

DINA LONKY, WILLS, O'NEILL AND :  
MELLK AND THE HORACE MANN :  
INSURANCE COMPANY, :  
 :  
PETITIONERS, :  
 :  
V. : COMMISSIONER OF EDUCATION  
 :  
BOARD OF EDUCATION OF THE CITY : DECISION  
OF BAYONNE, HUDSON COUNTY, :  
 :  
RESPONDENT. :  
\_\_\_\_\_ :

### SYNOPSIS

Petitioner Lonky – a former special education teacher in the Bayonne School District – challenged the respondent’s denial of her request for reimbursement of legal fees incurred in connection with her defense against two civil law suits which were based on allegations that Lonky mistreated two students she taught in her classroom. The civil suits were settled without admissions of liability, and the cases were dismissed. A criminal indictment based on the same charges was dismissed after Lonky completed a Pre-Trial Intervention Program (PTI). Lonky was covered by an educator’s employment liability policy underwritten by the Horace Mann Insurance Company, which sought legal services on behalf of Lonky through the Wills, O’Neill and Mellk law firm. Petitioner claimed indemnification for her legal fees relating to both civil suits pursuant to *N.J.S.A. 18A:16-6* and *N.J.S.A. 18A:16-6.1*. Cross motions for summary decision were filed by the parties.

The ALJ found, *inter alia*, that: the single issue in this proceeding is whether petitioners are entitled to indemnification from respondent pursuant to *N.J.S.A. 18A:16-6* and *N.J.S.A. 18A:16-6.1*; there is no genuine dispute of material facts, and the matter is ripe for summary decision; there was no determination as to criminality against petitioner Lonky; the indictment and civil complaints against her were dismissed in her favor; and the civil and criminal statutes therefore require respondent to provide indemnification. Accordingly, the ALJ concluded that petitioners are entitled to indemnification pursuant to *N.J.S.A. 18A:16-6*, and ordered respondent to defray all reasonable counsel fees and expenses relating to Lonky’s defense.

Upon a thorough and independent review, the Commissioner concurred that summary decision is appropriately granted to petitioners, and adopted the recommended decision of the OAL with the clarification that petitioners did not seek – nor are they entitled to – reimbursement for defense of the criminal matter, as PTI is an “indecisive” as opposed to “favorable” conclusion of a legal proceeding.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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July 7, 2008

OAL DKT. NO. EDU 7205-07  
AGENCY DKT. NO. 125-5/07

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and replies thereto of petitioners – filed in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

On exception the Board essentially recasts and reiterates its arguments advanced before the Administrative Law Judge (ALJ) below, *i.e.*, 1) that the instant claim is barred by the entire controversy doctrine and/or the New Jersey Tort Claims Act; and 2) because the criminal charges were not resolved in Ms. Lonky's favor, the underlying acts cannot be considered to have arisen out of and in the course of the performance of her duties of employment since the duties of employment cannot incorporate criminal conduct. As it is determined that such proffers were considered and addressed by the ALJ in her decision and – in the case of #2 – further clarified herein, they will not be reprised here.

Upon a full and independent review of this matter, the Commissioner concurs that summary decision is appropriately granted to petitioners as she fully agrees with the ALJ's findings and her conclusion that petitioners are entitled to indemnification from the Board for the reasonable legal fees and costs of Ms. Lonky's defense against the two civil lawsuits filed against her. However, to the extent that the ALJ's conclusion may convey the impression that petitioners are also entitled to indemnification for defense of the criminal charges against Ms. Lonky, the Commissioner is compelled to clarify that such is not the case.

There are two statutes which control the issue of whether a school employee is entitled to reimbursement for his or her legal fees and costs in connection with the defense of a civil, administrative, criminal or quasi-criminal matter – *i.e.*, *N.J.S.A. 18A:16-6* and *N.J.S.A. 18A:16-6.1*. *N.J.S.A. 18A:16-6* deals with the issue of whether a school employee is entitled to indemnification in connection with a civil or administrative action and – in pertinent part – specifies :

Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any...employment under the jurisdiction of any board of education...for any act or omission arising out of and in the course of the performance of the duties of such... employment...the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

By its very terms, central to qualifying for protection afforded under this statute is that *the conduct triggering the legal action against him or her must have 1) arisen out of the performance of his/her duties, and 2) occurred in the course of performing those duties*. In the context of the defense of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied.

However, in the context of a *criminal or quasi-criminal* charge made against a school employee, in addition to the above referenced criteria, *N.J.S.A. 18A:16-6.1* imposes a third criteria as a prerequisite to indemnification, *i.e., the legal action must result in a final disposition in favor of the school employee.*

Despite any intimations to the contrary in the Initial Decision, the petitioners in their appeal here did not seek – nor are they entitled to – reimbursement for defense of the criminal matter. Such criminal charges were dismissed by virtue of Ms. Lonky’s acceptance into and completion of the Pre-Trial Intervention (PTI) Program. Her completion of PTI signifies nothing regarding the truth of the charges – as it involves no determination that Ms. Lonky did or did not engage in criminal conduct. Rather, it is indicative only of the fact that the prosecuting authorities believed she was a good candidate for diversion from the criminal process. Because PTI is diversion oriented rather than an outcome which is dispositive as to guilt or innocence, it is viewed as an “indecisive” termination of a legal proceeding. It is by now well-established that dismissal of criminal charges through the completion of PTI is not a “favorable” conclusion within the intendment of *N.J.S.A. 18A: 16-6.1*. (*See Cressinger v. Board of Education of the City of Newark*, 256 *N.J. Super.* 155, 156 (App. Div. 1992))

Here, however, it is uncontroverted that petitioner is seeking reimbursement for defending two *civil* lawsuits brought against her. As such, notwithstanding that the gravamen of this civil litigation is related to the underlying factual conduct contained in the prior criminal action against petitioner, the focus here is upon the lawsuits for which petitioner is seeking to be indemnified. Consequently, petitioner’s acceptance into and completion of PTI is wholly irrelevant in determining this matter. The cases against Ms. Lonky were dismissed without admissions or adjudication of the alleged facts and there is, therefore, no proof that she

mistreated any children in her care. The only undisputed conduct present in this matter is that the alleged events took place at school – during school hours – while Ms. Lonky was to be performing her duties as a teacher. As such, the alleged behavior on which the civil suits were predicated *arose out of and in the course of the performance of the duties of Ms. Lonky's employment (See Bower v. Board of Education of the City of East Orange, 149 N.J. 416 (1997))*, thereby satisfying the criteria which entitles petitioners to indemnification pursuant to the terms of *N.J.S.A. 18A:16-6*.

Accordingly, the recommended decision of the OAL is adopted as clarified above. The Board is hereby directed to compensate petitioners for the reasonable legal fees and costs of defense of the two civil suits against Ms. Lonky.

IT IS SO ORDERED.\*

COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2008

Date of Mailing: July 7, 2008

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\* 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.*