BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
H.L. AND D.L., INDIVIDUALLY AND AS NATURAL GUARDIANS of K.L. AND J.L.,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioning Board sought to recover tuition payments from respondents pursuant to *N.J.S.A.* 18A:38-1(b)(2) for the period when minor children, K.L. and J.L., were allegedly not domiciled in Livingston and not entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1.

In light of testimony of witnesses and documents in the record, the ALJ found that the father, H.L., was domiciled at Staten Island and not in Livingston for the period in question, October 1990 - January 22, 1991. ALJ found that though building a home for his family in Livingston, H.L. and his family had one habitable, and intended, residence prior to January 22, 1991 and that residence was in Staten Island. Thus, the ALJ concluded that the Board was entitled to collect tuition from respondents in accord with the provisions of *N.J.S.A.* 18A:38-1(b)(2), but not entitled to recover legal fees or costs. Moreover, the ALJ found that respondents were not liable to the Board for tuition after January 22, 1991, as they were then able to occupy the Livingston house.

Commissioner adopted findings and determination in initial decision as his own with modification. The Commissioner clarified that the Board carried the burden of proof in that the matter was controlled by *N.J.S.A.* 18A:38-1(a) as it existed prior to its 1993 amendment. Thus, the burden rests with the Board to show by a preponderance of credible evidence that respondents' children were not entitled to a free public education for the periods in question. Commissioner found that the Board met that burden proving that respondents were not entitled to free public education prior to January 22, 1991 but did not prove that respondents were not domiciled in the District after that date. As to interest, the Commissioner determined that respondents should be liable for pre-judgment interest given their evolving posture in the face of accurate and consistent notification from the Board, their evasive testimony, untrue responses before the ALJ, together with the record which wholly belies their continuing claim that for seven and one half years they tried to resolve the matter. Commissioner declined to award legal fees in the absence of express statutory authority. Respondents were directed to reimburse the Board for tuition in the amount of $5,614.03 and pre-judgment interest in the amount of $4,097.41.

May 26, 1998

OAL DKT. NO. EDU 11593-96
AGENCY DKT. NO 37-2/91

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions from both parties are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, as was the Board's reply to respondents' exceptions.

In its exceptions, the Board asserts that: (1) it is entitled to both pre- and post-judgment interest; (2) it is entitled to be compensated for legal fees and costs which amount to $76,410.90 in this matter; and (3) respondents have failed to carry their burden of proof to support their claim of domicile as of January 18, 1991.

Respondents essentially take exception to the initial decision in its entirety, in that they object to the following: (1) the Administrative Law Judge's (ALJ) introductory recitation of the procedural history; (2) the ALJ's finding that they carry the burden of proof in this matter; (3) the review of the documentary and testimonial evidence as to habitability of the Livingston property; (4) the review of the documentary and testimonial evidence as to the Board's registration process; (5) each of the findings of fact pronounced by the ALJ; (6) the legal conclusions drawn by the ALJ; and (7) the way the ALJ conducted the within proceedings, in light of *N.J.A.C.* 1:1-1.5, Appendix A, Canon 2, so as to leave respondents "astounded and incredulous" by said hearing (Respondents' Exceptions at p. 29) and to force

respondents to conclude that the ALJ "***obviously made up her mind before all the testimony and facts were presented." (*Id.* at p. 32)

Upon review of the record in this matter, including all filings before the OAL, as well as the parties' exception and reply arguments, the Commissioner determines to affirm the initial decision of the ALJ, with modification as set forth herein.

Initially, the Commissioner observes that this matter is before him again, having been remanded by the Appellate Division pursuant to the Board's motion for summary judgment in that forum. *For the purpose of that motion*, and in accordance with applicable law, the Court accepted as true the factual allegations of respondents. *Board of Education of the Township of Livingston, Essex County v. [H.L.] and [D.L.], Individually and as Natural Guardians of K.L. and J.L.*, 97 *N.J.A.R.* 2d (EDU) 82. There, respondents averred that "***Mr. [L.] had already *moved into* the Livingston house by the beginning of the school term in September 1990." (*Id.* at 83, emphasis added) Thus, the Appellate Division, upon review of relevant domicile case law, found that summary judgment should not have been granted the Board of Education, presumably concluding that, on the basis of the facts which it assumed to be true for the purpose of the motion, there was sufficient evidence to permit a rational factfinder to resolve the alleged dispute issue in favor of respondents, as the non-moving party. See *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 (1995) at 523. The Appellate Division then remanded this matter for "***proceedings not inconsistent ***" with its opinion (97 *N.J.A.R.* 2d (EDU) 83), recognizing that the Board may contest the facts which respondents alleged as true.

