

SEARCH DAY PROGRAM, INC., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT : DECISION
OF EDUCATION, :
RESPONDENT :
_____ :

SYNOPSIS

Petitioning private school for the disabled appealed the Department's determination to disallow \$342,593 in salaries and benefits to nine teachers for the 2002-2003 school year because of their alleged failure to obtain emergency certification. Petitioner argued that this disallowance would require the return of the above amount to its sending districts, creating financial hardship for the non-profit school.

The ALJ found, *inter alia*, that: respondent has clear responsibility -- implicit in the laws and regulations requiring teachers to physically possess an emergency teaching certificate before commencing employment -- to act promptly on applications for emergency certification; respondent has for many years allowed teachers to commence work in September without emergency certificates in hand as long as applications for the certificates have been submitted and approved by the County Superintendent; in practice, emergency certificates have been issued by the Department as late as April or May of the school year, and then backdated to the date that the County Superintendent recommended approval to the Department; the credible evidence establishes that petitioner submitted paperwork for the nine teachers in question in a timely manner, and that it is likely that the applications in question were lost or misplaced; and that the situation could have been resolved by the County Superintendent's office in 2003. The ALJ concluded that respondent is equitably estopped from designating the salaries & benefits in question as non-allowable costs, and ordered: the Monmouth County Superintendent to review the replacement applications for the teachers in question, and to confirm that said teachers would have been entitled to receive emergency teaching certificates for 2002-2003; the Office of Licensing and Certifications to issue the appropriate emergency certificates backdated to September 2002; and the Division of Finance to reconsider its disallowance of the related salaries and benefits.

The Commissioner adopts the ALJ's conclusions that both the weight of evidence and the doctrine of estoppel support a decision in favor of petitioner, and orders that after determining which teachers were or were not entitled to receive emergency certificates for 2002-2003, the Division of Finance shall either rescind or recalculate the disallowance of \$342,593 in salary and benefits costs in the calculation of tuition which petitioner may charge to its sending districts.

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 2, 2006

OAL. DKT. NO. EDU 8569-04
AGENCY DKT. NO. 292-8/04

SEARCH DAY PROGRAM, INC., :
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V. : COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT : DECISION
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Petitioner appeals a determination by the Division of Finance of the New Jersey Department of Education (the Department) that for the 2002-2003 school year, salaries and benefit costs totaling \$342,593.00, for nine of petitioner's teachers, must be disallowed under N.J.A.C. 6:20-4.4(a)(4) and (11) (effective at the time but now superseded), due to the teachers' alleged failure to obtain emergency certification. Such a disallowance would have the effect of requiring petitioner to return that amount to its sending districts. Since petitioner is a non-profit entity which rarely achieves surpluses, and the amount cannot be paid with tuition from subsequent years, petitioner would have to engage in extensive fund raising. After reviewing the Initial Decision, the record¹, and the parties' exceptions, the Commissioner finds as follows.

It is undisputed that petitioner, a private, non-profit school for the disabled, located in Ocean Township, Monmouth County, and specializing in the education of autistic students, has been approved by the Department to receive placements from public school districts. It is also undisputed that in order to be fully staffed, petitioner has frequently hired teaching candidates who have not acquired standard teaching certificates. Thus, for several

¹ Transcripts of hearings held on August 25 and 26, 2005, and October 28, 2005 were provided.

years, petitioner has been forwarding to the Monmouth County Office of the Department of Education (Monmouth County Office) applications for emergency certificates for the positions of “teacher of the handicapped” and “speech language specialist.” Normally, these application packages are processed by the County Office and, if approved, are forwarded to the Department’s Office of Licensing and Credentials (State Licensing Office), in Trenton, for issuance of the certificates. The County Superintendent’s approval is the basis for issuing certificates. The State Licensing Office sends the certificates to the teacher/applicants. (1T146²)

It was the responsibility of petitioner’s office manager, Christina Johnson, to process the applications for emergency certification. (1T9) She testified that her general practice up through the 2002-2003 school year was to ask the staff for transcripts, money orders and applications in June and collect them in July. (*Ibid.*) She would give the application materials to Executive Director Katherine Solana for review and signature, and send the paperwork via regular mail to the County Office after she received it back from Solana. (1T9; 1T24) She did not keep copies of what she forwarded to the County Office. (1T20-21)

