213-17

OSMIN BETANCOURT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal with the Commissioner in February 2016, claiming that he had gained tenure under *N.J.S.A.* 18A:28-5, and that the respondent Board had violated his tenure rights by terminating his employment and/or failing to renew his employment. Petitioner began his employment in respondent's school district as a full-time Social Studies teacher on September 5, 2012, and continued teaching through school years 2012-2013, 2013-2014, and 2014-2015. Petitioner was granted a medical leave of absence that extended from September 9, 2015 through December 22, 2015, and planned to return to work on January 4, 2016. Prior to his return to work, petitioner was advised – by letter dated December 9, 2015 – that the Board was terminating his employment on sixty days notice. Petitioner filed the instant appeal on February 8, 2016.

The ALJ found, *inter alia*, that: during the pendency of the appeal, settlement negotiations culminated in a finalized settlement agreement that was presented to the Board by counsel for the petitioner in August 2016; the Board accepted petitioner's proposal and the ALJ was advised that a settlement had been reached; petitioner, however, ultimately refused to sign the agreement, contending that it had been his understanding that he would be returning to classroom duties as part of the agreement, and the Board had materially changed the terms of the settlement when it decided to place him on administrative leave pending an investigation rather than returning him to his classroom teaching assignment; the Board filed a motion for summary decision which sought to enforce the terms of the settlement agreement despite petitioner's refusal to sign it, maintaining that the settlement addressed all matters raised in the petition. The ALJ concluded that: the settlement agreement was enforceable because an offer of settlement was made and conveyed to the Board by petitioner's attorney, and petitioner's signature was not necessary to effectuate the agreement; this matter encompasses only those issues raised in the instant petition, and the issue of the Board's decision to place petitioner on administrative leave subsequent to reaching the settlement agreement is a separate and distinct issue, which may be addressed in another action. The ALJ ordered that an enforceable settlement in this matter was reached on August 24, 2016, and the settlement disposed of all issues in the instant petition; accordingly, the Board's motion for summary decision was granted.

The Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision with the modification that facts related to petitioner's arrest included by the ALJ are of no significance to the instant case, and are deemed stricken from the Commissioner's adoption of the decision. The Board's motion for summary decision was granted, and the petition was dismissed with prejudice.

August 4, 2017

OAL DKT. NO. EDU 03659-16
AGENCY DKT. NO. 29-2/16

OSMIN BETANCOURT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. Upon a comprehensive review of the record in this matter, the Commissioner adopts the Administrative Law Judge's (ALJ) decision as modified herein.

The ALJ found that petitioner's claims in this matter arose from the Board's alleged violation of petitioner's tenure rights, specifically, termination of petitioner's employment. Petitioner sought reinstatement to his position, back-pay and benefits, and emoluments associated with his employment, among other relief. The ALJ also found that during the pendency of this matter, the parties reached an agreement to settle the matter, and advised the ALJ of the same. The terms of the settlement agreement provided that petitioner would be reappointed to his specific teaching position for the 2016-2017 school year, and placed on the appropriate salary guide for the 2016-2017 school year. Additionally, petitioner would be recognized as having acquired tenure and seniority credit – inclusive of the 2015-2016 school year – and receive one month's back pay. In turn, petitioner agreed to withdraw any other claims for back-pay and other relief. The ALJ further found that after the parties finalized the terms of the agreement, petitioner refused to sign it – contending that the Board materially changed the terms of the agreement when it decided to place

him on administrative leave pending investigation – as it was his understanding that he would be returning to his classroom duties as part of the agreement. The ALJ concluded that the agreement was enforceable because an offer of settlement was made and conveyed to the Board by the petitioner's attorney, which the Board accepted; petitioner's signature was not necessary to effectuate the settlement because his attorney was authorized to make the offer, following which the tribunal was informed of the settlement; and, therefore, petitioner's subsequent refusal to sign the agreement does not terminate his assent to the settlement.

