#274-09 (OAL Decision not available online)

OAL DKT. NO EDU 736-09
AGENCY DKT. NO. 36-2/09

IN THE MATTER OF THE TENURE	:	
HEARING OF GILBERT ALVAREZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LAKEWOOD, OCEAN COUNTY.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner finds that she is unable to accept the proposed settlement as recommended by the OAL.

Preliminarily, the Commissioner recognizes that the parties and Administrative Law Judge have attempted to address the standards established by the State Board of Education to govern settlement of tenure charges. *In re Cardonick,* 1990 *S.L.D.* 842, 846; codified at *N.J.A.C.* 6A:3-5.6(a). Specifically, they have sought to propose a settlement that: 1) is accompanied by documentation as to the nature of the charges; 2) includes an explanation of the circumstances which they believe justify settlement; 3) evidences the consent of both the charged and the charging parties; 4) indicates that the charged party entered into the agreement with a full understanding of his rights; 5) attempts to demonstrate that the agreement is in the public interest; and 6) indicates that respondent, as a teaching staff member, is aware of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible action against the staff member's certificate.

However, the Commissioner cannot agree in this instance that the settlement as presented is, in fact, in accord with *Cardonick* standards.

In the proposed agreement, the Lakewood Board of Education (Board) now asserts that it will likely be unable to prove its allegations – which respondent denies – that respondent dealt with a disruptive student by pushing him into a wall and using profane language and threats; all the Board can likely prove, according to the agreement, is that respondent "did push the desk with the student in it, that the desk may have made contact with the student, [and] that the student may have made contact with the wall" – although "the student was not injured," the language used, while inappropriate, was "not necessarily profane," and respondent had been taunted and provoked by the student in question as well as others in the class. As to the Board's charges – likewise denied by respondent – that respondent treated African-American and Mexican-American students inappropriately and that the Board had "ongoing concerns" with respondent's behavior, the agreement notes that these charges did not include specific allegations of "racial remarks or statements" or prior instances of "profane language or physical contact," and that respondent has not previously been the subject of tenure charges or increment withholdings. Thus, the agreement proffers, loss of the 120 days pay already withheld from respondent following certification of tenure charges is sufficient penalty for any conduct likely to be proven at hearing, especially in view of respondent's "tenured service in the district" and "all other respects favorable record." (Settlement Agreement at 2-4)

It is by now well established that, having once taken up the burden of tenure charges, a board may not lay it down without spreading 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 March 22, 1982,

decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* N.J. Superior Court, Appellate Division, January 30, 1986. Here, the parties have made no showing whatsoever as to how settlement of this matter is in the public interest, instead seeking to relieve the Board of the burden it has taken up – and hold respondent essentially harmless but for a monetary penalty that is relatively light in the context of tenure proceedings – by relying on subtle distinctions which, in effect, do nothing more than minimize and re-characterize the very conduct forming the basis for both the Board's tenure charges and its contention, in earlier briefs before the OAL, that respondent posed a danger to students and had a detrimental impact upon them so as to warrant his removal from employment with the district. In the Commissioner's view, conduct of this type – no matter how it is characterized – raises serious questions not only about the propriety of a teacher's continued presence in the district, but also about his fitness to serve in that position elsewhere. [1]

In this regard, the Commissioner recognizes that she has, under certain circumstances, found settlement of tenure charges to be in the public interest notwithstanding that serious allegations had been made against the charged party and these remained unadjudicated following settlement. However, agreements in such cases have typically provided for both the charged party's resignation or retirement from the employing district *and* the voluntary relinquishment of his or her certificate(s) pursuant to *N.J.A.C.* 6A:9-17.11. See, for example, *In the Matter of the Tenure Hearing of Adam Aquilina, School District of the City of Elizabeth, Union County,* Commissioner's Decision No. 431-07, decided October 31, 2007; *New Jersey State Department of Children and Families, Institutional Abuse Investigation*

[1] As to the settlement's reliance on respondent's service and record, the Commissioner notes that respondent was hired in September 2004 and acquired tenure in September 2007, and the *latest* conduct alleged in the tenure charges – the pushing incident – occurred in December 2008. The parties also stipulate (Settlement Agreement at 4) that the behaviors at issue "have never been the subject of *significant* discipline" (*emphasis supplied*) and that respondent's evaluations ranged from "good to fair."

Unit v. A.S. and *In the Matter of the Tenure Hearing of A.S., Jr., School District of the City of Elizabeth, Union County* (Consolidated), Commissioner's Decision No. 441-07S, decided November 13, 2007; *Scott Powell v. Board of Education of the Township of Lopatcong, Warren County* and *In the Matter of the Tenure Hearing of Scott Powell, School District of Lopatcong Township, Warren County* (Consolidated), Commissioner's Decision No. 246-07, decided June 15, 2007.

