#39-10 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu1475-08_1.html)

RENEE POLLACK,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, a principal at a high school in the Board's district, contends that she was terminated in violation of her tenure rights. The Board asserts that petitioner was terminated when she failed to resign pursuant to a contractual agreement between the parties. Petitioner had been placed on paid administrative leave by the Board as the first step in attempting to diffuse a potentially dangerous situation that had developed at the high school as the result of mounting racial tensions. Subsequently, discussions between the Board and petitioner led to a proposal by petitioner to resign after continuing her employment with the district for sixteen months to enable her to seek new employment. The Board accepted petitioner's proposal; petitioner, however, decided to withdraw her offer, asserting that there was no settlement agreement and that her termination by the Board violated her tenure rights.

The ALJ found, *inter alia*, that: tenure and employment rights may be voluntarily relinquished; a settlement agreement is a contract between the parties and should only be set aside if it was achieved through coercion, deception, fraud, undue pressure, or if one party was not competent to voluntarily consent thereto; New Jersey has a strong public policy in favor of settlements; in this case, there was an offer of settlement contained in an August 18, 2006 letter from petitioner's attorney, and an acceptance of that offer by the Board via letter dated August 29, 2006; in the agreement, petitioner offered her resignation at the end of a sixteen month period in exchange for an opportunity to seek other employment while being paid by the respondent Board; although the Board sought clarification, in its letter of August 29, 2006, of certain aspects of petitioner's settlement proposal, the essence of the agreement – *ie:* that petitioner would resign in exchange for the consideration she requested in her proposal – was unchanged. Accordingly, the ALJ determined that petitioner's attempt to retract her settlement offer after both sides had taken action to meet the terms of said agreement does not negate the fact that there was an enforceable contract, with material terms clearly established, already in place.

The Commissioner concurred with the findings of the ALJ and adopted the Initial Decision as the final decision in this matter. The Board was directed to reimburse petitioner for $5,275 in legal fees consistent with the parties' settlement agreement.

OAL DKT. NO. EDU 1475-08
AGENCY DKT. NO. 354-11/07

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PETITIONER,	:	COMMISSIONER OF EDUCATION
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BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply thereto by the Board of Education (Board), both duly filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

In her exceptions, petitioner contends that the Initial Decision is "riddled with errors, in its factual findings and conclusions of law." (Petitioner's Exceptions at 2) According to petitioner, such errors include: 1) citing testimony that never occurred, specifically that of petitioner's former attorney Bruce (*sic*) Greenwood; 2) failing to discuss or even mention the "critical differences" between the settlement offer made by counsel for petitioner and the Board's "counter offer" with respect to payment of petitioner's legal fees and the type of outside work that would enable petitioner to receive a lump sum salary payment from the district; 3) failing to recognize the significance of the annual employment contracts executed by petitioner and the Board for the 2007-08 school year; 4) finding that both sides took action to meet the terms of their agreement, when all petitioner did was report to the position assigned her by the Board because the Board had the authority to make such assignment and refusal to take it could be construed as insubordination; and 5) failing to recognize the legal significance of the

plain meaning of language used by Board counsel, who made repeated references to a "proposed" settlement agreement which petitioner did not accept and which was rendered null and void by its own terms. (*Id*. at 2-4) In support of these assertions, petitioner renews and reiterates the arguments of her OAL briefs (*Id*. at 5-15 and 18-41), and additionally contends that a settlement agreement requires passage of a formal resolution at a public meeting of the board of education, which did not occur in this instance until fourteen months after petitioner's offer of settlement had been withdrawn. (*Id*. at 15-18)

In reply, the Board urges adoption of the Initial Decision, reiterating its prior arguments and countering that: 1) the ALJ's mention of petitioner's former counsel, Robert H. Greenwood, as a witness constitutes harmless error; 2) the ALJ was correct in finding that the parties had reached agreement on all material and essential terms, and that clarification of precise counsel fee amounts and the type of outside employment referenced for purposes of lump sum payment were minor issues that did not alter the essence of the agreement, i.e., petitioner's resignation in exchange for interim assignment to a principal position on the terms specified by counsel authorized to act on her behalf; 3) the ALJ was also correct in finding, based on the clear testimony of Board in-house counsel Ellen Bass, that the employment contracts referenced by petitioner were *pro forma* documents routinely sent to all employees, and that these were inadvertently sent to petitioner by administrators unaware of the settlement agreement; 4) the ALJ was further correct in finding that petitioner – who authorized her counsel to make an offer by which she intended to be bound if accepted by the Board – acted to fulfill the terms of settlement by performing the duties of the position the Board created for her at its meeting of August 28, 2006 in reliance on, and acceptance of, such offer; 5) the ALJ properly recognized that – while execution of the writings contemplated by Board counsel's letter of August 29, 2006 would certainly have been preferable – the parties' agreement was not

contingent on them and their absence does not alter the fact that an offer was made, accepted and relied upon in taking implementing action; and 6) the "lateness" of the Board's formal resolution was due entirely to petitioner's failure to sign a written document memorializing the terms of the parties' agreement, even as the date of her required resignation approached. (Board's Reply at 1, 6-7, 8-15)