Petitioner filed exceptions arguing that the ALJ erred in determining that the agreement was final and binding on the parties because the agreement did not comply with *N.J.A.C.* 1:1-19.1, and the ALJ's reliance on *Pollack v. Board of Education of the South Orange-Maplewood School District, Essex County,* Commissioner Decision No 39-10 (Feb. 8. 2010) ("*Pollack I*") was improper because the Appellate Division reversed the Commissioner's Decision in *Pollack v. South Orange-Maplewood Board of Education*, 2011 *N.J. Super. Unpub Lexis* 722 (App. Div. Mar. 23, 2011) ("*Pollack II*"). Petitioner also takes exception to the ALJ's finding of facts related to petitioner's arrest and alleged failure to provide notice, and the consequences thereof. [1] In its reply, the Board argues that petitioner has misinterpreted *N.J.A.C.* 1:1-19.1 and the Appellate Division's finding in *Pollack II*. The Board further argues that the Commissioner's decision in *In the Matter of the Tenure Hearing of Beverly Jones, Trenton School District, Mercer County*, Commissioner Decision No. 315-07 (Aug. 9, 2007) ("*IMO Jones*"), supports its contention that the parties had reached an enforceable agreement. The Board submits that both parties consented to the terms of the agreement that petitioner now seeks to disavow by raising issues not encompassed in the petition or the agreement.

[1] The facts in the Initial Decision related to petitioner's arrest are of no significance to the issue at hand – whether there is an enforceable agreement between the parties; therefore, such facts will not be considered by the Commissioner and are deemed stricken from the Commissioner's adoption of the decision.

As a preliminary matter, the Commissioner finds that petitioner's claim – that the agreement did not comply with *N.J.A.C.* 1:1-19.1 – was exhaustively addressed in the Initial Decision, and the ALJ's determination was proper. Petitioner has conflated the concept of two parties entering into a settlement agreement with the parties' obligation – pursuant to *N.J.A.C.* 1:1-19.1 – to disclose the terms of the agreement to the tribunal for review and approval. This tribunal certainly has the authority to reject a settlement agreement if it is contrary to law, but that does not undermine the fact that prior to such rejection (or acceptance), there was a meeting of minds – an agreement – between the parties to bind them to the terms of the agreement. Therefore, petitioner's reliance on *N.J.A.C.* 1:1-19.1 in support of his argument that the settlement agreement is not enforceable, is misplaced.

The Commissioner has previously upheld agreements where a formal document was not signed, but there was nonetheless a meeting of the minds. In *Pollack I*, the Commissioner found:

> [A] formal document is not necessary to create an enforceable settlement, and the absence of such a document in this instance – and of a resolution acknowledging the parties' agreement until the month prior to petitioner's scheduled termination – must be substantially attributed to petitioner's refusal to take the steps necessary to finalize the settlement to which she had previously agreed, because she by then no longer wished to abide by it.[2]

Similarly, in *IMO Jones*, the Commissioner found that there was a meeting of minds and the existence of the word "draft" in the written agreement – which contained the same terms that the parties had agreed to, was reviewed by the parties and no objections were voiced – was not sufficient to reject that written settlement. Here, petitioner's attorney – as authorized by petitioner – drafted and transmitted the offer of settlement to the Board, which was then accepted by the Board. The parties subsequently notified the ALJ that they had reached an agreement. Furthermore, the record

[2] The Appellate Division, in finding that the parties did not enter into a binding agreement, did not reject the Commissioner's conclusion that a formal document is not necessary to create an enforceable agreement; rather, the Appellate Division held that the facts in that case did not support a finding of an agreement between the parties. Therefore, the Commissioner is not persuaded by petitioner's interpretation of the basis of the Appellate Division's reversal.

reflects that petitioner intended to execute the agreement. Prior to formalizing the settlement, however, petitioner discovered that he was not going to be assigned to his classroom in the upcoming school year and that he was facing suspension. Petitioner now seeks to renege on his assent to the settlement on the basis that such circumstances were inconsistent with his understanding of the agreement. Petitioner's reasons for not signing the agreement are notably disingenuous as they relate to matters that were not raised in his petition and not considered or incorporated in the the settlement agreement drafted by the petitioner's attorney.

The Commissioner, therefore, finds no basis in fact or law on which to set aside the settlement reached by the parties in this matter, notwithstanding petitioner's subsequent, improper repudiation. Accordingly, the Initial Decision of the OAL – as modified herein – is adopted as the final decision in this matter. The Board's motion for summary decision seeking adoption of the settlement agreement is granted, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: August 4, 2017
Date of Mailing: August 4, 2017

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03659-16
AGENCY DKT. NO. 29-2/16

OSMIN BETANCOURT,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Respondent.

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

Sandra N. Varano, Esq., for respondent (Nirenberg & Varano, attorneys)

Record Closed: May 5, 2017 Decided: June 19, 2017

BEFORE: **JOHN P. SCOLLO**, A.L.J.