On remand, an evidentiary hearing was conducted at the OAL. In that the parties presented disparate views as to the burden of proof in this matter, the Commissioner herein clarifies, and now finds, that the Board carries the burden of proof. This matter is controlled by *N.J.S.A.* 18A:38-1(a), as it existed *prior* to its 1993 amendment which, in part, shifted the burden of proof in residency/domicile disputes from a local board to the parent, guardian or resident asserting that a child was entitled to a free public education in its district. (Sponsor's Statement, Senate Education Committee Statement and

Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as *c.* 380) Inasmuch as the within Petition of Appeal was initially filed by the Board on February 21, 1991, the burden of proof rests with the Board to show by a preponderance of credible evidence that respondents' children were not entitled to a free public education for the periods in question.

The Commissioner next acknowledges the extensive objections which respondents have raised regarding the facts determined by the ALJ based on the documentation before her, the testimony of the witnesses, as well as the credence and weight ascribed to such testimony. However, the record before the Commissioner does not include transcripts of the hearings at OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super*. 143, 158 (App. Div. 1987). Thus, without pertinent transcript citations from which to draw his own conclusions, the Commissioner defers to the credibility determinations reached by the ALJ who was in a position to hear and adjudge the credibility of the witnesses. See *Parker v. Dornbierer,* 140 *N.J. Super* 185, 188 (App. Div. 1976). Further, the Commissioner determines that the findings and conclusions of the ALJ are well grounded in the record before him, and such record does not provide any cause to challenge the weight ascribed to evidence or credibility assessments made by her. Consequently, respondents' exceptions challenging the ALJ's credibility determinations and the factual findings predicated thereon are hereby rejected as being without merit. The Commissioner, therefore, finds that the Board has demonstrated by a preponderance of credible evidence that respondent's children were not entitled to a free public education in the District prior to January 22, 1991, in accordance with *N.J.S.A.* 18A:38-1(a). However, he is not persuaded that the Board has met its burden of proving that respondents were not domiciled in the District after January 22, 1991. Consequently, the within decision provides no relief for the Board in the form of tuition reimbursement after January 22, 1991.

As to the issue of pre- and post-judgment interest, the Commissioner determines that respondents should be liable for pre-judgment interest in this matter. Here, the Commissioner recognizes

that pre-judgment interest may not be awarded to a claimant unless he concludes "that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule." *N.J.A.C.* 6:24-1.16(c)1.

In the initial decision, the ALJ found, and the Commissioner has so affirmed, that

> H.L. was told by Reale in October 1990 that he would have to prove that he was domiciled in Livingston in order for his children to receive a free public education there. [H.L.] rejected the concept in principle and refused to submit any documentation relating to his occupancy of the Livingston site. (Initial Decision at p. 20)

In their exceptions, respondents do not dispute that they were so advised, although they dispute the significance of the documentation they provided to the Board at the time they registered their children. That is, respondents maintain that this documentation satisfactorily evidenced their domicile in Livingston, while the Board was not so convinced. (Respondents' Exceptions at p. 16, addressing factual finding number 3)

In spite of the Board's unequivocal notice, respondents clung to the notion that, as taxpayers and property owners, they should not have to pay tuition to the Board.[1] To the extent respondents ever argued the concept of domicile prior to reaching the Appellate Division, they took the position that their status as taxpayers, their intermittent "physical presence" in Livingston,[2] and their intent

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[1] In a February 10, 1991 letter to the Board, respondents asserted that:

> In September of 1990, we submitted a paid tax bill to the Board of Education upon enrollment of [J.] and [K.] We assumed as taxpayers that tuition was appropriately applied. Under the circumstances, we feel we are being doubly taxed based on the levy of tuition fees in conjunction with taxes. We feel the Board of Education should request those tuition fees from the Township for this period of time. (P-12)

Soon thereafter, by letter dated April 24, 1991 to then Commissioner Ellis, respondents affirmed

