner as supervisor of Buildings and Grounds. R-37. The parties' signed an employment contract (undated) that showed that the BOE would employ the petitioner as supervisor of Buildings and Grounds from July 1, 1995, to June 30, 1996, at a salary of $50,160. J-22.

1996-97: The BOE's minutes for a meeting on April 29, 1996, show that the BOE approved motions to award "tenure contracts" for 1996-97 to named staff and award contracts to named "non-tenured" personnel, including the petitioner as supervisor of Buildings and Grounds. R-39. The BOE's minutes for a meeting on July 22, 1996, show that the BOE approved salaries of named tenured staff and others, including the petitioner, whose name is followed by "Supervisor of Buildings & Grounds $50,160," and the names of custodians other than the petitioner are followed by "(7/1/96 – 6/30/97)." R-40. The parties' signed an employment contract (similar to the contract for 1995-96), which was undated, that showed that the BOE

would employ the petitioner as supervisor of Buildings and Grounds from July 1, 1996, to June 30, 1997, at a salary of $52,166. J-23.

1997-98: The BOE's minutes for a meeting on June 9, 1997, show that the BOE approved motions to award contracts for 1997-98 to named staff and that it approved a contract for petitioner "as Supervisor of Buildings and Grounds for the 1997-98 school year at a salary of $54,227." R-42. The parties' signed employment contract (similar to the contract for the 1995-96 school year), which was undated, showed that the BOE would employ the petitioner as supervisor of Buildings and Grounds from July 1, 1997, to June 30, 1998, at a salary of $54,227. J-24. The parties also signed an employment contract, which was undated, that showed that the petitioner returned to the title of "maintenance person" for the period from January 1, 1998, to June 30, 1998, at a salary of $47,563 prorated. J-24A.

1998-99: The BOE's minutes for a meeting on May 11, 1998, show that the BOE approved motions to award "tenure contracts" for 1998-99 to named tenured staff and a motion to offer employment to others who were named for 1998-99, including the petitioner, whose name was followed by "(7/1/98 – 6/30/99)." R-45. The BOE's minutes did not show such a fixed term after the names of staff who were tenured or eligible for tenure. The parties' signed employment contract (similar to the contract for 1995-96), which was undated, showed that the BOE would employ the petitioner as a "maintenance person" from July 1, 1998, to June 30, 1999, at a salary of $49,370. J-25.

1999-2000: The BOE's minutes for a meeting on May 10, 1999, show that the BOE approved motions to award contracts for 1999-2000 to named tenured staff and non-tenured staff and a motion to offer employment for 1999-2000 to named "Custodians & Maintenance" personnel for 1999-2000, and the petitioner's name was among those listed. R-47. The parties' signed employment contract (similar to the contract for 1995-96), which was undated, showed that the BOE would employ the petitioner as a "maintenance person" from July 1, 1999, to June 30, 2000, at a salary of $51,295. J-26.

2000-01: The BOE's minutes for a meeting on May 8, 2000, show that the BOE approved motions to award contracts for 2000-2001 to named tenured staff and non-tenured staff

and a motion to offer employment for 1999-2000 to named custodians and maintenance personnel for 2000-2001, and the petitioner's name was among those listed. R-51. The parties' signed employment contract (similar to the contract for 1995-1996), which was undated, showed that the BOE would employ the petitioner as a "maintenance person" from July 1, 2000, to June 30, 2001, at a salary of $52,925. J-27.

2001-02: The BOE's minutes for a meeting on April 23, 2001, show that the BOE approved motions to award contracts for 2001-02 to named tenured staff and non-tenured staff and a motion to offer employment for 2000-01 to named custodians and maintenance personnel for 2001-02, and the petitioner's name was among those listed. R-52. The parties' signed employment contract (similar to the contract for 1995-96), which was undated, showed that the BOE would employ the petitioner as a "maintenance person" from July 1, 2001, to June 30, 2002, at a salary of $55,307. J-28.

2002-03: The minutes for the BOE's May 20, 2002, meeting list "maintenance staff" by name, title and salary, but petitioner's name is not listed. P-3. The minutes for the BOE's meeting on June 24, 2002, show that the BOE approved motions to award contracts for the 2002-03 school year to categories of personnel and that it approved a motion to award a contract to the petitioner as a maintenance/custodial employee for 2002-03 at a salary of $57,796. R-57. A letter from Elizabeth Nastus, the BOE's superintendent, addressed to the petitioner, dated October 31, 2002, stated that it transmitted a proposed contract for 2002-03. The letter stated that it transmitted a record of the days the petitioner had been absent during the 1999-2000, 2000-01, and 2001-02 school years and a copy of a memorandum to the petitioner addressing his "attendance record and deficiencies in work performance." The letter stated that continued excessive absences and job performance deficiencies could result in the withholding of a salary increment or in dismissal. R-1. The proposed contract (similar to the contract for 1995-96), which was undated and unsigned, showed that the BOE would employ the appellant as a "maintenance/custodial person" from July 1, 2002, to June 30, 2003, at a salary of $57,796. R-1. The BOE presented no signed contract for 2002-03. The petitioner testified that every time the BOE tendered a contract to him, despite the contract having his home address on it, the BOE left the contract in his school mailbox, and that he read, signed, and returned it. The BOE's superintendent never personally handed a contract to him. There were times when the BOE

advised him that, because of collective bargaining negotiations or other reasons, contracts had been held up or not provided, and the BOE employed him without contracts. He did not recall seeing the above-described letter, dated October 31, 2002. He testified that had he received the letter and the proposed contract, he would have read, signed, and returned it, and that no one from or on behalf of the BOE has asked him for a copy of such a contract.

2003-04: The minutes for the BOE's meeting of June 9, 2003, show that the BOE approved motions to approve 2003-04 salaries for named tenured staff and for named non-tenured staff such as custodians and maintenance personnel, including the petitioner, whose name was followed by "Maintenance, $60,397," which included a boiler license stipend. J-29. The BOE presented no contract for 2003-2004.