STATEMENT OF THE CASE

The Board of Education of the Town of West New York (hereinafter, "WNY," the "Board" or "BOE") operates a school district including a High School for the residents of the Borough of West New York in Hudson County, New Jersey. Petitioner, Mr. Osmin

Betancourt ("Betancourt"), was hired on July 26, 2012 by the respondent Board and taught under his Social Studies standard Instructional Certificate with an endorsement as a Teacher of Social Studies starting on September 5, 2012. Betancourt was employed as a full-time teacher for the school years of 2012–2013, 2013–2014 and 2014–2015. On August 26, 2015, the BOE granted Betancourt a medical leave of absence as follows: from September 9 to 22, 2015 under the Family Medical Leave Act with pay; from September 22 to November 30, 2015 under the Family Medical Leave Act without pay; and from December 1 to 22, 2015 as an unpaid leave of absence. Betancourt was scheduled to return to work on January 4, 2016. The BOE sent a letter dated December 9, 2015 advising Betancourt that he was being terminated on sixty days' notice and that this termination would be approved at the BOE's January 13, 2016 meeting. The BOE sent another letter, this one dated January 4, 2016, again advising Betancourt that he was being terminated on sixty days' notice. The letter stated that the termination would be approved at the BOE's January 6, 2016 meeting. The Board passed a resolution non-renewing or terminating Betancourt's employment. By letter dated January 20, 2016, the BOE informed Betancourt of the reasons for his termination.

On February 8, 2016, Betancourt filed a Verified Petition with the Commissioner of Education (the "Commissioner") claiming that he had gained tenure under N.J.S.A. 18A:28-5 and that the BOE had violated his tenure rights by terminating his employment and/or failing to renew his employment.

In his Verified Petition Betancourt sought an Order finding and declaring that: (a) he gained tenure under N.J.S.A. 18A:28-5; (b) that the BOE violated his tenure rights when it non-renewed and/or terminated his employment; (c) reinstating him to his tenured position; (d) granting full back pay, benefits and emoluments (such as retroactive benefits, including pension contributions and lost seniority for the period of time during which he was wrongfully denied employment); (e) pre-judgment and post-judgment interest; and (f) granting other and further relief as the Commissioner of Education deems appropriate.

On March 3, 2016, the BOE filed its Answer with the Commissioner. The Commissioner transferred the matter to the Office of Administrative Law where it was filed on March 8, 2016 as a contested case.

On April 15, 2016, the first of several Pre-Hearing conferences took place, and a Pre-Hearing Order was issued setting forth a discovery schedule and future telephone conferences. The conferences took place and the counsel for the parties engaged in settlement discussions. Counsel for both sides contributed to the drafting of the settlement agreement. Counsel for Betancourt drafted several versions of what was to become the finalized settlement agreement. Betancourt's counsel presented the finalized version on or about August 24, 2016 and the BOE accepted it. The terms of the settlement agreement provided that: (1) Betancourt would be reappointed to the position of Social Studies teacher for the 2016–2017 school year with an effective appointment date of September 1, 2016; (2) Betancourt would be placed on the salary guide applicable to the 2016–2017 school year as if he had continued in the BOE's employment for the 2015–2016 school year; (3) Betancourt would be recognized as having acquired tenure and will receive seniority credit in the Secondary Social Studies category as if he had been employed in the 2015–2016 school year; moreover, Betancourt would receive $6,556.30 representing one month's back pay from which appropriate payroll deductions would be made; and (4) Betancourt agreed to waive any other claims he may have had for back pay and for counsel fees and costs.

Sometime in August or September 2016, during a visit to the school, Betancourt was informed that his return to the classroom for a teaching assignment was being delayed due to the Board's decision to place him on administrative leave pending the completion of an investigation into whether or not Betancourt had been arrested/indicted for an offense.

Thereafter, Betancourt refused to sign the settlement agreement because it was his understanding that his return to actual teaching duties in the classroom was part of the settlement agreement. He contends that the BOE materially changed the terms of the settlement agreement when it decided to place him on administrative leave pending an investigation.

The Board filed a Motion seeking to enforce the terms of the settlement agreement despite Betancourt's refusal to sign it. The Board maintains that the Verified Petition sought only Betancourt's tenure, reinstatement to his position, retroactive wages, seniority and emoluments, and interest, all of which were provided in the settlement agreement. The Board maintains that the Verified Petition did not demand a specific assignment and that even if such relief were demanded the Tribunal is not empowered to grant this particular kind of relief.