The proposed settlement in the present matter, however, not only contains no such provision; it actually purports to preserve respondent's certificates as "intact without stigma" (Term 9B) – a provision the Commissioner would be without authority to accept in any event[2] – and contrives to circumvent the requirements of *Cardonick* by stipulating on the one hand (Terms 8-9A) that respondent's impending resignation from the district, following reinstatement to his employment position and payment of salary and benefits until December 31, 2009,[3] is for reasons unrelated to the charges against him and constitutes neither "part of the consideration for this agreement" nor a "loss of position" so as to warrant referral to the Board of Examiners under *N.J.A.C.* 6A:3-5.6(d), *N.J.A.C.* 6A:9-17.6(a)1, *N.J.A.C.* 6A:9-17.4 or any other statute or rule – while at the same time *specifically conditioning* such resignation on the Commissioner's full approval of the tenure settlement, most particularly the provision precluding referral to the Board of Examiners.[4] [5]

[2] The Commissioner here reminds the parties that decisions and underlying records in tenure matters are public documents unless sealed for good cause shown, *Williams v. The Board of Educ. of the Atlantic City Public Schools et al.* 329 *N.J. Super*. 308 (App. Div. 2000) and *N.J.A.C.* 1:1-14.1(a), and that any determination by the Commissioner not to refer a matter to the Board of Examiners cannot act to circumscribe the authority of that body to act independent of such referral, should it so wish, nor relieve the district of its responsibility to cooperate with the Board of Examiners in that eventuality.

[3] There is no indication that the Board intends to return respondent to active duty during this time.

[4] Term 8 of the Settlement Agreement reads in pertinent part: "Mr. Alvarez's determination not to return to employment after December 31, 2009…is contingent upon this settlement being approved." Term 10 further provides: "The parties agree that in the event the Commissioner of Education does not accept paragraph nine (9) [the paragraph prohibiting referral to the Board of Examiners] nor any other paragraph of this settlement agreement,

Under these circumstances – where the settlement's only identifiable benefit to the Board and public is avoidance of the uncertainty, expense and disruption that nearly always accompanies tenure proceedings centered on charges of unbecoming conduct involving students, while respondent retains the unfettered right to represent himself as the holder of a certificate in good standing issued by the State Board of Examiners and potential employers inquiring of the district will be provided with only minimal information and a "neutral" reference (Term 6)[6] – the Commissioner simply cannot accept the agreement as proposed, and must remand this matter for further proceedings. In so holding, the Commissioner stresses that she does not preclude the possibility of settlement, but reminds the parties that she cannot meet her broader obligation to the schools and children of this State without ensuring that any proposed agreement is consistent with the standards of *Cardonick* – including provision of a more compelling explanation as to why settlement is in the public interest and recognition of the Commissioner's duty to refer the respondent to the State Board of Examiners pursuant to *N.J.A.C.* 6A:3-5.6(d) and *N.J.A.C.* 6A:9-17.6(a)1 or *N.J.A.C.* 6A:9-17.4.

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this settlement agreement shall be null and void, and the matters (*sic*) shall be returned to the Office of Administrative Law for hearings (*sic*) without prejudice to either parties' (*sic*) position."

[5] In this regard, the Commissioner notes the distinction between the present matter and *Carol Ann Moore v. Board of Education of the City of Trenton, Mercer County, and In the Matter of the Tenure Hearing of Carol Ann Moore, School District of the City of Trenton, Mercer County (Consolidated)*, Commissioner's Decision No. 182-07, decided May 18, 2007. In that matter, the conduct deemed provable – failure to review a compendium of student literary works, some of which contained inappropriate language, prior to their distribution to a 12th grade literature class – was of a far less serious nature, and the charged party's resignation from employment with the district not only was stipulated as voluntary and unrelated to the tenure proceeding, but also was not conditioned on the Commissioner's acceptance of the settlement agreement.

[6] The Commissioner reminds the parties that the Board's actions must at a minimum comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, which states that the following employment information shall be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation and the reason therefor; and the amount and type of any pension received ***. (emphasis added) *N.J.S.A.* 47:1A-10

Accordingly, the proposed settlement and the Initial Decision of the OAL recommending its approval are hereby rejected, and this matter is remanded to the OAL for further proceedings addressing the concerns set forth above. If the parties are unable to reach agreement consistent with this decision, the tenure charges shall duly proceed to plenary hearing.

IT IS SO ORDERED. [7]

COMMISSIONER OF EDUCATION

Date of Decision: September 4, 2009
Date of Mailing: September 4, 2009

[7] 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.