Daria Wasserbach testified that she has served as the BOE's BA/secretary since February 2004, and that in February 2007 she attained tenure. In this position she serves as the BOE's custodian of records. She testified that she reviewed the BOE's policies that preceded her employment with the BOE, and that since she has served as the BA, at the BOE's organizational meetings it has readopted its policies. She considered custodians to be governed by the above-quoted BOE policies and she has not deviated from those policies. R-2; R-3. She does not know whether (before she began her service as BA) the BOE allowed tenure for the petitioner. She testified that Elizabeth A. Nastus, the BOE's superintendent, was alive and healthy and available to testify. Ms. Wasserbach testified that at the end of collective bargaining contracts are agreed upon, and that each year since she has been employed by the BOE the BOE has approved proposed contracts for employees. Her office issues the approved contracts to BOE employees, who are to sign and return them. Such contracts are kept in the respective employee's personnel file and personnel files are kept in locked cabinets. She asked her staff to pull BOE records related to this case. She could not explain why the BOE could not present contracts for some of the years it employed the petitioner. She testified (as Ms. Mazurak testified) that the BOE's approved, official minutes should be signed by the BA/secretary, secured in binders, and stamped with page numbers. She could not explain why approved, official minutes could not be located relative to the purported meetings of June 25, 1984, and September 26, 1988 (for which the "Minutes" were stamped, "NOT OFFICIAL." R-17; R-23). She acknowledged that the BOE does not have "100 percent success" in maintaining its records.

Ms. Wasserbach testified that the BOE first kept its records in the BOE's "Little Red Schoolhouse"; then in "tight" quarters in the BOE's McGaheran School; and, during the 2005-06 school year, the BOE moved its records to the basement of its Round Valley School. Before the records were moved, the BOE did not prepare an inventory to establish what records were present, and Ms. Wasserbach did not know if filing cabinets, boxes, or other containers of the records were or were not counted as a way of determining if any records were or were not missing after the move. Consequently, she does not know whether any records were missing or lost as a result of the move.

2004-05: The minutes for the BOE's meeting on May 10, 2004, show that the BOE approved motions to award contracts to named tenured staff and non-tenured staff, and a motion to approve employment and salaries to be determined for 2004-05 for named custodians and maintenance personnel, who are not shown as tenured, and the petitioner's name was among those listed. R-61. The minutes for the BOE's meeting on January 24, 2005, show that the BOE approved salaries for 2004-05 for named teaching staff and for other staff, including the petitioner. R-62. The parties' signed contract, dated January 25, 2005, showed that the BOE had employed and would employ the petitioner as "Maintenance" from July 1, 2004, to June 30, 2005, "at an annual salary of $60,897," and showed that the BOE would also pay an annual stipend of $600 for the petitioner's black seal boiler license. J-30.

2005-06: The minutes for the BOE's meeting on May 23, 2005, show that the BOE approved reappointments of listed employees for 2005-06, showing their names, titles, whether they have tenure, and their salaries. Relative to tenure, the list states "YES" or "NO" or "NA." For the petitioner, a "Custodian/Maintenance" employee, the list states "NA" and shows his salary as $61,397. R-63A. The parties' signed employment contract (using a form similar to the contract dated January 25, 2005), dated May 23, 2005, showed that the BOE would employ the petitioner as "Maintenance" from July 1, 2005, to June 30, 2006, at an annual salary of $61,397, and showed that the BOE would also pay an annual stipend of $600 for the petitioner's black seal boiler license. J-31.

2006-07: The BOE's minutes for a meeting on May 15, 2006, show that the BOE

approved reappointment for 2006-07 of staff and personnel, whose names are listed and identified as tenured, non-certified, and non-tenured, and the petitioner is shown as non-tenured and in the position of maintenance. Relative to tenure, the list states "YES" or "NO" or "NA." For the petitioner, a "Maintenance" employee, the list states "NA" and shows his salary as $61,897. R-65. The parties' signed employment contract (using a form similar to the contract dated January 25, 2005), dated May 15, 2006, showed that the BOE would employ the petitioner as "Maintenance" from July 1, 2006, to June 30, 2007, at an annual salary of $61,897. J-32.

The BOE reduced the number of persons employed as janitors or in similar titles. By letter dated October 24, 2006, the BOE notified the petitioner that it had abolished his position, effective November 30, 2006. Thereafter, the BOE employed other persons as janitors or in similar titles and it has not employed the petitioner.

The petitioner testified that he did not know whether he had tenure or did not have tenure. He served the BOE with an Open Public Records Act request for copies of documents related to his employment. He was afforded an opportunity to review his personnel file and the BOE notified him that he could come to its office and pick up the copies of documents from his personnel file. In 2007 the BOE notified him that he could pick up additional copies of documents, but he did not do so.

Ms. Wasserbach testified that in May 2007 a draft policy was prepared for the BOE that provided that it would be the BOE's policy that certain non-instructional staff members would be employed on an annual contract basis and that the BOE retained the prerogative of nonrenewal of employment of such employees. Ms. Wasserbach testified that the BOE was scheduled to adopt the policy at its July 23, 2007, meeting.

FINDINGS OF FACT

Based on the competent and credible evidence, I **FIND** the following facts.

Beginning in 1973 the BOE employed the petitioner as a janitor or in similar titles for a series of fixed terms, each not in excess of twelve months, as shown by the parties' contracts.

In 1978 the BOE adopted policies that stated that it was not its intent "to provide tenure status to any person hired in a custodial-maintenance category including supervisory personnel," and that required that each "nontenured, noninstructional staff member . . . sign an annual contract." R-2; R-3.

The BOE presented a series of contracts showing that it employed the petitioner as a janitor or in a similar title for a series of fixed terms consisting of the school years (July 1 to June 30) up to the 1985-86 school year. I find Ms. Mazurak to be a credible witness. Ms. Mazurak testified that from 1983 until 1991, while she served as the BOE's BA/secretary, such contracts were submitted to the employees. The petitioner testified that he needed his employment to support his family, and that when he received such a contract, he would sign and return it. Ms. Mazurak testified that unless the employee signed and return the contract to the BOE administration, the BOE did not pay the employee, and there is no evidence that the BOE did not pay the petitioner.