Betancourt opposes the Motion on the ground that there was no settlement because:

> (1) the rules of the OAL regarding settlements have not been fulfilled; the settlement agreement was not signed; there was no disclosure of the settlement terms to the ALJ per N.J.A.C. 1:1-19.1 (a) (2); there was no written Order of the Tribunal or stipulation of the parties made under oath attesting to the existence of the settlement per N.J.A.C. 1:1-19.1 (b);
>
> (2) the Board never disclosed its intention to place him on administrative leave due to the ongoing investigation into his alleged commission of an offense; and
>
> (3) no settlement can become final unless and until it is approved by the Commissioner of Education.

At the present time, the BOE contends that a settlement has been reached and its Motion asks the Tribunal to enforce it by way of entry of an Order for Summary Decision. Betancourt contends that a settlement has not been reached and opposes the entry of an Order for Summary Decision.

FINDINGS OF UNDISPUTED FACTS

The following statements of fact are not disputed by the parties.

(1) In the case at bar, Betancourt claimed that despite being on leave, he was employed for the requisite amount of time so as to be eligible for tenure. The BOE's contention was that he had not been employed long enough to qualify for tenure. Regardless of who was correct, the tenure issue has been resolved. After the draft settlement agreement underwent several changes, a final draft was agreed upon by both counsel on August 24, 2016. The final draft set forth the terms of a settlement whereby Betancourt would be recognized as a tenured teacher of Social Studies; would be "appointed to the position of Social Studies teacher for the 2016–2017 school year with an effective appointment of September 1, 2016;" would be placed on the proper salary guide applicable for the 2016–2017 school year; would receive one month's back pay; and would receive seniority service credit in the Secondary Social Studies category, which would be calculated as if he had been employed with the BOE for the 2015–2016 school year. It is clear that these are the terms that the attorneys for the two sides agreed upon.

(2) The final draft of the settlement agreement of August 24, 2016 reflected the issues for which Betancourt sought redress in his Petition: the granting of tenure; his restoration to his full-time position; the granting of retroactive salary with interest; and the restoration of lost seniority. There was no mention by either party of when Betancourt would return to his duties in the classroom. There was no mention by either party of an investigation or the possibility of Betancourt being placed on administrative leave.

(3) Betancourt refused to sign the settlement agreement after learning from the school's Human Resources personnel that his conduct was being investigated and that he was being placed on administrative leave. The legal dispute in the Motion at bar is whether the terms of the agreement mandate Betancourt's immediate resumption of in-class teaching duties or merely allow for re-instatement to his position. The BOE's position is that the two sides agreed only to the granting of tenure in his position of Social Studies teacher, his re-appointment as a teacher for the 2016–2017 school year, effective September 1, 2016, placement on the proper salary guide, one month's back pay, and

appropriate seniority credit. The BOE insists that, regardless of the just-resolved dispute, it always has the right to place a teacher on administrative leave while it investigates allegations concerning a teacher's conduct. Betancourt denies any wrongdoing and claims that the plain meaning of the settlement agreement mandates the immediate resumption of his teaching duties in the classroom. He implicitly argues that the Board was obligated to address all issues -- including conduct allegations -- during the pendency of the case and during settlement negotiations.

(4) On February 7, 2017, the Tribunal requested that the parties provide additional information, including information about any investigation into whether or not Betancourt was arrested or indicted for an offense. Respondent submitted documents to the Tribunal which demonstrate that on May 31, 2014 Betancourt was arrested by U.S. Marshalls and charged with operating his motor vehicle on federal property while intoxicated, i.e., Driving While Intoxicated, Refusal to take a Breathalyzer Test, Failure to stay in his Lane while driving, Reckless Driving, and Failure to Signal. Betancourt entered a plea of guilty in the United States District Court for the District of New Jersey before Magistrate Anthony R. Mautone, U.S.M.J. to the charge of Driving While Intoxicated in violation of 36 C.F.R. 4.23 (a) (1) and entered a plea of guilty to the charge of Failure to Stay in Lane in violation of 36 C.F.R. 4.2 on March 4, 2015. The court dismissed the charges of Reckless Driving, Failure to Signal, and Refusal to Take the Breathalyzer Test. The records also demonstrate that Betancourt paid a fine; was incarcerated from September 30, 2015 to December 24, 2015 for the above-listed offenses; and was placed on probation for two years. The time during which Betancourt was incarcerated coincided with the medical leave absences he requested and with the FMLA leave of absences he requested.