Upon careful review and consideration, the Commissioner concurs with the Initial Decision that petitioner entered into an enforceable settlement agreement and that the Board did not violate her tenure rights by terminating her employment in accordance with the terms of such agreement.

As clearly recognized by the ALJ, the essence of this matter – notwithstanding occasional obfuscation of the basic trajectory of events – is that the Board sought to diffuse a volatile and untenable situation by undertaking to explore with petitioner a way to end her employment as principal of Columbia High School – and ultimately her employment with the district – without embarrassing her, reflecting poorly on her job performance or jeopardizing her future professional prospects; these efforts led to a firm offer on the part of petitioner wherein she would exchange her resignation sixteen months hence for interim assignment to a temporary position from which she could draw salary and benefits while looking for other employment under her specified terms. This offer was accepted and acted upon by the Board, but then repudiated by petitioner before a formal, finalized written agreement could be executed, owing to her abrupt change of heart following receipt of a positive job evaluation from the superintendent[1]

[1] The evaluation in question (Exhibit J-18) facially predates petitioner's offer of settlement; however, petitioner testified that she had not yet seen this document at the time of her offer and predated her signature on the instructions of district staff. T106-108. (This and all subsequent similar citations refer to the transcript of the December 9, 2008 OAL hearing.)

and what she perceived to be a favorable ruling in the federal court case in which she had been named as a defendant in connection with the problems at the high school.

Petitioner's own testimony leaves no doubt that she fully intended to enter into the settlement offered in her counsel's letter of August 18, 2006 if her stated terms and conditions were met,[2] and the Board's acceptance of that offer is evidenced both by the representations in Board counsel's letter of August 29, 2006 and by the Board's action at its meeting of August 28, 2008, where – in reliance on petitioner's offer following acceptance thereof in closed session – it immediately moved to create the position of "Principal on Special Assignment" and assign petitioner to it.[3] While petitioner's counsel characterizes the August 29, 2006 letter as a "counteroffer" and points to the "crucial differences" between it and petitioner's terms with respect to payment of legal fees and the type of alternative employment that would trigger a lump sum salary payment, it is clear from the credible testimony on record that the Board accepted petitioner's terms in principle but – in the absence of specific information – left it to counsel to follow up in the written agreement with the clarification necessary to ensure that the Board would not be left open to unanticipated or unreasonable demands in these regards.[4] That the expected follow-up did not come to fruition was due entirely to petitioner's subsequent repudiation of her prior offer, not to "counter-demands" by Board counsel, whose pertinent statements in the August 29, 2006 letter and "proposed" written agreement of September 5, 2006 (Exhibit J-10) are plainly nothing more than an attempt to

[2] See T121-123.

[3] See Exhibit J-26 and T217-218, 249-251, 256. The Board's subsequent "appointment" action (Exhibits J-7 and J-21) was taken for auditing purposes and to approve a revision made to the job description at petitioner's request. See T242-243.

[4] See T165-167, 203-206, 227-228, 256-262, 266-268.

initiate the discussions necessary to obtain the required clarification and memorialize the parties' agreement in a formal document for approval by Board resolution in the ordinary course.[5]

In so holding, the Commissioner is cognizant that no formal agreement was ever signed by petitioner and no resolution adopted by the Board until November 5, 2007; he further acknowledges petitioner's contention that she never acted to implement the agreement because she had no alternative but to take the position assigned her by the Board. However, as found by the ALJ, a formal document is not necessary to create an enforceable settlement, and the absence of such a document in this instance – and of a resolution acknowledging the parties' agreement until the month prior to petitioner's scheduled termination – must be substantially attributed to petitioner's refusal to take the steps necessary to finalize the settlement to which she had previously agreed, because she by then no longer wished to abide by it. In this regard, the Commissioner finds it wholly disingenuous for petitioner to assert under the circumstances, as she and her counsel repeatedly do, that the Board's creation on August 28, 2006 of the position of "Principal on Special Assignment" and her immediate assignment to it were in no way connected to her offer of settlement or Board acceptance thereof, and that she vacated her office at the high school at the end of August and – after having been on administrative leave since April – proceeded to undertake central office duties solely because she recognized that the Board had the authority to transfer her within the scope of her certification and tenure rights and she did not wish to expose herself to charges of insubordination.[6]