The BOE did not present contracts for several school years, but it presented testimony and other documents and the petitioner testified relative to that period of time. The BOE's meeting minutes show that it annually approved contracts for employees, including the petitioner, for the succeeding twelve months (July 1 to June 30) in 1986-87, 1987-88, 1989-90, 1990-91, 1991-92, and 1992-93. In approving such contracts, the BOE identified employees to be employed, such as teachers, as tenured and named them, and identified other employees as not tenured, such as janitors or similar titles, and named them. The BOE's minutes repeatedly showed fixed terms after petitioner's name. No document in evidence established that the BOE employed the petitioner for a term in 1988-89. However, Ms. Mazurak testified credibly that, while she served as BA/secretary, the BOE required and obtained signed contracts. The petitioner testified that in the late 1980s the BOE employed him without a contract, so his testimony contradicts Ms. Mazurak's. However, the petitioner candidly commented that he was not good with dates and/or that he did not recall dates. Acquisition of tenure is such a significant event for a public school employee that most persons would probably remember it. The petitioner also testified that he did not know whether or not he had tenure (but that, after the reduction in force, he believed he had tenure). Considering all of the competent and credible

evidence, I **FIND** that Ms. Mazurak was credible and that the BOE employed the petitioner as a janitor or in a similar title, for fixed terms, until the 1992-93 school year, and I **FIND** that there were contracts for these schools years, but they have been lost.

Contracts signed by the parties show that the BOE employed the petitioner as a maintenance person for twelve-month (July 1 to June 30) terms in 1993-1994 and 1994-1995. The parties' contracts provided that the BOE would employ the petitioner as acting superintendent of Buildings and Grounds and as supervisor of Buildings and Grounds until June 30, 1995, and for twelve-month terms in 1995-96 and 1996-97. It was not shown that as superintendent and supervisor the petitioner's duties differed substantially from those of a janitor. In 1997 the parties signed a contract providing for the petitioner's return to the title of maintenance man (similar to janitor), from January 1, 1998, until June 30, 1998. J-24A. Thereafter, the parties signed a series of contracts providing for the BOE's employment of petitioner as a maintenance person for a series of twelve-month terms in 1998-99, 1999-2000, 2000-01, and 2001-02.

The BOE did not present contracts for employment of the petitioner for the 2002-03 and 2003-04 school years. Again, the BOE presented documents, including meeting minutes, to show that the BOE annually approved contracts for employment of the petitioner as a non-tenured janitor or in a similar title for succeeding twelve-month (July 1 to June 30) terms in 2002-03 and 2003-04.

The parties signed employment contracts for the BOE's employment of the petitioner for twelve-month terms in 2004-05, 2005-06. In October 2006 the BOE reduced the number of persons employed as janitors or in similar titles and notified the petitioner that it had abolished his position effective November 30, 2006. Thereafter, the BOE employed non-tenured persons as janitors or in a similar title.

To summarize, consistent with the BOE's policy against tenure for janitorial employees and the policy requiring annual contracts of employment, the BOE annually approved contracts for employment of the petitioner as a non-tenured janitor or in a similar title for terms not in excess of twelve months (July 1 to June 30), and the parties executed a series of contracts with

such fixed terms. Contracts for some of the years that the BOE employed the petitioner are not in evidence. However, the BOE presented other evidence to show that it repeatedly and routinely distinguished tenured employees from non-tenured employees such as those employed as janitors or in similar titles and approved employment of those employed as janitors or in similar titles only for fixed terms not in excess of twelve months. The absence of signed contracts for certain years does not necessarily require the finding that during such years the BOE employed the petitioner without a fixed term. The petitioner admitted that he did not believe he had tenure and he did not prove that the BOE employed him without a fixed term. Considering all of the evidence, consistent with the BOE's routine practice, it employed the petitioner only for a series of fixed terms and did not employ him without a fixed term or permanently. N.J.R.E. 406. Further, there is no competent or credible evidence that the BOE's reduction in force of its janitorial staff was for reasons other than for good faith reasons of economy.

CONCLUSIONS OF LAW

The Legislature has reserved the acquisition of tenure for limited groups of employees and on an ad hoc basis and each legislative grant is sui generis. Plumbers and Steamfitters v. Woodbridge Bd. of Educ., 159 N.J. Super. 83, 87 (App. Div. 1978).

School laws providing for tenure for public school teachers have been described as aiding the establishment of competent and efficient school systems by affording them a measure of security and by preventing boards of education from abusing their superior bargaining power in contract negotiations and preventing dismissal of employees for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)); see also N.J.S.A. 18A:6-10; Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949); Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944).

Statutory tenure for public school janitors has also been recognized as a means of providing job security for those who perform their jobs properly, preventing school boards from abusing their superior bargaining power, and protecting employees from dismissal for bad faith reasons. Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (1985).

N.J.S.A. 18A:17-3, which allows tenure for public school janitors, states:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by [N.J.S.A. 18A:6-2(b)].
>
> [Emphasis added.]

N.J.S.A. 18A:17-3 uses only the title "janitor," but that title has been broadly construed to include janitorial employees generally, such as those engaged in cleaning, upkeep, and repair of school facilities in titles such as custodian, maintenance man, utility man, groundskeeper, and janitorial supervisor. Barnes v. Bd. of Educ., 85 N.J. Super. 42, 45-46 (App. Div.), certif. denied, 43 N.J. 450 (1964); see also Keaney v. Bd. of Educ. of Bloomfield, EDU 5881-03, Initial Decision (July 28, 2005), adopted, Comm'r (August 31, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>.