(5) There is no dispute between the parties that the regulations require a certificate holder to disclose an arrest or indictment to the Superintendent of Schools. Pursuant to N.J.A.C. 6A:9-17.1 (which is reflected in the West New York Board of Education Policy Number 3159 called "Teaching Staff and Staff Members / School District Reporting Responsibilities"), all certificate holders (teachers) are

required to report arrests and/or indictments for any crime or offense to the Superintendent of Schools within fourteen calendar days. Failure to comply with these reporting requirements may be deemed "just cause" for revocation or suspension of a certification pursuant to N.J.A.C. 6A: 9-17.5. The parties agree that Betancourt did not report the above-mentioned guilty pleas to the Superintendent of Schools. Moreover, during the course of discovery in the matter at bar, the BOE served Interrogatories upon Betancourt on April 25, 2016 which included two questions inquiring into illegal activities. Interrogatory Question Number 22 asked:

> "State whether you have been arrested or indicted for any crime or offense within the past five (5) years. If so, set forth the date of said arrest and / or indictment, the charges alleged and the disposition of same."

Question 23 asked:

> "If you were arrested or indicted during the time you allege to have been employed by the West New York Board of Education, state whether you reported same to the Superintendent of Schools, the Director of Human Resources or any other individual employed by the West New York Board of Education of the disposition of any such arrest or indictment. Provide any documentation relevant to this interrogatory."

On or about June 1, 2016, Betancourt answered "No" to each of the aforementioned questions.

The BOE's counsel supplied copies of documents from the United States District Court for the District of New Jersey, which demonstrated that Betancourt was arrested for five motor vehicle offenses on May 31, 2014; that he pled guilty on March 4, 2015 to two offenses, including Driving While Intoxicated; that he paid a fine; and that he was incarcerated for nearly three months. In light of these documents it must be concluded that Betancourt's answers of "No" to Interrogatory Number 22 and Interrogatory Number 23 were not truthful.

LEGAL ANALYSIS AND CONCLUSIONS

CERTIFICATES AND ENDORSEMENTS

In New Jersey, no teaching staff member can be employed as a teacher unless he is a holder of a valid certificate to teach. N.J.S.A. 18A: 26-2 and N.J.A.C. 6A-9B-5.1.

A "certificate" is defined as a legal document that permits an individual to serve as a teaching staff member. N.J.A.C. 6A:9-2.1. Three categories of certificates are available: instructional, administrative, and educational services. N.J.A.C. 6A:9B-5.3.

An "instructional certificate" is a certificate that permits an individual to serve as a teacher in a classroom setting. N.J.A.C. 6A:9B-2.1. A "standard certificate" is a permanent certificate issued to a person who has met all requirements for a particular certificate. N.J.A.C. 6A:9B-2.1. A "standard instructional certificate" is a permanent certificate issued to a person who has met all teacher certification requirement.

TENURE

In New Jersey, state statutes grant teachers the right to tenure. The Tenure Act, N.J.S.A. 18A: 28-1 to -18, defines the conditions under which teachers are entitled to the security of tenure. The Tenure Act defines the term "position" as any office, position or employment. N.J.S.A. 18A: 28-1. A teacher is entitled to tenure if (1) he works in a position for which a teaching certificate is required (i.e., he is a teaching staff member); (2) he holds the appropriate certificate; and (3) he has served (i.e. been employed in the district) for the requisite period of time. The requisite period of time for this third element is set forth in N.J.S.A. 18A-28-5 (a) and (b). Section (a) pertains to teaching staff members who have been employed prior to the effective date of P.L. 2012, c. 26 (N.J.S.A. 18A: 6-177 et al.) and Section (b) pertains to teaching staff members who have been employed on or after the effective date of said statute. The effective date of the statute was August 6, 2012. So under Section (a) teachers employed before August 6, 2012 are eligible for tenure "after employment in such district or by such board for:

> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose;
> or
>
> (2) Three consecutive academic years, together with any four consecutive academic years.
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years."

Under Section (b) teachers employed on or after August 6, 2012 are eligible for tenure "after employment in such district or by such board for:

> (1) Four consecutive calendar years; or
>
> (2) Four consecutive academic years, together with Employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than four academic years within a period of any five consecutive academic years."

