

New Jersey Commissioner of Education
Decision

B.K., on behalf of minor child, L.P.,

Petitioner,

v.

Board of Education of the Borough of Tenafly,
Bergen County,

Respondent.

Synopsis

Pro se petitioner alleged that the respondent Board violated her child's rights through a series of interactions between L.P. and the principal of Tenafly Middle School, which L.P. attends; petitioner filed the within appeal challenging the Board's failure to discipline the principal for these alleged improper interactions and demanding that tenure charges be filed against the principal to suspend him, reduce his pay, and/or terminate his employment. The Board denied all allegations and asserted that by law, there is no mechanism available to require the Commissioner of Education to order a local board of education to discipline or terminate a principal, nor to require that he apologize based on allegations made by a parent. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner challenged the Board's failure to discipline the Tenafly Middle School principal following three incidents in which she alleged violation of her child's rights, including one in which L.P. was brought to the school nurse's office for suspected marijuana or vaping use during school hours on school property; in each of the incidents, the Board investigated and found that there was no inappropriate conduct by the principal toward L.P., and no basis for disciplinary action; such determinations are appropriately made at the discretion of local boards of education; a board of education is vested entirely with the authority to discipline its employees, including a principal, based on the board's sole judgment of whether the employee's conduct was appropriate considering the facts and circumstances surrounding the incident; here, the petitioner does not argue that the Board abused its discretion, but rather asks that the Commissioner or the Office of Administrative Law (OAL) substitute its judgement for that of the Board. The ALJ concluded that the petitioner failed to state a claim upon which relief can be granted. Accordingly, as petitioner set forth no cause of action against respondent, the Board's motion for summary decision was granted, and petitioner's cross motion was dismissed.

Upon review, the Commissioner concurred with the ALJ that the Commissioner does not have the authority to compel a board of education to file tenure charges against an employee. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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.

February 1, 2021

New Jersey Commissioner of Education
Decision

B.K., on behalf of minor child, L.P.,

Petitioner,

v.

Board of Education of the Borough of Tenafly,
Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioner challenged the Board's failure to discipline the principal of the middle school, alleging that he violated her child's rights in a series of interactions. The Board determined that the principal had not acted in an improper manner and found no basis for disciplinary action. Thereafter, petitioner filed a petition of appeal, seeking that the Board file tenure charges against the principal so that he may be suspended, reduced in pay, or terminated. The Administrative Law Judge (ALJ) found that petitioner does not have a cognizable right to request that the Board or Commissioner impose disciplinary action on a school principal. As such, the ALJ dismissed the matter for failure to state a claim upon which relief can be granted.

Upon review, the Commissioner agrees with the ALJ that the Commissioner does not have the authority to compel a board of education to file tenure charges against an employee.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. ¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 1, 2021
Date of Mailing: February 4, 2021

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

**GRANTING RESPONDENT'S
MOTION TO DISMISS**

OAL DKT. NO. EDU 02392-20

AGENCY DKT. NO. 25-1/20

B.K. ON BEHALF OF MINOR CHILD L.P.,

Petitioner,

v.

BOARD OF EDUCATION OF TENAFLY

BERGEN COUNTY,

Respondent.

Birgitta Karlen, pro se, petitioner

Stephen R. Fogarty, Esq., (Fogarty and Hara, attorneys) for respondent

Record closed: August 21, 2020

Decided: December 18, 2020

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Petitioner, B.K. on behalf of minor child, L.P., (petitioner or B.K.) has alleged that respondent, the Board of Education of Tenafly, Bergen County (BOE), violated her child's rights by a series of interactions between L.P. and the Principal, John Fabbo (Principal/Fabbo), of the Tenafly Middle School which L.P. attends. Respondent denies all the allegations, claims there are no real factual disputes, and filed electronically a Motion for Summary Decision on July 20, 2020. Petitioner also filed a motion for Summary Decision (Cross Motion) on July 23, 2020.

