

OAL DKT. NO. EDU 12576-05 (OAL decision not published)
AGENCY DKT. NO. 287-10/05

IN THE MATTER OF THE TENURE HEARING :
OF MARILYN CUYKENDALL, SCHOOL
DISTRICT OF THE TOWNSHIP OF BOONTON, :
MORRIS COUNTY.

COMMISSIONER OF EDUCATION
DECISION

_____:

After reviewing the Initial Decision approving a proposed settlement of this matter, and the documents that were submitted with same, the Commissioner is constrained to remand this matter to the Office of Administrative Law (OAL).

On October 20, 2005, the petitioning School District of Boonton filed with the Commissioner of Education (the Commissioner) certified tenure charges of unbecoming conduct and insubordination against Marilyn Cuykendall, who had served petitioner as Board Secretary/Business Administrator. The specific allegations submitted to support the charges included the following:

- Alteration of attendance records pertaining to vacation leave;
- Failure to properly communicate with and report to the district superintendent;
- Failure to respond to inquiries from district superintendent;
- Violation of Board policies and directives concerning purchasing;
- Disregard of directives issued by the district superintendent concerning such matters as the rate of pay for summer school employees and the issuance of personnel contracts.

Six days of hearings were conducted in the OAL on January 31, and February 2, 3, 7, 8 and 15, 2006. According to correspondence in the file, during the proceedings on

February 16, the parties placed settlement terms onto the record. No transcripts of the hearing or settlement terms are in the record transmitted to the Commissioner.

A settlement agreement (Agreement) dated March 10, 2006, executed by both parties, is attached to the Initial Decision. Under the terms of the Agreement, the petitioner agreed to withdraw the tenure charges (Para. 1 of Agreement), dissolve respondent's suspension and restore all back pay and benefits. (Para. 2 of Agreement) The parties agreed that for the balance of the 2005-2006 school year, *i.e.*, through June 30, 2006, respondent would be on administrative leave (Para. 4 of Agreement), and petitioner would pay respondent full salary and benefits. (Para. 3 of Agreement)

Respondent agreed to resign effective June 30, 2006, with the option to retire on that date or thereafter (Para. 5 of Agreement), and petitioner agreed to pay respondent \$176,264.82, by way of three installment payments of \$58,754.94, as "consideration for the cancellation of future rights and benefits otherwise due to Ms. Cuykendall as a statutorily tenured employee of the Board." (Para. 6 of Agreement)

The Administrative Law Judge (ALJ) found that the Agreement and petitioner's meeting minutes and resolution were consistent with the law, fully disposed of all the issues in controversy, and were voluntarily entered into by the parties. (Initial Decision at 1-2) The ALJ more specifically found that:

A totally satisfactory explication of the circumstances justifying the settlement of this matter is contained in the sixth "whereas" paragraph on page one of the Agreement settling this matter;

. . . . and,

This Agreement is in the public interest on account of all those matters referred to in the sixth and seventh "whereas" paragraphs on page one of the Agreement.

He thus concluded that the settlement meets the requirements of *N.J.A.C. 6A:3-5.6*, and approved it.

The Agreement's sixth and seventh "whereas" paragraphs, upon which the ALJ relies, read as follows:

WHEREAS, the risk of litigation and the uncertainty of the outcome, the threat of further and additional litigation arising out of the Charges, Grievances or otherwise, and a due consideration of the costs and expenses of litigation induced the Board to engage in extensive negotiations with Ms. Cuykendall with a view toward resolution of all outstanding issues between the parties, including, without limitation, all matters embraced within the Charges and the Grievances; and

WHEREAS, the parties did reach an agreement resolving, settling and adjudicating all matters in dispute between them, and now wish to record their agreement and secure the approval thereof by the Commissioner of Education, pursuant to *N.J.A.C. 6A:3-5.6*, and, believing the same constitutes a fair and reasonable settlement of the matter and to be in the public interest, as well as in the interest of the parties hereto, upon the ground that it eliminates the risks, inconvenience, cost and expense of litigation, and enables a complete resolution of all disputes and grievances, including matters not embraced within the current proceedings,

Decades ago, the Commissioner of Education expressed his reservations about "settlements reached in tenure matters which are opened upon proper certification of charges as prescribed by statute and under statutory formula, but which are concluded by lump sum payments to respondent parties." *In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, Camden County*, 1982 *School Law Decisions* 842, 845 (April 7, 1982). He made it clear that he would "carefully examine the factual circumstances surrounding each settlement so proposed, both as to the nature of the charges involved in such matter as well as to the exact terms of the settlement," in order to preserve the integrity of the Tenure Employees Hearing Act, *N.J.S.A. 18A:6-10 et seq.*, and insure that

determinations in tenure matters serve not only the interests of the parties but also the broader public interests. *Ibid.*

Similarly, the Commissioner has cautioned that once a Board takes up the burden of tenure charges it cannot lay it back down again without setting forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner on March 22, 1982, decision on remand June 16, 1983, *aff'd. with modification* by the State Board of Education, November 2, 1983, *aff'd.* Superior Court, January 30, 1986.

As guidance in evaluating the circumstances pertaining to proposed settlements in tenure matters, the State Board of Education articulated standards. The proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal; 3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. *N.J.A.C. 6A:3-5.6; In re Cardonick*, 1990 S.L.D. 842, 846. Thus, in order to meet her obligation to the schools and children of this State, and the public, the Commissioner must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra*. See, also, *In the matter of the Tenure Hearing of Gary Willis, North Hunterdon-Voorhees*

Regional High School District, Hunterdon County, OAL Dkt. No. EDU 91-05, Agency Dkt. No. 438-12/04, decided July 8, 2005.

Both of the paragraphs upon which the ALJ relies as justification for a settlement of this matter state simply that the parties wish to avoid the risks and expenses of litigation, a general sentiment, applicable to most controversies. Such statements neither explain why certified tenure charges should be dropped in this particular case nor why it is in the public's best interest, after the matter has been litigated through six or seven days of hearings, to pay this respondent over \$176,000, in addition to full salary for the 2005-2006 school year. The Initial Decision does not include specific enough findings to justify the settlement terms, and the absence from the record of transcripts of the proceedings precludes the Commissioner from, for example, making her own findings that the evidence elicited at the hearing could not sustain the charges, or that back pay, front pay and an extra \$176,000 are collectively less than a realistic assessment of the costs of continuing the litigation.

Accordingly, the matter is remanded to the OAL for proper evaluation of the proposed settlement under the *Cardonick* standards, or further proceedings.

IT IS SO ORDERED.¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 19, 2006

Date of Mailing: June 19, 2006

¹ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A: 6-27 et seq.* and *N.J.A.C. 6A: 4-1.1 et seq.*