Nor is it of any significance under the circumstances, as petitioner contends, that she was given annual contracts of employment extending beyond the period of her agreed-upon

[5] *Ibid.*; see also T252-253, 273-275. It is likewise clear that the Board had no objection to providing petitioner with her statutory rights of indemnification and meeting its obligations with respect to petitioner's son. See T74-75, 102-104, 156-157, 168-169.
[6] See T50-51, 54-59, 95-96, 108-109, 123-127.

termination. (Exhibits J-13 and J-15) The record is clear that the documents in question were of the type routinely issued to employees for purposes of establishing individual annual salary consistent with the applicable collective bargaining agreement and subsequent revisions thereto, and that they were issued to petitioner – whose name was included in the resulting Board personnel approval lists – by district human resources staff lacking knowledge of the agreement providing for termination of petitioner's employment on December 31, 2007, prior to the end of the school year to which the contracts pertained.[7]

Consequently, the Commissioner finds no basis in fact or law on which to set aside the agreement struck by the parties in this matter, notwithstanding its subsequent repudiation by petitioner. To the extent that petitioner now regrets that to which she previously agreed, the Commissioner notes – as was well stated by ALJ Jeff S. Masin in an Initial Decision subsequently adopted by the Commissioner and equally applicable to settlements reached in an effort to avoid litigation – that such discontent is "a not at all uncommon event after parties compromise their positions in the course of settling an oft-times contentious litigation," *Pascarella v. Bruck*, 190 *N.J. Super.* 118, 126, and that if petitioner is allowed to back out of her proffered agreement, such a step would "undermine the strong public policy [favoring settlement[8]]" and would "damage the ability" of governmental entities to "rely on stated agreements" when such are put forth as a means of balancing the parties' respective interests in seeking to resolve a difficult situation. *In the Matter of the Tenure Hearing of Beverly Jones, Trenton School District, Mercer County*, Commissioner's Decision No. 315-07, decided

[7] See T244-245, 269-72.

[8] *Department of Public Advocate v. N.J. Board of Public Utilities*, 206 *N.J. Super.* 523, 528 (App. Div. 1985); *Bistricer v. Bistricer*, 231 *N.J. Super.* 143, 147 (Ch. Div. 1987); *Jannarone v. W.T. Co.*, 65 *N.J. Super*. 472, 476 (App. Div.), *certif. den.* 35 *N.J.* 61 (1961); *Pascarella v. Bruck*, 190 *N.J. Super*. 118, 125 (App. Div.), *certif. den.* 94 *N.J.* 600 (1983). The doctrine is of such importance that a court should "strain" to uphold such settlements. *Dept. of Public Advocate*, 206 *N.J. Super*. at 528.

August 9, 2007. See also, *Kentwood Academy v. Lucille Davy, Commissioner, and the New Jersey State Department of Education*, Commissioner's Decision No. 242-09, decided July 27, 2009.

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter.[9] The petition of appeal is dismissed, and the Board is directed to reimburse petitioner – to the extent it has not already done so[10] – for $5,275 in legal fees, consistent with the parties' settlement agreement.

IT IS SO ORDERED.[11]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 8, 2010
Date of Mailing: February 11, 2010

[9] The Commissioner notes the ALJ's inadvertent inclusion, on page 2 of the Initial Decision, of petitioner's prior counsel Robert H. Greenwood, Esq. among the witnesses who testified at hearing; it is clear from the remainder of the decision, however, and from the list of witnesses on page 15 as well as the official transcript, that Mr. Greenwood did not, in fact, testify. While acknowledging petitioner's exception in this regard, the Commissioner finds that the referenced error had no impact whatsoever on the ALJ's fact-finding, analysis or conclusions, and hereby corrects it for the record together with the misdating, in the penultimate paragraph on page 13, of petitioner's letter of offering as *September* 18, 2006 rather than August 18, 2006.

[10] Because settlement finalization discussions did not ensue as anticipated, the Board did not know the actual amount of petitioner's legal fees until the hearing in this matter. The record is now clear, however, that the total amount owed is $5,275 – representing reimbursement of the $2,500 retainer paid by petitioner plus an outstanding balance of $2,775, an amount consistent with the level of reasonableness contemplated by the Board in accepting petitioner's offer of settlement. See Exhibits J-19 and J-27; T153-4, 165-166, 200-202, 267-268.

[11] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.