Johnson testified that in 2002 she did not deviate from the procedures described above when she handled the applications for emergency certificates for the previously mentioned nine teachers. (1T24) However, in June of 2003, as she initiated the process of preparing emergency certification applications for the next school year, she realized that the certifications for the prior year had never arrived. (1T10) She testified that her failure to realize earlier that there was something amiss was attributable to the fact that the emergency certificates had, in her experience, always arrived well into the second half of the school year, i.e., March, April or

² 1T = Transcript of August 25, 2005 hearing; 2T = Transcript of August 26, 2005 hearing; 3T = Transcript of October 28, 2005 hearing.

May, and had always been backdated to the prior September. (1T11; 1T164) Respondent does not dispute this.

Johnson advised Solana of the problem (1T15), and contacted county certification officer Donna Pesci. (1T16) Pesci could not find any record of the applications and asked Johnson for copies. Johnson had some money order receipts provided by the applicant teachers (1T33; 1T59; P-13; P-14), a transcript copy for one of the teachers (P-15), and possibly a copy of the envelope, but could provide nothing else because she generally did not keep copies of what she forwarded to the County Office. (1T20-21) She sent what she had to Pesci. (1T21) Pesci's supervisor, June Hankel, contacted Johnson and said she would look into the problem. (1T23)

In August 2003, at the suggestion of Pesci and/or Hankel, Search Day resubmitted applications to the County Office for all nine teachers for the 2002-2003 year. (P-4) Hankel sent the paperwork to the State Licensing Office on September 15, 2003, and checked with Peggy Smith of that office on October 8 and 24, 2003. (P-5; P-6) Solana also wrote to the State Licensing Office on September 8, 2003, explaining the situation, and asking both for retroactive emergency certificates for the 2002-2003 school year, and renewals for the 2003-2004 school year. (P-8)

Joan Brady, Director of the State Licensing Office, responded to Solana's September 8, 2003 letter on October 28, 2003. She stated that there was no basis upon which to grant petitioner's request for retroactive emergency certificates for 2002-2003 and renewals for 2003-2004 [presumably because the State Licensing Office possessed no approvals from the County Superintendent], and further directed petitioner to submit new applications for the 2003-2004 school year. (P-8) On November 10, 2003, Hankel sent Smith an email reminding the State Licensing Office that petitioner had already resubmitted applications to the County

Office and that those applications had been forwarded to the State Licensing Office on September 15. (P-9) Hankel followed the e-mail up on November 18, 2003, November 25, 2003, and December 1, 2003, at which point the 2003-2004 emergency certificates were apparently issued, backdated to September 2003. (*Ibid.*) The list of teachers whose salaries had been disallowed for 2002-2003 and the list of teachers who were approved for teaching in 2003-2004 were identical.

In the meanwhile, during the late summer and autumn of 2003, petitioner met with the county superintendent (P-15), and wrote to the Commissioner of Education and other employees of the Department of Education (P-17; P-18; P-19) about the dispute concerning the emergency certification applications, and the serious impact that the disallowance of \$349,593 would have on petitioner's \$3 million annual budget.

The factual controversy in this case is whether petitioner submitted to the County Office the nine emergency certification applications for the 2002-2003 school year. There are copies in the file of statements from all nine of the involved teachers describing when and how they submitted their emergency applications (P-11) and, as stated above, petitioner's office manager described at the OAL hearing how she processed and forwarded the applications.

