

## New Jersey Commissioner of Education

### Final Decision

New Jersey Education Association,

Petitioner,

v.

Board of Education of the Hudson County  
Schools of Technology, Hudson County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent Hudson County Schools of Technology Board of Education (HCST) pursuant to *N.J.A.C. 1:1-18.4*, and the reply thereto filed by petitioner New Jersey Education Association (NJEA), have been reviewed and considered.<sup>1</sup>

In this matter, the NJEA is seeking payment from HCST for the legal fees and costs that it incurred in defending a criminal matter involving an HCST secretary, Graciela Rubet. Rubet was accused of taking a gift bag belonging to another employee from a locker on June 22, 2018. Following an investigation into the incident, the Board attorney directed the district to have charges filed against Rubet. Thereafter, on or about August 9, 2018, the superintendent reported the incident to the police, provided them with a copy of video surveillance, and informed them that she wanted to pursue a criminal complaint against Rubet. On August 29, 2018, the North Bergen Municipal Court issued a criminal complaint against Rubet, charging her

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<sup>1</sup> HCST's reply to the NJEA's reply was not considered, as such a filing is not contemplated by *N.J.A.C. 1:1-18.4*. Despite HCST's assertions, the Commissioner notes that the NJEA's reply exceptions were timely filed in accordance with the extension that it received from the Commissioner with HCST's consent.

with the fourth-degree crime of theft by unlawfully taking or exercising control over movable property. On February 24, 2020, the charges against Rubet were dismissed. Rubet was defended in the criminal matter by the Law Firm of Caruso Smith Picini, P.C. (Law Firm). On April 24, 2020 and again on August 25, 2020, the Law Firm sent demand letters to the Board, requesting reimbursement in the amount of \$155,367.27 to defray Rubet's legal costs in defending the criminal charges against her. The NJEA then filed the instant petition of appeal.

Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that the NJEA is entitled to reimbursement for the legal fees and costs associated with defending Rubet in the criminal matter, pursuant to *N.J.S.A. 18A:16-6.1*. Specifically, the ALJ concluded that the criminal charge arose out of and in the course of the performance of Rubet's position as a secretary at HCST. The ALJ noted that *N.J.S.A. 18A:16-6.1* provides an exception to indemnification when a criminal complaint is filed by or on behalf of the Board. In this case, the ALJ found that the complaint was filed by a police officer and on behalf of Edward Sellmeyer, the employee who owned the gift bag, and not by or on behalf of HCST, such that the exception does not apply. Finally, the ALJ found that the NJEA is entitled to indemnification even though the funds will be paid to the Law Firm rather than to Rubet herself, and that a settlement agreement and release between Rubet and HCST does not affect the NJEA's right to seek indemnification.<sup>2</sup>

In its exceptions, HCST argues that the NJEA is not entitled to indemnification for several reasons. First, according to HCST, Rubet's actions in going into a coworker's locker and taking a

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<sup>2</sup> The settlement stemmed from Rubet's suspension from employment during the pendency of the criminal matter. In the agreement, HCST agreed to pay Rubet \$115,000 to compensate for her pain and suffering during the suspension period in exchange for a general release for any claims arising out of the suspension during the suspension period.

gift bag does not arise out of and in the course of the performance of her duties as a secretary as it is unrelated to her job responsibilities. Second, HCST argues that the ALJ erred in finding that this matter was not filed by or on behalf of the Board as it ignores that the school contacted police and made the request to file a criminal complaint. Third, HCST contends that Rubet does not have a right to reimbursement for her legal fees because she waived her rights to bring any action against the Board in a settlement agreement with HCST. Finally, HCST maintains that the NJEA does not have an independent right or standing to bring this action as the NJEA is not an employee of HCST.

In reply, the NJEA argues that the ALJ correctly concluded that the complaint was not filed by or on behalf of HCST. The NJEA explains that police officers issue complaints, and therefore the complaint in this case was issued by the officer who signed the summons. The NJEA also points out that the complaint was filed on behalf of Sellmeyer, who was the actual victim because he owned the property, and not the Board. As such, the NJEA maintains that it is entitled to reimbursement of Rubet's legal fees. Additionally, the NJEA contends that the settlement agreement between Rubet and HCST did not release any rights of the NJEA because it was not a party to the settlement. Accordingly, the NJEA's position is that it funded Rubet's legal fees, and it is therefore entitled to reimbursement under *N.J.S.A. 18A:16-6.1*.

Upon review, the Commissioner finds that the NJEA is not entitled to payment for the legal fees and costs incurred in the defense of Graciela Rubet because the criminal matter was initiated by HCST. The statute provides:

Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the

cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.

[N.J.S.A. 18A:16-6.1 (Emphasis added).]