N.J.S.A. 18A:17-3 does not require tenure for janitors. Instead, the Legislature allows boards of education discretion to deny tenure by appointing janitors for a fixed term, allows boards and janitorial employees to negotiate terms of employment, and allows boards to determine which janitors, if any, shall receive tenure. Wright, supra, 99 N.J. at 118-19; Hunterdon Cent. High Sch. Educ. Ass'n v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 1988 S.L.D. 2468, 2473, aff'd, No. A-5036-87T2 (App. Div. June 28, 1989). The janitorial tenure statute is contrasted with the teachers' tenure statute, which preempts such discretion. Compare N.J.S.A. 18A:28-5 with N.J.S.A. 18A:17-3.

Attaining statutory tenure requires compliance with the specific conditions set forth in the governing statute. Zimmerman, supra, 38 N.J. at 72. A claimant bears the burden of presenting sufficient, competent, and credible evidence of facts essential to his or her claim. Schaffer v. Weast, 546 U.S. 49, 55-56, 126 S. Ct. 528, 533-34, 163 L. Ed. 2d 387, 395-96 (2005); N.J.S.A.

52:14B-10(c). Here the petitioner must prove by the preponderance (greater weight) of the competent and credible evidence that the BOE employed him without a "fixed term" to succeed in this claim that he attained tenure. N.J.S.A. 18A:17-3; see also N.J.S.A. 52:14B-10(c); Wright, supra, 99 N.J. at 119.

Tenure is not a property right and has always been subject to the greater public interest in a thorough and efficient system of public schools for the education of children. In re Tenure Hearing of Haspel, 1964 S.L.D. 17, 30; see also N.J. Const. art VIII, § 4, ¶ 1.

The evidence here includes the petitioner's testimony; the parties' contracts; testimony by the board's former BA/secretary; testimony by the board's BA/secretary; and the board's policies, meeting minutes, and resolutions. The petitioner did not present documentation to demonstrate that he acquired tenure. When prompted, he had a general recollection that he had no contract in the late 1980s, but he did not testify credibly that the BOE employed him for a specific school year without a contract and without a fixed term. The BOE presented exhibits showing, consistent with its policy, appointment and employment for a series of fixed terms.

In Zielinski v. East Brunswick Board of Education, 95 N.J.A.R.2d (EDU) 161, aff'd, 96 N.J.A.R.2d (EDU) 3, the board of education passed a resolution stating that its "policy" was to grant tenure to "efficient Janitors, who are members of the State Pension and Annuity Fund, after three years of service." The Appellate Division affirmed the ALJ's and Commissioner's conclusion that the board did not establish that its fixed-term contracts equated with an assessment of inefficiency and, pursuant to the resolution, the janitor acquired tenure. In Strincoski v. Board of Education of East Brunswick, 94 N.J.A.R.2d (EDU) 37, aff'd, 94 N.J.A.R.2d (EDU) 527, the State Board of Education, affirmed by the Appellate Division, concluded that, by virtue of the board of education's express policy to grant tenure to janitorial employees, the custodian acquired tenure. In Smith v. Board of Education of East Brunswick, EDU 5654-81, Initial Decision (June 13, 1983), aff'd, Comm'r (August 16, 1983), aff'd, State Bd. of Educ. (April 4, 1984), the State Board of Education affirmed the conclusion that, where the board of education policy was to grant tenure to janitorial employees after three years' service, notices signed by Smith specifying his annual salary for each school year did not constitute contractual employment for successive fixed terms and, pursuant to the board's policy

it had granted tenure. In contrast with the above-cited cases, the respondent BOE's policy was not to grant tenure to janitors and persons employed in similar titles.

The absence of a contract of employment of a janitor does not, in itself, establish that the BOE employed the petitioner for an unfixed term. Hunterdon Central High School Educ. Ass'n, supra, 1988 S.L.D. at 2473 (citing Lang v. Bd. of Educ. of Holmdel, Comm'r (July 22, 1983)); Hemighaus v. Bd. of Educ. of Bridgeton, EDU 2397-01, Initial Decision (January 25, 2002), adopted, Comm'r (March 14, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>; Sharpe v. Bd. of Educ. of Wyckoff, 93 N.J.A.R.2d (EDU) 331.

In McCullough v. Board of Education of Trenton, EDU 10053-99, Initial Decision (December 4, 2001), rev'd, Comm'r (January 15, 2002), <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner considered the "totality of the circumstances" and, since the board of education's minutes were silent relative to the term of employment of McCullough and, after the initial employment of McCullough, the board approved a contract for "a permanent assistant custodian position," the Commissioner concluded that he thereby acquired tenure. In contrast with McCullough, the respondent BOE's minutes repeatedly stated that the BOE appointed the petitioner for only a fixed term.

In Cromwell v. Board of Education of River Vale, EDU 9213-98, Initial Decision (November 18, 1999), aff'd, Comm'r (January 6, 2000), aff'd, State Bd. of Educ. (June 7, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, the State Board of Education affirmed the conclusion that, notwithstanding the board of education's discontinuance of the practice of executing formal employment contracts with Cromwell, since the board's minutes clearly revealed that the board employed Cromwell for successive fixed terms, he did not acquire tenure. See also N.J.R.E. 406.

Janitorial tenure, unlike tenure for professional school employees, has been described as a personal privilege that can be waived by acceptance of employment for a fixed term. Hemighaus, supra, EDU 2397-01 <http://lawlibrary.rutgers.edu/oal/search.html> (citing Giandomenico v. Bd. of Educ. of Winslow, Camden County, 1975 S.L.D. 258, aff'd, 1976 S.L.D. 1139). However, waiver of tenure requires that the tenured employee voluntarily

relinquish a known right. Keaney, supra, EDU 5881-03, Initial Decision <http://lawlibrary.rutgers.edu/oal/search.html> (citing O'Toole v. Forestal, 211 N.J. Super. 394 (App. Div. 1986)). Further, it has been held that the tenured janitorial employee who thereafter accepts janitorial employment as chief janitor or supervisor of maintenance does not thereby relinquish his tenure. Brunner v. Bd. of Educ. of Camden, 1960 S.L.D. 155, 157; Keaney, supra, EDU 5881-03, Initial Decision <http://lawlibrary.rutgers.edu/oal/search.html>. (Neither party demonstrated whether, as superintendent and supervisor, the petitioner's duties did or did not remain substantially similar to those of a person employed as a janitor or in a similar title.) Further, once tenure has been acquired, a mere annual salary notice does not vacate tenure and establish employment for a finite term. Keaney, supra, EDU 5881-03, Initial Decision <http://lawlibrary.rutgers.edu/oal/search.html> (quoting Smith, supra, EDU 5654-81).