Both Pesci and Hankel denied ever receiving emergency certification paperwork from petitioner for the 2002-2003 school year. Neither witness believed that the applications could have been lost or misplaced in their office. Hankel, however, testified that before arriving in the County Education Office, all mail went to and was processed by the Monmouth County mailroom, located in a different building. (3T25-26)

In addition, both Pesci and Hankel testified that their office moved in August 2002. (1T149; 3T20) August is, according to their testimony, the busiest time for

receiving certification application materials from the fifty-two districts and private schools in Monmouth County. (1T158-159) Further, Hankel stated that the move was executed “in different times” (3T24) and that she was on vacation during the days in which the files for emergency certification applications were transported to the new office. (3T20-21)

The ALJ found in favor of petitioner on two grounds. The first ground was the weight of the evidence. The ALJ found Johnson’s testimony to be credible and consistent with other evidence in the record, such as the statements, receipts and a transcript copy from the nine teachers whose salaries were disallowed, showing that they had submitted their application materials by September of 2002. Johnson’s explanation for her tardy realization that there was a problem with the 2002-2003 certifications was also consistent with other evidence in the record that the State was typically late in issuing emergency certificates. Thus, the expectation that the certificates were on their way precluded timely concern and action while there was still time to correct the situation.

In addition, respondent’s position that it is unlikely that the county lost or misplaced petitioner’s emergency certificate applications is not entirely harmonious with certain undisputed facts. First, the County Office moved during the critical period in which emergency certificate applications were submitted by over 52 districts. Second, Hankel was not actually present on the days that the office contents were moved. Third, the emergency certification filing cabinets were sealed for a few days, and Hankel was not able to explain what was done with applications that might have come in during those days and could not be filed.

The ALJ also referred to Hankel’s testimony that all county mail was first routed to a mailroom at a location separate from the Superintendent’s office. Neither Hankel nor Pesci

knew how the mail was processed in the county mailroom, or how it was subsequently distributed to the various county offices.

The second ground upon which the ALJ based his decision was equitable. The regulations in 2002 mandated that services requiring a certificate could be rendered only by the holder of the required certificate *N.J.A.C.* 6:11-3.1(a). However, emergency certificate applications could not be submitted to the county until after August 1. *N.J.A.C.* 6-11-4.3(b). The Department's witness, Smith, testified that it was virtually impossible for the county and state to process every emergency certificate application between August 1 and the beginning of the school year. Consequently – as conceded by both the county and State witnesses – each year teachers in many districts taught without “holding” their emergency certificates. The certificates typically did not arrive from the State until half of the school year – or more – was over.

Technically, therefore, the State violated its own regulations each school year, by designating as allowable costs the salaries of many teachers who did not actually have their certificates in hand. Further, through this pattern of practice, the State caused districts to rely on the validity of their emergency teacher's credentials until it was too late to resubmit applications. The districts came to expect backdated certificates to arrive in March, April, or even May.

The ALJ also took into consideration the fact that respondent did not allege that any of the teachers who had not received the emergency certification for the 2002-2003 school year would have been ineligible to receive same, had their applications been timely processed. In fact, they all were approved for certificates for the 2003-2004 school year, and apparently several had received certificates for the 2001-2002 school year.

Upon consideration of the foregoing, the ALJ concluded that respondent is equitably estopped from designating the 2002-2003 salaries and fringe benefits of petitioner's nine emergency teachers as non-allowable costs.

In its exceptions, respondent challenges both of the ALJ's grounds for his Initial Decision in favor of petitioner. In challenging the ALJ's determination about the weight of the evidence, respondent asserts that Johnson testified that she submitted applications in batches as they were supplied to her by teachers (1T54:23-1T56:3) and that she did so in August and September as they came in. (1T55:20-25) Because it would be unlikely that multiple batches of only one out of fifty-two schools' emergency certificate applications would get lost, respondent contends that the weight of the evidence goes against petitioner's contention that the County Office lost the applications. Respondent also pointed to Hankel's and Pesci's testimony about how meticulous their office practices were.

The Commissioner sees no reason to disturb the ALJ's finding concerning the weight of the evidence. First, the Commissioner must defer to the ALJ's determination that Johnson's testimony about mailing the emergency certification applications was credible and more likely than respondent's position concerning the infallibility of the county office procedures. *D.L. v. Board of Educ. of Princeton Regional School Dist.*, 366 N.J. Super. 269, 273 (App. Div. 2004); *Clowes v. Terminex Int'l.*, 109 N.J. 575 (1988).

