

R.O. on behalf of minor child, R.O., II, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
WEST WINDSOR-PLAINSBORO :  
SCHOOL DISTRICT, MERCER :  
COUNTY, :  
RESPONDENT. :  
\_\_\_\_\_ :

SYNOPSIS

Petitioner challenged a ten-day suspension imposed on his son for possession of a knife on school property, and seeks a due-process hearing and a reversal or expungement of the suspension. Respondent Board moved for summary decision, arguing, *inter alia*, that the issues determinative to this matter had already been adjudicated in New Jersey Superior Court.

The ALJ found, *inter alia*, that: the doctrine of issue preclusion prevents any re-litigation; the school record of petitioner’s son cannot be determined to be “inaccurate, irrelevant or otherwise improper” and therefore does not meet the criteria for expungement under *N.J.A.C.* 6:3-6.7; information about R.O.’s delinquency proceeding was properly released pursuant to N.J.S.A. 2A:4A-60d(1); there is no genuine issue as to any material fact, and the respondent is entitled to prevail as a matter of law. Accordingly, the ALJ granted respondent’s motion for summary decision, and dismissed the petition.

The Commissioner found no merit in petitioner’s twenty-one exceptions; concurred with the ALJ’s determinations articulated in the Initial Decision; supplemented the Initial Decision; granted the respondent’s motion for summary judgment and dismissed the petition.

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.

March 17, 2006

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The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), petitioner’s exceptions and respondent’s reply exceptions have been thoroughly and independently reviewed.<sup>1</sup> After considering the facts and applicable law, the Commissioner adopts the administrative law judge’s (ALJ) decision to grant respondent summary judgment, dismissing the petition.

This case was initiated on February 9, 2005, by petitioner’s appeal to the Commissioner from respondent’s denial of petitioner’s request to remove from his minor son’s (R.O.) school record any mention of a ten-day suspension that had been imposed on March 3, 2004, as a result of R.O.’s possession of a knife on school premises. Petitioner also requested a “hearing to challenge the school suspension,” and the “names and identities” of students who could possibly provide facts about the conduct that precipitated the suspension. (Petition at 2) General reference to such students had been made in a June 16, 2004, memorandum by Donna Gibbs-Nini, one of two assistant principals in R.O.’s school. The matter was transmitted to the OAL on March 8, 2005.

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<sup>1</sup> Replies to reply exceptions are not contemplated by *N.J.A.C.* 1:1-18.4. Consequently, petitioner’s reply to respondent’s reply exceptions was not considered.

On September 23, 2005, petitioner moved before the Commissioner for interlocutory review of an order by the ALJ denying petitioner leave to supplement the original petition. On October 6, 2005, the Commissioner issued an order granting interlocutory review, adopting the ALJ's order denying supplementation of the original petition, and stating that the appropriate course of action would be for petitioner to raise his new claims in a separate petition of appeal. Accordingly, petitioner filed a second petition – Agency Dkt. No. 274-10/05, OAL Dkt. No. EDU 8827-05 – on October 9, 2005, alleging violation of R.O.'s due process rights (First Count), racial discrimination (Second Count) and violation of R.O.'s civil rights (Third Count). The Commissioner dismissed the Second Count for lack of jurisdiction on November 4, 2005, and the matter was transmitted to the OAL on November 9, 2005.

Petitioner once again moved before the Commissioner for interlocutory review on October 20, 2005. On this occasion, petitioner challenged the ALJ's October 19, 2005 order denying reconsideration of his September 30, 2005 order denying petitioner's motion to compel respondent to answer a new set of interrogatories. The Commissioner declined interlocutory review on October 28, 2005.

On October 19, 2005, respondent resubmitted a motion for summary judgment that had originally been filed, and denied, in the previous month. The gravamen of respondent's motion was that the question of whether R.O. had possessed a knife on school premises on March 3, 2004 had already been decided in the affirmative in a proceeding in family court on February 3, 2005. On that occasion, R.O. had been adjudicated delinquent for possessing a dangerous knife while on the grounds of an educational institution without written authorization from the governing officer of the institution, in violation of *N.J.S.A. 2C:39-5(e)(2)*, a fourth degree crime. Respondent argued that the doctrine of issue preclusion – as articulated, for example, in *State v. Gonzalez*, 75 *N.J.* 181, 186 (1977) – bars petitioner from litigating the issue again. Further, since R.O. had been found guilty of

possessing a knife on the grounds of an educational institution, there was no basis under *N.J.A.C. 6A:32-7.7(a)(1)* for expungement of the suspension from his record.