When interpreting a statute, the goal is to discern the legislative intent, which can be gleaned from the plain meaning of the language. *Board of Education of the City of Sea Isle City v. Kennedy*, 196 N.J. 1, 12 (2008). In doing so, courts intend to give meaning to all statutory provisions, without rendering any language “inoperative, superfluous, void[,] or insignificant.” *In re DiGuglielmo*, 252 N.J. 350, 360-61 (2022) (alteration in original) (quoting *Sanchez v. Fitness Factory Edgewater, LLC*, 242 N.J. 252, 261 (2020)). The language of N.J.S.A. 18A:16-6.1 indicates that an employee will not have her legal costs indemnified if the criminal complaint is filed against the employee “by or on behalf of the board of education.” In order to effectuate meaning to each provision of the statute without rendering any words superfluous, the Commissioner notes that there must be a different meaning when a complaint is filed “by” a board versus when a complaint is filed “on behalf of” a board, as the provisions are separated by “or,” indicating that there are two separate scenarios when the legal costs will not be defrayed.

Considering the plain meaning of the statute in this circumstance, the complaint was filed *on behalf of* Sellmeyer, the victim who owned the property that was allegedly stolen. Conversely, the complaint was filed *by* HCST. The Board attorney directed the district to have charges filed. Thereafter, the superintendent reported the incident to police, and the police incident report specifically indicates that “Mrs. Lin-Rodriguez informed me that at this time, she

would like to pursue criminal complaints against Rubet.” HCST initiated the criminal action by reporting it to police and pressing charges. The Commissioner is not persuaded by the NJEA’s argument that the complaint was filed by the police officer who signed the summons. While the officer physically signed the complaint, that is an officer’s job. However, it was HCST that reported the incident and pursued the charges with the police, such that the police followed through and issued the summons. The legislature could only intend that that a complaint is filed by the party that presses charges.<sup>3</sup> As the complaint was filed by HCST, Rubet shall not be held harmless and have her legal costs defrayed under *N.J.S.A. 18A:16-6.1*. Therefore, the NJEA is not entitled to reimbursement of the costs it spent for Rubet’s legal defense.<sup>4</sup>

Accordingly, the Initial Decision of the OAL is rejected. HCST’s motion for summary decision is granted, and the NJEA’s motion for summary decision is denied. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.<sup>5</sup>

  
ANGELINA ALLEN McMILLAN, J.D.  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023  
Date of Mailing: April 26, 2023

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<sup>3</sup> While it appears to be undisputed that the gift bag at issue in this matter belonged to Sellmeyer, the criminal summons indicates that the gift bag belonged to HCST. If such were true, the complaint would have been filed on behalf of HCST in addition to being filed by HCST.

<sup>4</sup> As this issue is dispositive, the Commissioner need not determine any of the remaining issues in this matter.

<sup>5</sup> 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**

**SUMMARY DECISION**

OAL DKT. NO. EDU 00727-21

AGENCY DKT. NO. 127-6/20

**NEW JERSEY EDUCATION ASSOCIATION,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE HUDSON**

**COUNTY SCHOOLS OF TECHNOLOGY,**

**HUDSON COUNTY,**

Respondent.

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**Joshua Forsman**, Esq., for petitioner (Caruso, Smith, Picini, P.C., attorneys)

**Michelle Schott**, Esq., for respondent (Purcell, Mulcahy & Flanagan, LLC,  
attorneys)

Record Closed: July 28, 2022

Decided: February 3, 2023

BEFORE **ELISSA MIZZONE TESTA**, ALJ

**PROCEDURAL HISTORY AND STATEMENT OF CASE**

Petitioner, New Jersey Education Association (“NJEA”), seeks payment by the respondent, the Board of Education of the Hudson County Schools of Technology

(“Respondent”, “Board” or “HCST”) for legal fees and costs associated with defending a criminal matter. On January 21, 2021, this matter was transferred to the Office of Administrative Law (“OAL”) from the New Jersey Department of Education.

Respondent filed a Motion to Dismiss in Lieu of an Answer in accordance with N.J.A.C. 6A:3-1.10 and N.J.A.C. 6A:3-1.5(g). On April 8, 2021, pursuant to a telephone conference held with the undersigned and counsel for the parties, it was agreed that there are no disputed facts with respect to this matter, and respondent’s Motion to Dismiss in Lieu of an Answer was converted to a Motion for Summary Decision. Subsequently, petitioner filed a Cross-Motion for Summary Decision and each party then submitted opposition and replies to each Summary Decision Motion. On January 5, 2022, Oral Argument was held on the Summary Decision Motions. On July 28, 2022, a telephone conference was held to clarify whether the reasonableness of the attorneys’ fees in question was an issue to be decided before the undersigned; it was agreed and determined that the only issue to be decided by way of this Initial Decision is whether respondent is required to reimburse petitioner for the cost of the legal fees associated with Rubet’s criminal defense pursuant to N.J.S.A. 18A:16-6.1. The record was then closed.