Relative to tenure and a reduction in the numbers of tenured janitors and similar employees, the school laws state:

> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments.
>
> [N.J.S.A. 18A:17-4.]

Therefore, under N.J.S.A. 18A:17-4, a board may abolish janitorial positions for reasons of economy and, where the board implements a bona fide reduction in force, it may reduce compensation for a tenured janitor. Atlantic City Educ. Ass'n v. Bd. of Educ. of Atlantic City, EDU 10335-98, Initial Decision (August 19, 1999), adopted, Comm'r (October 7, 1999), aff'd, State Bd. of Educ. (March 1, 2000) <http://lawlibrary.rutgers.edu/oal/search.html> (citing Impey

v. Shrewsbury Bd. of Educ., 142 N.J. 388 (1955)). However, a tenured janitorial employee does not have a right to a specific title, assignment or position. Reinertsen v. Bd. of Educ. of E. Brunswick, EDU 10328-97, Initial Decision (May 27, 1998), adopted, Comm'r (July 8, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>.

Here, beginning in 1973 and pursuant to a series of contracts with fixed terms, the BOE employed the petitioner as a janitor or in a similar title. The BOE presented no signed employment contract (appointing the petitioner for fixed terms) for certain years, but that does not necessarily mean that the BOE employed the petitioner without a fixed term. All of the competent and credible evidence must be weighed and the BOE's testimony and numerous exhibits demonstrated, consistent with BOE policy, a routine practice of annual approvals of employment of petitioner for distinct, fixed terms. Consequently, I must **CONCLUDE** that the petitioner did not meet his burden of proof and that he did not acquire tenure.

ORDER

I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 27, 2007

DATE

JOHN R. TASSINI, ALJ

Date Received at Agency:

9-27-07

SEP 28 2007

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

EXHIBITS

Joint:

J-1 Employment Contract, dated August 14, 1973 EV

J-2 Employment Contract, dated May 14, 1974; addendum relative to annual salary, approved by BOE, June 25, 1974 EV

J-3 Employment Contract, dated April 22, 1975 EV

J-4 Employment Contract, dated April 13, 1976 EV

J-5 Employment Contract, dated April 18, 1977; addendum relative to annual salary, approved by BOE, June 21, 1977 EV

J-6 Employment Contract, dated April 10, 1978 EV

J-7 Letter from BOE, April 24, 1979; Employment Contract, dated June 27, 1979; addendum relative to annual salary, approved by BOE, July 17, 1979 EV

J-8 Employment Contract, dated April 28, 1980; addendum relative to annual salary, approved by BOE, July 14, 1980 EV

J-9 Employment Contract, dated April 20, 1981 EV

J-10 Employment Contract, dated April 19, 1982; addendum relative to annual salary, approved by BOE, May 10, 1982 EV

J-11 Employment Contract, dated April 11, 1983; addendum relative to annual salary, approved by BOE, May 9, 1983 EV

J-12 Letter from BOE, April 18, 1984; Employment Contract, dated June 25, 1984; addendum relative to annual salary, approved by BOE, July 9, 1983; Memorandum Non-Teaching Staff Members, 9/10/84 EV

J-13 Employment Contract, dated April 24, 1985 EV

J-14 BOE minutes, 4/14/86, page 834 EV

J-15 BOE minutes, 4/27/87, page 4 EV

J-16 BOE minutes, 12/18/90, page 1355 EV

J-17 BOE minutes, 5/23/90, no page shown EV

J-18 Employment Contract, dated May 20, 1991, unsigned EV

J-19 Employment Contract, dated July 13, 1992, unsigned EV

J-20 Employment Contract, dated May 10, 1993 EV

J-21 Employment Contract, dated May 2, 1994 EV

J-21A Employment Contract, dated December 12, 1994 EV

J-22 Employment Contract (for the period July 1, 1995, to June 30, 1996), undated EV

J-23 Employment Contract (for the period July 1, 1996, to June 30, 1997), undated EV

J-24 Employment Contract (for the period July 1, 1997, to June 30, 1998), undated EV

J-25 Employment Contract (for the period July 1, 1998, to June 30, 1999), undated EV

J-26 Employment Contract (for the period July 1, 1999, to June 30, 2000), undated EV

J-27 Employment Contract (for the period July 1, 2000, to June 30, 2001), undated EV

J-28 Employment Contract (for the period July 1, 2001, to June 30, 2002), undated EV

J-29 BOE minutes, June 9, 2003, page 4056 EV

J-30 2004/2005 Employment Contract Maintenance, Sloan, Don, January 25, 2005 EV

J-31 2005/2006 Employment Contract Maintenance, Sloan, Don, May 23, 2005 EV

J-32 2006/2007 Employment Contract Maintenance, Sloan, Don, May 15, 2006 EV

For Petitioner:

P-1 BOE minutes, 1996-97, page 2720 ID

P-2 BOE minutes, 1997-98, page 2915 ID

P-3 BOE minutes, 2002-03, no page shown ID

For Respondent:

R-1 Letter from BOE, October 31, 2002; Employment Contract (for the period July 1, 2002, to June 30, 2003), undated and unsigned EV

R-2 BOE Policy No. 403, Employment Contract, Adopted 2/21/78 EV

R-3 BOE Policy No. 406, Noninstructional Employees Which are Not Tenured, Adopted 2/21/78 EV