Tenured teaching staff members shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. N.J.S.A. 18A:28-5. Tenure rights are designed "to aid in the establishment of a competent and efficient school system by affording principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Ed. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Being of remedial purpose, the Tenure Act is to be liberality construed to achieve its beneficent ends. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). The burden of proving a right to tenure rests with the teacher. Canfield v. Bd. Of Ed., Borough of Pine Hill, 51 N.J. 400 (1968).

TWO ALTERNATIVE ISSUES

As set forth above, the parties' attorneys agreed on August 24, 2016 on the terms of a settlement agreement encompassing the issues set forth on the Petition, namely the non-renewal of contract/tenure violations issues. The first issue before the Tribunal at this time is:

> Does the scope of this matter encompass only the issues raised in the Petition, or does it also include the issue of the BOE's right to place Betancourt on administrative leave pending the outcome of an investigation into alleged offenses?

If the answer to this question is that scope of the matter includes the issue of the BOE's right to place Betancourt on administrative leave pending the outcome of an investigation into alleged offenses, then this matter has not been settled. If, on the other hand, the answer to this question is that the scope of the matter encompasses only the issues raised in the Petition, then a secondary question arises, namely:

> Is the August 24, 2016 agreement enforceable even without Betancourt's signature affixed to it?

Turning to the first question, it is the BOE's contention that the issue of Betancourt's guilty pleas to the above-referenced charges were not, are not and should not be considered part of Betancourt's Petition for reversal of the non-renewal of his employment and violations of his tenure-related rights. The BOE contends that the suspension with pay pending investigation of Betancourt's conduct is a separate and distinct matter.

Betancourt's contention is that the non-renewal / tenure violations issues stated in his Petition are intertwined with the BOE's investigation into his alleged conduct. Betancourt contends that the BOE's silence about its knowledge of his guilty pleas demonstrates that the BOE negotiated the settlement in bad faith. Betancourt contends that the BOE's failure to mention conduct allegations during the pendency of the non-renewal / tenure violations case demonstrates that the BOE did not desire a true settlement that would dispose of all issues, but rather desired to institute new charges after the settlement agreement was signed, which would keep him out of the classroom for an indefinite period.

The Verified Complaint filed on behalf of Betancourt before the Commissioner of Education on March 8, 2016 only raises issues regarding his claim for tenure and for

violations of his tenure rights. There is no mention therein of the charges he was arrested for on May 31, 2014. Throughout the case neither of the parties discussed the investigation by the BOE into Betancourt's conduct and it was not cited by the BOE as a reason for the nonrenewal of his contract. Moreover, during the pendency of the case Betancourt never alleged that the BOE had any ulterior motives or harbored any ill-will towards him based on his arrest and charges. Indeed, when specifically asked in Interrogatories about whether any charges were ever brought against him, he denied the existence of any charges. Sometime after August 24, 2016, Betancourt was informed by the BOE's Human Resources Department that he would not receive a teaching assignment for the Fall Semester of 2016. He learned that he was being placed on administrative leave pending the results of an investigation into his conduct. Thereafter Betancourt alleged that the BOE has been trying to humiliate and embarrass him and that he was no longer interested in settling the matter.

A "contested case" is defined in N.J.A.C. 1:1-2.1 as:

> "an adversary proceeding . . . in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required . . . to be determined by an agency . . . by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests . . . ."

The above definition requires that a Petition seeking relief from an Agency, and thereby from the OAL, must contain all of the facts and issues that constitute the controversy.

In the matter at bar, the Petition properly sought relief from the BOE's non-renewal of the contract and from the violations of tenure rights. There is no mention in the Petition of a request for relief against the BOE for launching an improper investigation. If Betancourt wishes to pursue such an action, it would have to be sought in a separate action, not in the one presently at bar. I **CONCLUDE** that the scope of

this matter encompasses only those issues set forth in the Petition. Turning to the second question:

> Is the August 24, 2016 agreement enforceable even without Betancourt's signature affixed to it? - it must be analyzed and interpreted against the background of the law of accord and satisfaction.