Petitioner's responses to the summary judgment motion contained a number of arguments. First, petitioner maintained that certain alleged erroneous rulings by the family court judge, and the appealability of the delinquency determination, barred summary judgment. Second, petitioner asserted that it was improper for respondent to use and disclose, in the present proceeding, transcripts and orders from R.O.'s juvenile delinquency trial. While not expressly stated in his papers, petitioner presumably intended that the ALJ deny summary judgment because respondent's grounds for same were offered to the ALJ via these documents from the family court action.

Third, petitioner appeared to contend that summary judgment could not be granted because R.O. was improperly denied a hearing before the respondent board. For the proposition that R.O. was entitled to such a hearing, petitioner relied upon *N.J.A.C. 6A:16-5.5*, *N.J.A.C. 6A:16-5.6* and *N.J.A.C. 6A:16-5.7*, which provide that students who commit certain offenses must receive certain due process rights, including hearings before the board of education.

The ALJ found that the following facts in this matter are undisputed. On March 3, 2004, R.O. was a seventh grade student at Community Middle School in the West Windsor-Plainsboro school district. On that date, he was suspended for ten days for possessing a weapon on school grounds. No written explanation was given to R.O.'s parents on March 3, 2004 or immediately thereafter, and no formal hearing was held by respondent before or after imposition of the suspension. R.O.'s parents requested a copy of an incident report prepared by a school employee. (Initial Decision at 2-3)

The ALJ also found that certain facts relating to R.O.'s family court proceeding are also undisputed. They are as follows. On May 10, 2004, a juvenile delinquency complaint was filed against petitioner in New Jersey Superior Court, Chancery Division Family Part, Middlesex County, containing – among other charges – allegations that on March 3, 2004, R.O. purposefully and

knowingly possessed a dangerous knife while on the property of an educational institution in violation of *N.J.S.A. 2C:39-5(e)(2)* – 4<sup>th</sup> degree. On February 3, 2005, the Superior Court judge found that R.O. had claimed that on March 3, 2004, he had found a knife on the school bus, that the bus had arrived at the school at approximately 7:00 a.m., and that R.O. had not given the knife to Assistant Principal Donna Gibbs-Nini until after he was summoned, at approximately 11:20 a.m. The judge then found the above-articulated allegations in the juvenile delinquency complaint to be true, and adjudicated R.O. delinquent. (Initial Decision at 3-4)

Since it was undisputed that a court had already adjudicated R.O. guilty of possessing a dangerous knife on the grounds of an educational institution, the ALJ agreed with respondent that – under the doctrine of issue preclusion – the Department of Education cannot relitigate the matter, and the petition must be dismissed as a matter of law. He reasoned further that there is no basis to expunge information about R.O.’s ten-day suspension from his school record. Under *N.J.A.C. 6A:32-7.7(a)(1)*, information in a student’s school record must be inaccurate, irrelevant or otherwise improper for it to warrant expungement. The ALJ found that the record of R.O.’s suspension meets none of those criteria. (Initial Decision at 4-6)

The ALJ also rejected petitioner’s claim that R.O. was entitled to a hearing before the board of education. He agreed with respondent that *N.J.A.C. 6A:16-5.5*, *N.J.A.C. 6A:16-5.6* and *N.J.A.C. 6A:16-5.7* – regulations that pertain, respectively, to student possession of firearms, assaults with weapons, and assaults on board of education members and employees – are irrelevant to the level of process due to R.O. The foregoing regulations address offenses that carry serious penalties, including expulsion and suspensions up to a year or more. The penalty imposed on R.O. was what the Department of Education’s regulations consider short-term, and is subject to the requirements of *N.J.A.C. 6A:16-7.2*. The ALJ determined that R.O. had received the informal hearing required by *N.J.A.C. 6A:16-7.2 (a)(2)*. (Initial Decision at 6)

As for petitioner's contention that respondent improperly used documents from R.O.'s delinquency proceeding, the ALJ noted that petitioner himself had continually referred to the family court proceeding during the pendency of this matter in the OAL, and that the information was properly released pursuant to *N.J.S.A. 2A:4A-60 (d)(1)*. (Initial Decision at 4)

Finally, the ALJ revisited the summary decision standards set forth in *N.J.A.C. 1:1-12.5 (b)*. He found that respondent's brief and certifications had met its burden to show that there were no disputes of material fact, and that respondent was entitled to prevail as a matter of law. Petitioner, on the other hand, had failed to respond with any opposing certifications showing that there were, in fact, genuine issues of material fact that required determination at an evidentiary hearing. (Initial Decision at 6)