R-4 Draft of BOE Policy Certain Staff Members Not Tenured ID

R-5 Evaluation/Conference Form, September 8, 1995 ID

R-6 Evaluation/Conference Form, May 9, 1996 ID

R-7 Annual Evaluation, July 25, 1996 ID

R-8 Evaluation Report, October 21, 1996 ID

R-9 Status Report (relative to meeting with petitioner), November 7, 1996

R-10 Annual Evaluation, June 12, 1997 ID

R-11 Memorandum (relative to "job performance and attitude"), February 22, 2005 ID

R-12 Memorandum (relative to "job performance"), September 21, 2006 ID

R-13 Memorandum (relative to 1977-78 contracts), April 22, 1977 ID

R-14 "Bills, April 13, 1976"; forms relative to expenses, April 13, 1976; "Secretary's Report, April 13, 1976"; "Resolution," approved December 8, 1975; BOE's Table of organization, April 13, 1976; "Superintendent's Report, April 13, 1976" EV

R-15 Agenda, April 18, 1977; Minutes of April 18, 1977 EV

R-16 Minutes of April 10, 1978 EV

R-17 "Not Official" Minutes of Special Meeting, June 25, 1984 ID

R-18 Minutes of Special Meeting, April 24, 1985 EV

R-19 Minutes of Regular Meeting, April 14, 1986 EV

R-20 Minutes of Organizational Meeting, April 21, 1986 EV

R-21 Minutes of Special Meeting, April 27, 1987 EV

R-22 Board Notes, April 25, 1988 Special Meeting EV

R-23 "Not Official" Minutes of Special Meeting, September 26, 1988 EV

R-24 Superintendent's Report, April 24, 1989 EV

R-25 Minutes of Special Meeting, April 24, 1989 EV

R-26 Minutes of Regular Meeting, December 18, 1989 EV

R-27 Minutes of Public Hearing, April 2, 1990 EV

R-28 Minutes of Regular Meeting, April 23, 19990 EV

R-29 Minutes of Regular Meeting, May 23, 1990 EV

R-30 Minutes of Regular Meeting, May 20, 1991 EV

R-31 Minutes of Special Meeting, April 27, 1992 EV

R-32 Minutes of Agenda Meeting, July 13, 1992 EV

R-33 Minutes of Regular Meeting, May 10, 1993 EV

R-34 Minutes of Organizational and Regular Meeting, May 2, 1994 EV

R-35 Employment Contract, December 12, 1994 EV

R-36 Minutes of Regular Meeting, December 12, 1994 EV

R-37 Minutes of Special Meeting, May 8, 1995 EV

R-38 Minutes of Regular Meeting, October 16, 1995 EV

R-39 Minutes of Regular Meeting, April 29, 1996

R-40 Minutes of Regular Meeting, July 22, 1996 EV

R-41 Minutes of Regular Meeting, January 27, 1997 EV

R-42 Minutes of Regular Meeting, June 9, 1997 EV

R-43 Minutes of Regular Meeting, November 10, 1997 EV

R-44 Minutes of Regular Meeting, January 12, 1998 EV

R-45 Minutes of Regular Meeting, May 11, 1998 EV

R-46 Minutes of Regular Meeting, September 28, 1998 EV

R-47 Minutes of Regular Meeting, May 10, 1999 EV

R-48 Memorandum, June 10, 1999 ID

R-49 Letter, June 14, 1999 ID

R-50 Minutes of Regular Meeting, June 14, 1999 ID

R-51 Minutes of Organizational/Regular Meeting, May 8, 2000 EV

R-52 Minutes of Organizational Meeting, April 23, 2001 EV

R-53 Minutes of Regular Meeting, March 11, 2002 ID

R-54 Meeting Notice, April 22, 2002; Agenda, April 22, 2002 ID

R-55 Memorandum (sick days, etc.), April 25, 2002 ID

R-56 Letter, October 31, 2002; Employment Contract (unsigned) ID

R-57 Minutes of Regular Meeting, June 24, 2002 EV

R-58 Meeting Notice, June 24, 2002; Agenda, June 24, 2002 EV

R-59 Minutes of Regular Meeting, June 24, 2002 EV

R-60 Minutes of Regular Meeting, June 9, 2003 EV

R-61 Minutes of Regular Meeting, May 10, 2004 EV

R-62 Regular Meeting, January 24, 2005, Minutes(?), Resolutions, etc. EV

R-63 Regular Meeting, May 23, 2005, Minutes (without list) ID

R-63A Regular Meeting, May 23, 2005, Minutes (with list) EV

R-64 Memorandum, undated, ID

R-65 Regular Meeting, May 15, 2006, Minutes(?), Resolutions, etc. EV

WITNESSES

For Petitioner:

Donald Sloan

For Respondent:

Claire Mazurak

Daria Wasserbach

499-07

#499-07E

OAL DKT. NO. EDU 11983-07
AGENCY DKT. NO. 346-11/07

WILLIAM F. MILLEVOI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON
RESPONDENT.	:	APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law on November 21, 2007 – along with the recommended Order of the Administrative Law Judge (ALJ) – have been reviewed by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner adopts the recommended Order denying emergent relief as she concurs with the ALJ – for the reasons clearly detailed on the hearing tape – that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably, petitioner has not demonstrated that absent such relief he will suffer irreparable harm; that he has a likelihood of prevailing on the merits; or that a balancing of the interests and equities weighs in his favor.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits scheduled by the ALJ for April 2, 2008.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/27/07
Date of Mailing: 12/28/07

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

CONTROVERSIES & DISPUTES
2007 NOV 27 PM 2:45

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 11983-07

AGENCY DKT. NO. 346-11/07

WILLIAM F. MILLEVOI,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

Record Closed: November 21, 2007 Decided: November 21, 2007

BEFORE: **JOSEPH A. PAONE,** ALJ:

On November 21, 2007, petitioner William F. Millevoi came before me on an Order to Show Cause for Emergent Relief, challenging the District's decision not to award him the position of girl's basketball coach and seeking an order compelling the District to appoint him as the Head Girls Basketball Coach at Ferris High School for the 2007-2008 season and enjoining the District from appointing any other individual to that position or discontinuing his compensation for that position. After consideration of the Crowe v. DeGoia, 90 N.J. 126 (1982) standards, I **FIND** that this is a contract dispute and that petitioner is not likely to prevail on the merits. Specifically, he did not meet the qualifications of the posting for the position and, moreover, the State District

Superintendent never approved his employment. I also **FIND** that petitioner will not suffer irreparable harm because monetary relief is available should he ultimately prevail. Finally, I **FIND** that when the equities and interests of the parties are balanced, petitioner will not suffer greater harm than the District, which has an interest in the enforcement of their reasonable employment policies.