ACCORD AND SATISFACTION

The Supreme Court of New Jersey in Nolan v. Lee Ho, 120 N.J. 465 (1990) re-iterated certain long-standing principles applicable to the treatment of settlement agreements. It stated that "[a] settlement agreement between parties to a lawsuit is a contract", citing Pascarella v. Bruck, 190 N.J. Super., 118, 124 (App. Div.), certif. denied, 94 N.J. 600 (1983). It stated "[s]ettlement of litigation ranks high in our public policy", citing Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div.), certif. denied, 35 N.J. 61 (1961). The Court went on to say at p.472, "Consequently, our courts have refused to vacate final settlements absent compelling circumstances." Again, quoting from Pascarella, it stated, "In general, settlement agreements will be honored 'absent a demonstration of fraud or other compelling circumstances.'" Quoting from DeCaro v. DeCaro, it added, "[b]efore vacating a settlement agreement, our courts require 'clear and convincing proof' that the agreement should be vacated." Nolan at 472.

In Grow Company, Inc. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008) the Appellate Division re-iterated the above-stated quotes from Nolan. It went on to state that "courts do not re-write contracts in order to provide a better bargain than contained in their writing", quoting from Christafano v. N.J. Mfrs. Ins. Co., 361 N.J. Super. 228, 237 (App. Div. 2003). It also stated that "unambiguous contracts are to be enforced as written," quoting from Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293, 302 (1953).

In Lahue v. Pio Costa, 263 N.J. Super. 575 (App. Div. 1993) relying on the holding in Bistricer v. Bistricer, 231 N.J. Super. 143 (App. Div. 1987) the Appellate Division stated:

> "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 at 596.

In the Bistricer case, where the plaintiff attempted to raise an additional issue after the parties had negotiated a settlement, but had not yet reduced it to a formal written agreement, Judge Humphreys of the Hudson County Chancery Division characterized the plaintiff's action as an "afterthought" and said that "if it were not important enough to raise during [negotiations], it is not an essential part of the settlement." The judge went on to write:

> "The policy of our court system is to encourage settlements and the court should 'strain' to uphold such settlements. Dept. of Pub. Adv. v. N.J. Bd. of Public Utilities, 206 N.J. Super. at 528. Here the parties agreed to the essential terms of the settlement. Plaintiffs' objections are basically either "afterthoughts" or pertain to the implementation of the settlement. Setting aside the settlement under these circumstances would allow plaintiffs to avoid a fair agreement duly entered into to resolve pending and burdensome litigation. This would be unfair to defendants."

Judge Humphreys went on to say:

> "Moreover, the proposition that a case is not settled until the last 'i' is dotted and the last 't' is crossed on a written settlement agreement carries the germ of much mischief. A party could, in bad faith, waste the time of the court and the other litigant in protracted settlement negotiations, and then, after a 'framework' has been established, wiggle out of that framework by creating a flood of new issues and questions."

The above-stated principles have been applied in the settlement of education employment cases. See Renee Pollack v. Board of Education of the South Orange and Maplewood School District, Essex County, #39-10 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu1475-0_1.html)

Betancourt has set forth several arguments in opposition to the Motion to Enforce. A review and analysis of these arguments follows.

First, Betancourt argues that there can be no settlement because the rules of the OAL were not followed. He presents three sub-arguments based on the rules.

The first sub-argument is that the settlement agreement was not signed. Obviously, Betancourt himself refused to sign it. However, I **CONCLUDE** that when Betancourt's attorney signed the letter of August 24, 2016 enclosing the proposed settlement agreement, it constituted Betancourt's unequivocal offer to settle the matter. Therefore, I **CONCLUDE** that Betancourt's action authorizing his attorney to transmit the settlement agreement was an adequate manifestation of his intent to be bound by the settlement terms which he proposed.

The second sub-argument is that the settlement terms were not disclosed to the ALJ pursuant to N.J.A.C. 1:1-19.1 (a). The argument misinterprets this rule. It does not require disclosure to the ALJ *before* the parties reach an agreement. I **CONCLUDE** that it only requires that the settlement be disclosed to the judge so that he or she can review it and determine whether it is consistent with the law, is voluntary, and is dispositive of all issues in controversy.

The third sub-argument is that there was no written Order from the Tribunal or Stipulation of the parties made under oath attesting to the existence of the settlement pursuant to N.J.A.C. 1:1-1.19 (b). This is the same misinterpretation of the rule as set forth immediately above. The rule does not require that the Stipulation be signed or orally placed on the record before the settlement is signed. Certainly, it cannot be expected that the Tribunal would sign its Order before the parties sign the settlement agreement. I **CONCLUDE** that the Tribunal is only required to review the settlement agreement to determine whether it is consistent with the law, is voluntary, and is dispositive of all issues in controversy. Moreover, as stated above, I **CONCLUDE** that the fact that Betancourt authorized his attorney to send an unequivocal offer of settlement is an adequate manifestation of his intent to be bound.