The Commissioner finds no merit in petitioner's twenty-one exceptions, most of which are duplicative of his arguments in opposition to respondent's application for summary judgment. In his exceptions 10, 11 and 12, petitioner maintains that the ALJ omitted certain findings of fact. And in exception 16, petitioner claims that the ALJ erroneously denied him access to students who might have had relevant information. Based upon these allegations, petitioner argues in his first exception that outstanding disputes of fact render summary judgment inappropriate. However, the undisputed facts in this case are sufficient to support the suspension that was imposed upon R.O. He had a four-inch knife in his possession in school for over four hours and produced it from his pocket when asked about it. Nothing in the record suggests that he was prevented from turning over the knife during the four hours. Any remaining facts, including the "newly discovered facts" referenced in petitioner's exception 13, are not material, and consequently do not serve as a bar to summary judgment. Even though the allegations of the pleadings may raise issues of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment can be granted. *Judson v. People's Bank & Trust Co. of Westfield*, 17 N.J. 67, 75 (1954). *See, also, Brill v.*

*Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995) (disputed issues that are of an insubstantial nature cannot overcome a motion for summary judgment).

Further, petitioner provided no evidential support for his allegations, such as a certification from R.O. about any fact which he deemed relevant to his position, but which was not adduced at the delinquency trial. Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment. *United States Pipe & Foundry Co. v. American Arbitration Ass'n*, 67 N.J. Super. 384, 399-400 (App. Div. 1961).

Petitioner's exceptions 2, 3 and 4, in which he contends that respondent improperly utilized R.O.'s juvenile records, are also meritless. As the ALJ observed, petitioner himself submitted the juvenile records to the court. The juvenile delinquency complaint against R.O. was annexed to the petition, and it appears – from a letter by petitioner, dated September 15, 2005 – that petitioner sent the ALJ a copy of the transcript of the juvenile delinquency proceeding. If a party offers or allows evidence with full knowledge of the risks, he will be regarded as waiving, irrevocably, his right to have his evidence excluded. *Administrator of Monfort v. Rowland*, 38 N.J. Eq. 181 (N.J. Ch. 1884); *Berryman v. Graham*, 21 N.J. Eq. 370 (E.E.A. 1869); *Boone v. Ridgway Exrs.*, 29 N.J. Eq. 543 (N.J. Ch. 1878).

Moreover, N.J.S.A. 2A:4A-60 does not bar the availability of R.O.'s juvenile records in this proceeding. The Commissioner agrees with the ALJ that N.J.S.A. 2A:4A-60(d) allows public disclosure of information about R.O.'s delinquency proceeding. Further, the Commissioner finds that information about the delinquency proceeding was properly disclosed to respondent under N.J.S.A. 2A:4A-60(c) (2). Respondent was the equivalent of “the agency which filed the complaint.” Respondent reported the offense to the police, and served – through Assistant Principal Gibbs-Nini – as the complaining witness. In addition, the Commissioner agrees with respondent that N.J.S.A.2A:4A-60 (A) (6) pertains. Respondent is an agency that has an interest in the case and

made, through counsel, a request to the court to obtain the records of R.O.'s family court proceeding, which request was granted.

The Commissioner similarly finds no merit in petitioner's argument, in his exception 5, that respondent's absence as a party in the delinquency proceeding bars the application of the doctrine of issue preclusion. R.O. was found to have knowingly possessed a dangerous knife on school premises in a prior proceeding. R.O. is seeking, in the present proceeding, to dispute his liability for the same offense. It is R.O., the party against whom the doctrine of issue preclusion is asserted, that must have been a party (or in privity with a party) in the prior proceeding. *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 505 (3d Cir. 1992); *State v. Gonzalez*, 75 N.J. 181, 186 (1977). Respondent's lack of participation in that proceeding is irrelevant.

The Commissioner also finds that petitioner's fourteenth exception is irrelevant to the instant controversy. In that exception, petitioner invokes standards for criminal trials, which standards do not govern these administrative proceedings.

Respecting petitioner's exceptions 6, 7, 8, 9 and 15, in which petitioner disputes the ALJ's conclusions about the due process required for ten-day suspensions, and about the applicability – or lack thereof – of *N.J.A.C. 6A:16-7.2* and *7.3*, and *N.J.A.C. 6A:16-5.5* through *5.7* to this issue, the Commissioner adopts the ALJ's determinations, for the reasons set forth in the Initial Decision and supplemented herein.

Petitioner's exception 17 is moot because respondent does not request dismissal of the petition on the basis of timeliness, and petitioner's exception 18 is rendered moot by the recent decision of the State Board of Education regarding petitioner's appeal of the denial of his request for an order compelling answers to twenty-seven interrogatories.

Finally, petitioner's exceptions 19, 20, and 21 pertain to the subject matter of a separate petition filed with the Commissioner on October 9, 2005, and will not be addressed herein.

In summary, for the reasons articulated in the Initial Decision of the OAL, and supplemented herein, respondent's motion for summary judgment is granted, and the petition is dismissed.

IT IS SO ORDERED\*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 17, 2006

Date of Mailing: March 17, 2006

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\* The Commissioner's 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.*