ORDER

Accordingly, I hereby **ORDER** that Petitioners' Application for Emergent Relief is **DENIED**, and I **FURTHER ORDER** that this matter be heard at a plenary hearing scheduled for April 2, 2008, at 9:00 a.m.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 21, 2007
DATE

JOSEPH A. PAONE, ALJ

lr

500-07

#500-07

M.W. on behalf of minor child T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed her minor child, T.C.'s, 10-day suspension following a confrontational incident with another student on September 20, 2007 outside Ewing High School. Several individuals witnessed the disturbance and testified at the OAL hearing. T.C. had a history of suspension, and had been involved in an off-campus altercation with the same student the night before, to which police had responded.

The ALJ found the testimony of witnesses to the incident to be credible, and – given T.C.'s prior suspensions and the off-campus altercation on the previous night – there was a need to deter aggression among students at the high school; the ten-day suspension was therefore warranted. The ALJ affirmed the respondent's 10-day suspension of T.C.

The Assistant Commissioner, to whom the matter was delegated pursuant to N.J.S.A. 18A:4-34, concurred with the ALJ that the suspension was not arbitrary, capricious, or unreasonable, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 27, 2007

OAL DKT. NO. EDU 8213-07
AGENCY DKT. NO. 283-9/07

M.W. on behalf of minor child T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.by the Assistant Commissioner, to whom this matter has been delegated, pursuant to *N.J.S.A.* 18A:4-34.[1] No exceptions were filed.

The petitioner challenged a ten-day suspension which had been imposed upon her daughter as a result of a confrontational incident which had occurred outside respondent's high school on September 20, 2007. Several individuals had witnessed the disturbance, including two teachers and an assistant principal, all of whom testified at the OAL hearing.

Among the exhibits which were entered into evidence at the hearing were two electronically submitted reports - one from each of the teacher witnesses. Both teachers had observed two groups of students yelling at each other. Both reported that a student, S.S., had told them that she anticipated that T.C. was going to wait for her 'down the road' and fight her.

[1] The record does not include transcripts of the November 1, 2007 hearing at the OAL.

According to the Administrative Law Judge's (ALJ) summary of the teachers' testimony, both testified that they found S.S. in a shaky, agitated state. One teacher described S.S. as frightened of T.C. (Initial Decision at 2)

The assistant principal who witnessed the incident – Thomas Jones – also testified that two groups of students were 'arguing.' *(Ibid)* He spoke with S.S., who advised him that T.C. had threatened her. He and the school principal pursued T.C. and the group of students she was with. Although they called to T.C. to stop, she did not respond. When they caught up with her she stated "keep that f_____ girl away from me." The testimony of Rodney Logan, the high school principal, corroborated Jones' account.

As a result of his own observations, interviews with students and the reports from the teachers, Jones concluded that T.C. had been the aggressor in the incident. He suspended T.C. for ten days, effective September 21, 2007, the day after the incident. According to Jones' testimony, there had been a prior incident in school involving physical contact between T.C. and S.S. on September 11, 2007, at which time both students had been instructed to stay away from each other. This occurrence is referenced in Respondent's Exhibit R-4 (Exhibit R-4). Jones also testified that on September 19, the day before the incident at issue here, there had been an altercation between T.C. and S.S. to which the police had responded – off school grounds.

Logan also concluded that T.C. was the aggressor and S.S. was afraid of her. He noted that S.S. was trembling when he spoke with her. He was aware of the 'fight' between the two students that had been broken up by the police the night before, Initial Decision at 3, and noted that T.C. had received prior suspensions for physical altercations.

Thus, the imposition of a ten-day suspension in the present case followed a five-day suspension that T.C. had received as the result of a fistfight she had engaged in with a

different student on March 30, 2007. *See,* Exhibit R-8 and R-9. Less than six months prior to that discipline was a longer suspension precipitated by a physical altercation between T.C. and yet another student – in October 2006. *See,* Exhibit R-7.

Petitioner did not submit any exhibits. Her evidence consisted of T.C.'s testimony, which was summarized by the ALJ as follows:

> She was told by the school security officer just before leaving the building on the day in question to "watch your back". As T.C. departed the campus S.S. and her friends began taunting her and said something like "what are you going to do now"? T.C. responded that she wasn't about to fight in front of the school and left. She saw S.S. take her jacket off and drop her books as if to fight, but she just walked away. T.C. testified that she didn't hear Principal Logan calling until he was quite near.

The ALJ found respondent's witnesses to be credible, a finding that the Commissioner generally will not disturb. *See, N.J.S.A.* 52:14b-10 (c) (The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record.) *See, also, State v. Sheika*, 337 N.J. Super. 228, 238-39 (App. Div. 2001) (We are obliged to defer to the trial judge's credibility determination to the extent that it was grounded in the court's opportunity to observe the character and demeanor of the witnesses, an opportunity that we . . . are not afforded.)

Measuring the evidence provided by those witnesses (and the documentary evidence entered at the hearing) against T.C.'s testimony, the ALJ found that respondent's

decision to suspend T.C. for ten days was not arbitrary, capricious or unreasonable. Upon review of the record before her, the Assistant Commissioner cannot disagree.