Petitioner claims that the current Superintendent of the BOE, Ms. DeMarco, wrongfully failed to discipline Principal Fabbo and seeks to overturn her decision. Respondent answers that all the charges made against Principal Fabbo were thoroughly investigated and properly addressed. Notwithstanding that, however, they argue by law, there is no mechanism available to require the State Commissioner of Education to Order a local BOE of discipline or terminate a principal or require that he apologize based on allegations made by an aggrieved parent. I agree with the BOE and grant summary decision in its favor and dismiss the complaint.

BACKGROUND AND PROCEDURAL HISTORY

On or about January 27, 2020, petitioner filed a petition of appeal with the Commissioner of Education seeking to overturn the decision of the Tenafly Board of Education not to discipline Principal John Fabbo of the Tenafly Middle School regarding incidents involving interaction between Principal Fabbo and petitioner's son L.P. Petitioner had made essentially three allegations to the BOE concerning Fabbo.

Allegation One alleged that Fabbo lied about his knowledge and input into a change in L.P.'s schedule when L.P. was removed for distractive behavior from a drama class. Petitioner argued Fabbo was discriminating inappropriately against her son who has a reading deficiency qualifying him for Special Education. However the BOE found that Fabbo committed no inappropriate conduct toward L.P. Allegation Two involved an incident where Fabbo grabbed the heads of two student's one of them L.P. and pretended he was going to knock their two heads. Petitioner contended such behavior was an unacceptable offensive touching of L.P. and conduct not becoming of a teacher (or Administrator). However, the board concluded there was no inappropriate or offensive touching. The third incident concerned L.P. having being brought to the school's physician's office for suspected vaping or marijuana use during school hours on school property. Petitioner argued Fabbo did not follow State Law in dealing with students suspected drug use, specifically N.J.S.A. 18A:40A-14 and N.J.A.C. 6A16-4.2. Further she claimed Fabbo failed to follow Tenafly's BOE policies in the way he conducted his meetings with the parent concerning this incident. However, the Board found there was just cause for having a physical examination of L.P. concerning his conduct in class, where he appeared to be unsteady after discussing marijuana and using the colloquial phrase "4/20" which refers to a holiday to celebrate marijuana use. Further they found the examination was conducted by the nurse with the principal present. While during the exam, at one point, Fabbo touched L.P.'s jacket he didn't touch L.P. Further the examination was done in accordance with School Policy. They declined to take any action against Principal Fabbo. B.K. filed an appeal with the New Jersey Department of Education (DOE). She requested that Principal Fabbo be disciplined with tenure charges initiated to include suspension decrease of pay and/or dismissal. She also requested the BOE issue an apology to her over their handling of the matter.

On or about February 11, 2020, the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 19, 2020, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A telephone prehearing scheduled for March 25, 2020 was rescheduled owing to the COVID-19 emergency. A prehearing conference was held on June 18, 2020.

Respondent filed electronically a Motion for Summary Decision on July 20, 2020. Petitioner also filed a motion for Summary Decision (Cross Motion) on July 23, 2020. On August 21, petitioner filed a reply to respondent's motion. No oral argument was requested.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the petitioner's filing, respondents motion for summary decision, brief and certification in support of summary dismissal, on petitioner's motion for summary decision certification and argument, and respondents brief in opposition to petitioner's motion, and for the purpose of deciding the motion for summary decision, I **FIND** the following:

1. Petitioner, B.K. is the mother of L.P., a student in the school district of the Borough of Tenafly, and is representing his interests in this matter.
2. The respondent, BOE operates the public schools serving children from pre-kindergarten through 12th grade high school, including the Tenafly Middle school, which L.P. attended during the time relevant to this matter.
3. On January 31, 2019, B.K. sent a letter to the Superintendent for the BOE complaining of certain actions she claimed Principal Fabbo took against L.P. First, after the theatre teacher had removed L.P. from her class owing to what she called his disruptive behavior, B.K. met with Fabbo who refused to change the teacher's decision. The letter also said that Fabbo was disrespectful and dismissive to her. According to B.K. she then met with the district superintendent who reversed the theatre teacher's decision to remove L.P from her class. B.K. insisted also that Principal Fabbo lied to her regarding the extent of his role in

this incident. The Superintendent assured B.K. that Fabbo would be disciplined. However, months went by and no discipline was imposed on Fabbo. Further, the Superintendent had resigned, replaced by an acting Superintendent.