> We did not feel that it was in the best interest of our children to disrupt their academic year by uprooting them for a few months to another school. We took the more difficult way by commuting to New Jersey every day. (P-44)

[2]When this matter was initially before the Commissioner in 1995, notwithstanding their liberal use of the term "domicile," respondents' submission affirmed,

to make Livingston their permanent home was sufficient to establish domicile. (Respondents' Exceptions to the Commissioner dated February 23, 1995 at p. 3; Respondents' Letter to State Board of Appeals, April 10, 1995) However, at no time in respondents' communications with the Board, the Commissioner (prior to remand) or the State Board of Education did respondents state that H.L had changed his domicile to Livingston in September of 1990. (Initial Decision at p. 19) Instead, the record supports the disturbing conclusion that it was not until respondents reached the Appellate Division that they alleged H.L. *moved into* the Livingston residence, so as to effectuate a domicile. Given respondents' evolving posture in the face of accurate and consistent notification from the Board, their evasive testimony at the OAL (Initial Decision at p. 20), their "obviously untrue" responses before an administrative law judge (*id*.), together with a record which wholly belies their continuing claim that they have "tried to resolve this matter for seven and a half years," (Respondents' Exceptions at p. 41), the Commissioner finds that the Board is entitled to an award of pre-judgment interest.

Finally, the Commissioner declines to direct that the Board be compensated for legal fees in this matter. In so doing, the Commissioner does not disregard the Board's predicament, as it asserts that

> [i]n the interest of equity, attorneys' fees must be awarded to prevailing boards in domicile disputes. If boards cannot recoup attorneys' fees as part of the Commissioner's judgment, they will likely suffer a net financial loss each time the residency of a student is challenged pursuant to board policy and *N.J.S.A.* 18A:38-1. This financial preclusion will allow nonresidents to register their children, knowing that the board will not litigate and incur attorneys' fees in excess of the cost of annual tuition.*** (Board's Reply at p. 3)

> Indeed, although we commuted from Staten Island during the period in question, we in fact, spent more time in Livingston than in Staten Island supervising the "finishing touches" of our home and establishing ourselves and our children in the community. *** (Respondents' Exceptions dated February 23, 1995 at p. 3)

Before the State Board of Education, respondents supplemented the record with documentation including, but not limited to, proof of homeowner's insurance, utility bills, phone bills, credit card statements, a deed and supporting letters. (Respondents' Letter to State Board of Appeals, April 10, 1995)

Notwithstanding the Board's legitimate, practical concern for how local boards may be constrained in enforcing the residency/domicile statutes, and even considering that "[t]he Supreme Court has repeatedly 'reaffirmed the great breadth of the Commissioner's powers,' recognizing that he has 'fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws, *N.J.S.A.* 18A:6-9,'" (*Board of Education of the City of Newark v. Levitt*, 197 *N.J. Super*. 239, 246 (App. Div. 1984), citing *Hinfey v. Matawan Regional Board of Education*, 77 *N.J*. 514, 525 (1978)), the Commissioner must nevertheless maintain that "***until such time as he is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, [he] declines to award counsel fees. ***" (*B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No. 1 and Donald Merachnik, Superintendent of Schools, Union County*, 1987 *S.L.D.* 323 at 336) See, also, *Balsley v. North Hunterdon Bd. of Educ*. 117 *N.J.* 434, 442, 443 (1990), where, in an education-discrimination matter, the Supreme Court indicates that, notwithstanding the Commissioner's "sweeping remedial powers for enforcing equal protection in the administration of the public education laws,***the absence of express statutory authority is fatal to the claim for counsel fees;" and *State, Dept. of Environ. Protect. v. Ventron Corp*., 94 *N.J.* 473, 504 (1983), where the Court affirms that legal expenses are not recoverable absent express authorization by statute, court rule or contract.

Accordingly, the initial decision of the ALJ is affirmed, with modification as set forth above. Respondents are directed to reimburse the Board for tuition in the amount of $5,614.03 and pre-judgment interest in the amount of $4,097.41.[3] (See Board's Post-Hearing Brief at p. 59 and Certification of Steven K. Parness at Exhibit B).[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3]It is herein noted that the Board has calculated pre-judgment interest as of February 13, 1998.

[4] This decision, as the Commissioner's final determination 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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

May 26, 1998