In light of the foregoing, the petition is dismissed.

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/27/07

Date of Mailing: 12/28/07

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8213-07
AGENCY DKT. NO. 283-9/07

M.W. ON BEHALF OF T.C.,
Petitioner,
v.
BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY,
Respondent

M.W., petitioner, pro se

Jeffrey F. Belz, Esq., for the respondent

Record Closed: November 1, 2007 Decided: November 15, 2007

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a decision by the Ewing Township Board of Education to suspend T.C. for ten days based on an incident that occurred on September 20, 2007. The suspension took effect on September 21, 2007 and continued through October 4, 2007. Petitioner filed a request for emergent relief with the Department of Education on September 27, 2007, which was transmitted to the Office of Administrative Law on October 2, 2007. Oral argument was scheduled for October 4,

2007 and then adjourned as the suspension had already been served. A plenary hearing was scheduled to determine whether the Board's action was appropriate.

Todd L. Pae is an English teacher at Ewing High School. On September 20, 2007, he was exiting the school building at the end of the day and saw two groups of students congregated near a parking area. He approached and found S.S. in an agitated state and directing her attention to a group who were leaving the area. He attempted to block S.S.'s sight line and tried to calm her. S.S. said that another girl had threatened her and would be waiting down the road. Mr. Pae directed S.S. back into the building, along with some other personnel who were arriving at the scene.

Debra Feeney is also an English teacher at Ewing High School. On September 20, 2007, at approximately 2:40 p.m., she was leaving for the day and noticed two groups of students yelling at each other. She approached and spoke to S.S. who seemed shaky and frightened. S.S. said "if she jumps me I'll have to deal with it". Various students in the area identified T.C. as the other girl involved in this exchange.

Thomas Jones is an Assistant Principal at Ewing High School. He was outside the building on September 20, 2007 and saw the two groups of students who were arguing. As he arrived one group began to leave and he spoke briefly to S.S. She indicated that T.C. had threatened her. Mr. Jones testified that he and Dr. Rodney Logan, the school Principal, pursued the group that was departing and that Dr. Logan called to them loudly, but they did not stop. It was only when he and Dr. Logan got close that T.C. turned and said "keep that fucking girl away from me". Dr. Logan told her to go home and Mr. Jones called shortly thereafter and spoke with both T.C. and her mother M.W. Mr. Jones testified that from talking to students at the scene and from his own observations, it appeared T.C. had been the aggressor. S.S. was not suspended.

Mr. Jones testified that there had been an in-school incident between S.S. and T.C. on September 11, 2007, which involved a loud exchange and bumping; his understanding was that this was over a boy. Both girls were told to keep away from

each other and T.C. was suspended for two days. On September 19, 2007, the day before the incident in question, this same pair had a physical altercation off school grounds and the Ewing Police were called.

Dr. Rodney J. Logan testified that on September 20, 2007 he was called concerning a commotion outside the school. He went out immediately to investigate and S.S. complained that T.C. had threatened her. Dr. Logan saw one group of students walking away from the area and he ran after them calling for them to stop three or four times in a loud voice. He was certain that T.C. heard him, but she did not stop until he was quite close, at which point she turned and said "keep that fucking girl away from me". He told her to go home.

Dr. Logan testified that T.C. has a history of suspension and she clearly was not fearful of S.S. In Dr. Logan's estimation T.C. can be violent and he has concerns about her. On the other hand, S.S. was visibly upset and trembling; he concluded that T.C. was the aggressor. Dr. Logan was aware that the Ewing police had broken up a fight between these two girls the night before. T.C. is a second year student at the high school; although she is still technically in ninth grade for failure to complete certain course work.

T.C. testified in her own behalf. She was told by the school security officer just before leaving the building on the day in question to "watch your back". As T.C. departed the campus S.S. and her friends began taunting her and said something like "what are you going to do now"? T.C. responded that she wasn't about to fight in front of the school and left. She saw S.S. take her jacket off and drop her books as if to fight, but she just walked away. T.C. testified that she didn't hear Principal Logan calling until he was quite near. This is the substance of the record.

Boards of Education enjoy wide discretion in the conduct of school affairs, Thomas v. Morris Bd. Of Educ., 89 N.J. Super. 327 (App. Div. 1965); Kopera v. West Orange Bd. Of Educ., 60 N.J. Super. 288 (App. Div. 1960). Both Mr. Jones and Dr. Logan were at the scene of this incident within moments. They interviewed students

and obtained a sense of events from the demeanor of the two participants. They testified credibly and from this record there is no reason to distrust their evaluation. Dr. Logan was also troubled by the fact that T.C. would not stop despite his loud calls to her. Given her prior two day suspension, the awareness of an off-campus altercation the night before, and the vital need to deter aggression among students, the ten day suspension was warranted.

Based on the foregoing, the Board's ten day suspension is affirmed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/15/07
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency: 11/15/07

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 20 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

T.C.

For Respondent:

Todd L. Pae
Debra Feeney
Thomas Jones
Dr. Rodney J. Logan

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 E-mail of Todd Pae, dated September 21, 2007
R-2 E-mail of Deborah Feeney, dated September 21, 2007
R-3 Conduct & Discipline Report, dated September 20, 2007
R-4 Conduct & Discipline Report, dated September 11, 2007
R-5 4th Level Offenses
R-6 Incident List
R-7 Conduct & Discipline Report, dated October 19, 2006
R-8 Conduct & Discipline Report, undated
R-9 Notice of Disciplinary Action

Dombroski, Colleen

om: System Administrator
.o: EDU2; EDU3
Sent: Thursday, November 15, 2007 11:13 AM
Subject: Delivered: EDU 8213-07 M.W.

Your message

To: EDU
Subject: EDU 8213-07 M.W.
Sent: 11/15/2007 11:12 AM

was delivered to the following recipient(s):

EDU2 on 11/15/2007 11:12 AM
EDU3 on 11/15/2007 11:12 AM