Second, the hearing transcript reveals that the testimony of Johnson to which respondent refers was given in response to questions, some theoretical, about Johnson's general procedures prior to 2002-2003. (1T54:13 to 1T55:13) In point of fact, Johnson testified that "[i]f [she] had three applications, [she] would send three applications in one envelope."

(1T55:14-15) And she also testified that she did not specifically recall whether the 2002 applications went in separately or together. (1T55:16-19)

A review of the statements from the nine teachers and the money order receipts mentioned above reveals that at least seven or eight of the applications could have been sent in one envelope in September or October.³ If that were the case, the timing would have been after the move of the County Superintendent's Office, but the possibility of misplacement by the county mailroom or the County office would have remained.

Respondent's challenge to the ALJ's application of equitable estoppel is also without merit. Relying on *Jesse Barr v. City of Newark Police Department*, 97 N.J.A.R. 2d 582, (1997), *aff'd.*, Merit System Board (decided April 15, 1997), and other cases, respondent maintains that to establish a claim of equitable estoppel against a government entity, a party must prove that the public entity knowingly and intentionally misrepresented or engaged in conduct that is calculated to mislead another, and that the misled party relied upon the government entity, changing its position to its detriment. The intentional misrepresentation requirement is needed to balance the detriment to the public interest that could result from estoppel against the government. *O'Malley v. Department of Energy*, 109 N.J. 300, 317 (1987). Estoppel against the government is only justified where its absence would cause manifest injustice. *W.V. Pangborne & Co., Inc. v. New Jersey Dep't. of Transportation*, 116 N.J. 543, 554 (1989). Respondent reasons that the doctrine of equitable estoppel is inapplicable to this case because there was no showing of intentional misrepresentation by the Department.

However, in *State Dep't. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473 (1983), a case cited in the authority upon which respondent relies, the New Jersey Supreme Court explained that "intentional misrepresentation by the government may be found if

³ Christine Peterson wrote that her application was submitted in January 2003.

a public official knew or should have known of material facts but acted as if he did not have knowledge, thus causing a misrepresentation. *Ventron, supra*, 94 N.J. at 499. The evidence in this case reveals that both the Department and the County knowingly 1) allowed “emergency” teachers to work in the county’s schools for the better part of the year without their certificates and 2) routinely sent backdated certificates to the teachers after most of the school year had passed. These practices by the Department left little time for the correction of errors, since the schools relied upon receiving backdated certificates in March, April or May, and thus had no reason to suspect problems until the end of the school year.

Further, there is nothing in this record to suggest that detriment to the public interest would result from a decision in favor of petitioner. There is no contention that the nine teachers did not do the jobs for which they were hired and paid, and there is no contention that they were not eligible for emergency certificates. To the contrary, a decision in favor of respondent would impose a debt on the petitioner of ten percent of its budget, which would cripple its ability, as a non-profit entity that rarely enjoys surpluses, to continue its important service to the community.⁴

In summary, the Commissioner adopts the ALJ’s conclusions that both the weight of the evidence and the doctrine of estoppel support a decision in favor of petitioner. Accordingly, the Monmouth County Superintendent of Schools shall review the replacement applications for 2002-2003 emergency certificates submitted on behalf of the nine teachers at issue and confirm whether they would have been entitled to emergency certification for the 2002-2003 school year. As to those teachers who were so entitled, the Office of Licensing and Certification shall issue emergency certificates backdated to September 2002. Finally – after the

⁴ The first argument in respondent’s third exception appears to be missing some text and is not comprehensible. The second argument is unconvincing. The Commissioner is not persuaded that the payment of \$342,593 in installments will significantly ease the impact of the debt on petitioner’s budget.

county superintendent determines which, if any, of the teachers were not entitled to receive emergency certificates for 2002-2003 – the Division of Finance, Office of Fiscal Policy and Planning shall either rescind or recalculate its disallowance of \$342,593 in salary and fringe benefit costs in the calculation of tuition which petitioner may charge to its sending districts.

IT IS SO ORDERED.⁵

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 2, 2006

Date of Mailing: June 2, 2006

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.*