Second, Betancourt argues that there was no settlement because the BOE did not disclose its intent to place Betancourt on administrative leave. As set forth above, I **CONCLUDE** that this matter only encompasses issues raised in the Petition. That the BOE decided to place Betancourt on administrative leave is a separate and distinct issue, which may be addressed in another action.

Third, Betancourt argues that no settlement can become final unless and until it is approved by the Commissioner of Education. This argument assumes that the Commissioner exercises veto power over settlements which are negotiated between the parties at arm's length, are consistent with the law, are voluntary and are dispositive of all issues in controversy. This view is not entirely accurate. The Commissioner has the authority to reject or modify the ALJ's Initial Decision. The Commissioner may even reject or modify an ALJ's Initial Decision Approving Settlement if, for example, the ALJ approves a settlement which is not consistent with the law. However, in practice, the Commissioner will not disturb a settlement reached by the parties that is consistent with the law, is voluntary and is dispositive of all issues in controversy. In light of the clear mandate of the case law cited above, the body of the law of accord and satisfaction in New Jersey clearly fosters settlements and does not require, as Judge Humphreys aptly stated it in Bistricer at p.151, that "every "i" be dotted and every "t" be crossed" as long the parties have agreed to "the essential terms of the settlement". I **CONCLUDE** that while the Commissioner of Education is mandated to review and either adopt, reject, or modify each Initial Decision and Initial Decision Approving Settlement; settlements are binding when the parties agree to them and it is only in extraordinary cases of gross error that settlements will be set aside by the Commissioner.

In the case at bar several facts stand out:

(1) Betancourt was arrested for offenses, which he was obligated to report to the BOE.

(2) Betancourt failed to report his arrest to the BOE within the allowable timeframe.

(3) When specifically questioned by the BOE during discovery about whether he had been arrested or indicted he gave inaccurate answers.

(4) The Petition only raised tenure and violation of tenure issues and did not raise any issues pertaining to the BOE's investigation of Betancourt's conduct.

(5) The attorneys for the BOE and for Betancourt addressed all issues raised in the Petition and on August 24, 2016, reached an agreement on the terms of a settlement, which the attorney for Betancourt reduced to writing and sent to the attorney for the BOE. The BOE accepted the terms of the written settlement agreement.

(6) After Betancourt learned that he would not be given a teaching assignment for the Fall Semester of the 2016-2017 school year, he refused to sign the settlement agreement which his attorney had presented on his behalf to the BOE and which the BOE accepted.

Applying the principles of the law of accord and satisfaction set forth above to the facts of this matter, I **CONCLUDE** that an offer of settlement was made by Betancourt's attorney when he presented the August 24, 2016 settlement agreement to the BOE's attorney and I **CONCLUDE** that BOE accepted Betancourt's offer. I **CONCLUDE** that when the BOE accepted Betancourt's offer the matter at bar was settled. I **CONCLUDE** that Betancourt's signature is not necessary to effectuate the settlement because he authorized his attorney to transmit an offer of settlement to the BOE. I **CONCLUDE** that this action manifested Betancourt's intent to be bound by the terms of the settlement agreement which his attorney transmitted to the BOE on his behalf and was tantamount to the affixing of his signature to the document.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the record of the case at bar shall reflect that an enforceable settlement was reached on August 24, 2016, when the petitioner's attorney transmitted a bonafide, unequivocal settlement offer, in the form

of a final draft of a proposed settlement agreement, to the respondent and when the respondent accepted said offer; and it is further

ORDERED that Betancourt's refusal to sign the settlement agreement shall not be construed as a termination of his assent to the settlement of this matter; and it is further

ORDERED that, this Tribunal having found that the settlement is consistent with the law, was voluntarily entered into by both sides, and disposes of all issues in controversy, the parties may enforce and must abide by the terms of the aforesaid settlement agreement; and it is further

ORDERED that the respondent's Motion for Summary Decision is hereby **GRANTED.**

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

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

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

June 19, 2017

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

List of Exhibits

Joint Exhibits

J-1 Settlement of August 24, 2016

For Petitioner:

P-1 Verified Petition

For Respondent:

R-1 Documents from U.S. District Court regarding charges brought against Betancourt and disposition of same