4. In April 2020 another two incidents involving Fabbo and L.P. occurred. In one, Principal Fabbo had mockingly pretended to “clunk” together L.P.’s head with another student’s head. In another L.P.’s behavior was reported to Fabbo by staff members. L.P. was acting “strange.” He had been in a bathroom for an unusual amount of time and emerged looking nervous and unsteady. It was reported to him that a little earlier L.P. had been joking with other students about “4-20,” a mock “holiday” celebrating using marijuana. Fabbo had brought L.P. to the nurse’s office partly to have a witness when he asked L.P. to empty his pockets. While in the nurse’s office, the nurse performed a cursory exam, including shining a light into L.P.’s eyes, while Fabbo watched. L.P.’s parent’s had not been informed before the search took place and exigent circumstances to justify a search were lacking. However, two teachers had independently told L.P.’s guidance counselor on the date of the marijuana incident that they noticed L.P. acting unusually in class and verified the “4-20” reference that occurred before the search. Nevertheless, B.K. that Principal Fabbo lied to the BOE regarding the extent of his role in this incident and the reason for the search.
5. Because of continual dissatisfaction with the BOE and Superintendent DeMarco, the Board directed its Affirmative Action Officer, Dr. Mamman to investigate B.K.’s complaints against Demarco to determine 1) if Fabbo discriminated against L.P. on the basis of his disability; 2) if Fabbo have inappropriate physical contact with L.P. and 3) if Fabbo subjected L.P. to an improper, unauthorized search.
6. Dr. Mamman interviewed eight employees, including the school nurse, guidance counselor, the theater teacher and others having personal

knowledge of the incidents, plus Fabbo and L.P. Mamman determined that: Regarding possible discrimination in the removal of Fabbo had no role in changing L.P.'s schedule with the theatre class. Regarding inappropriate conduct toward L.P. Fabbo had only responded regarding the possible vaping or marijuana complaint to concerns expressed to him by the guidance counselor and two teachers. The search by the nurse checked L.P.'s eyes, tried to detect the odor of marijuana and assess his level of consciousness. Fabbo never touched L.P. although he touched his jacket. Accordingly, Dr. Mamman found no impropriety in any of Fabbo's conduct. After B.K. reviewed a summary of the investigation and complained it was not completely accurate, Superintendent DeMarco amended the report but did not modify the essential findings of no inappropriate behavior by Fabbo.

7. B.K. appealed Superintendent Demarco's findings and specifically complained on four counts: 1) Fabbo had L.P. removed from the drama class based on a false claim that L.P. had been a behavior problem for years. 2) Fabbo inappropriately touched L.P. when he pretended to that he was going to "clunk" his head together with another student's. 3. The search incident was conducted in violation of various school policies. 4. The BOE erred in not disciplining Fabbo for his infractions; specifically B.K. Contended tenure charges should be preferred and Fabbo removed as principal. Like Superintendent DeMarco, the BOE disagreed with all of B.K.'s contention. They found Fabbo had nothing to do with L.P.'s removal from the theatre class and it was irrelevant he believed L.P. had a greater behavioral history than he in fact did. The BOE believed the incident of the pantomiming knocking the heads together was an attempt to engage the students and had to malicious notice. Finally Fabbo's conduct during the marijuana check at the nurse's office was completely appropriate and within his authority as principal. Also, much of B.K.'s evidence didn't complain so much as to

what Fabbo did, but what Fabbo had said about his actions which was not always accurate.

8. The BOE could find no basis for any action against Principal Fabbo. They summarized that B.K.'s allegations "reflect a misunderstanding of a school principal and the broad discretion to act in what he/she considers, in their professional opinion to be the best interests of an individual student or the school as a whole..."
9. The current appeal to the State Commissioner repeats the same allegations against Fabbo, noting that the pantomime striking of the two student's heads together was an offensive touching of a student even though no harm was intended, citing BOE policy 3217. Further, Fabbo's conduct during the marijuana investigation did not comply with NJSA 18A:40A-12 and N.J.A.C.6A:16-4.3. She again seeks Fabbo's discipline including possible removal and asks that the BOE issue an apology for its conduct in these proceedings.
10. The overwhelming evidence based on the investigation conducted under the auspices of the school BOE and their Superintendent's report is that: Fabbo did not interfere with the decision to remove L.P. from theatre class. Further, no harm was intended or done to L.P. with the pantomime incident; whether his behavior was appropriate on that point is a determination to be made at the sound discretion of the NJBOE. Similarly, the BOE is vested entirely with the authority to discipline its employees including a school principal over whether his conduct in investigating a possible drug incident based entirely on their judgment of whether his conduct was appropriate based on the circumstances. There certainly was no offensive touching by Fabbo when the nurse conducted the check for possible marijuana use and there is no evidence of any ill motive in Fabbo's behavior.

11. The BOE is vested entirely with the authority to discipline its employees including a school principal over whether his conduct in investigating a possible drug incident or similar incidents, and can be based entirely on the BOE's sole judgment of whether his conduct was appropriate based on the facts and circumstances as they determine. The petitioner does not argue the BOE abused its discretion. Rather, the petitioner asks that the Commissioner or the OAL substitute its judgement for the judgement of the BOE.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether petitioner has any cognizable right to seek from the BOE, the Commissioner of Education, or the Office of Administrative Law to discipline a school principal for perceived misdeeds. The answer must be a resounding "No!" Although I find that petitioner has not met its burden to withstand the motion for dismissal, in its allegations against respondent, in any event, the petitioner has failed to file a claim upon which relief may be lawfully granted.

As correctly stated by respondent, the local Board of Education is vested with the discretion to accept or reject tenure charges. Galante v. Board of Education of the City of North Arlington, Bergen County, OAL Docket No. 11479-06 (Final Decision August 21, 2008.) Further the Commissioner of Education may not impose other discipline such as suspension, or decrease of pay of a principal as demanded by petitioner. The legislature has vested that authority to make and enforce rules governing tenure terms of employment dismissal and discipline of its employees. It is untenable, if not impossible to accept as a working principal of governing school board business that an aggrieved parent could compel a Board of Education to discipline one of its principles or other employees. N.J.S.A. 18A:27-4 et. seq.

Petitioner also asks that the BOE be compelled to issue an apology for its actions. Quite apart that petitioner has not, and cannot, meet its burden of proof to warrant any such apology based on the manner in which it conducted the investigation that the petitioner herself demanded, such a decision to apologize is at the sound discretion of the BOE. There has not been given an iota of proof that the Boards actions in its failure to issue an apology was “patently arbitrary, without rational basis or induced by improper motives.” Parsippany-Troy Hills Education Assoc. v. BOE of Parsippany-Troy Hills Twp., 188 N.J. Super, 161, 167 (App. Div. 1983).

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). “When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision].” Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm’r (May 12, 2014), <http://njlaw.rutgers.edu/collections/oal/> (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden “to make an affirmative demonstration . . . that the facts are not as the movant alleges.” Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the “movant’s burden to exclude any reasonable doubt as to the existence of any genuine issue of fact.” Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)). Here the respondent has demonstrated there is no reasonable doubt as to the existence of any genuine issue of fact.

Accordingly, I **FIND** that petitioner has failed to state a claim upon which relief can be granted. This is sufficient to hold that respondent's motion to dismiss must be granted.

Accordingly, as petitioner has set forth no cause of action against respondent, this matter is ripe for summary decision.

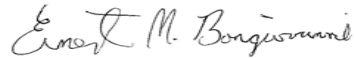
ORDER

I hereby **ORDER** that respondent's motion to dismiss is **GRANTED**, and this matter is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



December 18, 2020

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

12/18/20

Date Mailed to Parties:

12/18/20

EMB/id

APPENDIX

EXHIBITS

For Petitioner:

1. Petitioner's Verified Petition, dated January 26, 2019

For Respondent:

1. Motion for Summary Decision and brief, dated March 27, 2018
2. Brief, dated November 30, 2018