### **FACTUAL DISCUSSION**

The following facts are undisputed, and I therefore **FIND** them to be the **FACTS** of the case:

1. On June 22, 2018, Graciela Rubet was employed as a secretary by the Hudson County Schools of Technology.
2. On June 22, 2018, it was alleged that Rubet unlawfully took property while on school grounds during the course of her employment.
3. On August 29, 2018, a Criminal Complaint against Rubet, alleging theft by unlawfully taking or exercising control over property, was issued by the

North Bergen Municipal Court, (Exhibit A. Criminal Complaint). The Complaint was signed by Officer Eric Weyand (Exhibit A).<sup>1</sup>

4. John R. Dineen, Esq., Board Counsel for HCST, directed HCST to have criminal charges filed against Rubet and those charges were filed on the district's behalf. (Exhibit R. Certification of John R. Dineen, Esq., Board Counsel for HCST).
5. The North Bergen Police Department Incident Report attached to the Criminal Complaint also indicate that then Acting Superintendent Amy Lin-Rodriguez of the District requested that criminal charges be filed against Rubet. (Exhibit A., Criminal Complaint, Police Incident Report).
6. The Police Incident Report indicates that Lin-Rodriguez viewed Rubet on a surveillance camera taking a gift bag from an employee's locker. (Exhibit A., Criminal Complaint, Police Incident Report).
7. It is undisputed that there is no evidence to suggest that Rubet's job responsibilities as a secretary included going into the lockers of other employees.
8. Rubet was represented in her criminal defense matter by the Law Firm of Caruso Smith Picini, P.C. (Exhibit C, April 24, 2020 Demand Letter for Rubet's Legal Fees, with Invoices).
9. The Criminal Complaint against Rubet was ultimately dismissed by the North Bergen Municipal Court on or about February 24, 2020. (Exhibit D. New Jersey Automated Criminal Complaint System Charged, Disposition Inquiry Report).
10. As per the billing records of Rubet's attorneys, a few days prior to the Criminal Complaint being dismissed against her, her attorneys began negotiating with respondent's Board Counsel regarding a Settlement Agreement between Rubet and respondent. (Exhibit C., April 24, 2020 Demand to respondent for Rubet's Legal Fees, with Invoices; See Counsel Entries on February 20, 2020.)

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<sup>1</sup> The referenced Exhibits are attached to the Motion and Cross-Motion for Summary Decision.



11. On April 24, 2020, a Demand Letter from Nicolas Poberezhsky of the Caruso Smith Picini Law Firm “to defray Ms. Rubet’s legal costs” was forwarded to respondent. (Exhibit C. April 24, 2020 Demand Letter to Respondent for Rubet’s Legal Fees with Invoices).
12. In the Demand Letter, Mr. Poberezhsky demands \$155,367.27 be forwarded to his law firm “to defray Rubet’s legal costs.” (Exhibit C. April 24, 2020 Demand Letter to Respondent for Rubet’s Legal Fees, with Invoices).
13. Rubet and respondent agreed to settle their differences related to the matter involved in the Municipal Court Criminal Complaint and their Settlement Agreement was fully executed on or about July 17, 2020. (Exhibit E., Settlement Agreement).
14. Under the terms of the Agreement, Rubet was paid \$115,000. (Exhibit E. Settlement Agreement, ¶8).
15. The General Release in the Settlement Agreement reads, in part, as follows:

General Release – As an inducement for the Employer to enter into this Agreement, the Employee does hereby remise, release and forever discharge the Employer and its officials, officers, directors, employees, agents, successors and assigns from any and all debts, obligations, suites, actions, causes of action, claims or demands, in law or in equity, which the Employee ever had now has or hereafter can, shall or may have, for upon or by reason of any matter, cause or thing whatsoever arising
16. The General Release further reads, in part, as follows:

. . . In the event that any action or proceeding has been filed or instituted, the Employee agrees to cause its immediate dismissal with prejudice. Employee further agrees not to participate as a plaintiff either individually or as part of a class, as if so named, she shall withdraw with prejudice from the matter. (Exhibit E., Settlement Agreement, ¶10) (Emphasis added).
17. The Settlement Agreement further provides as follows:

**KNOWING AND VOLUNTARY WAIVER** – The Employee acknowledges that in the execution of this Agreement, she is affecting a knowing and voluntary waiver of any claims, liabilities or causes of action against Employer, its officials, and employees . . . The Employee has consulted with an attorney and has read this Agreement and fully understands all of its terms.

(Exhibit E. Settlement Agreement. ¶12) (Emphasis added).

18. The Petition in this matter was filed on or about October 20, 2020 with the New Jersey Education Association as the petitioner and the Hudson County Schools of Technology as respondent. (Exhibit F., Petition without Exhibits). The petitioner seeks to have the Hudson County Schools of Technology pay to the New Jersey Education Association \$155,367.27 “to defray Ms. Rubet’s legal costs” that appear to have been incurred by the Caruso Smith Picini Law Firm in representing Ms. Rubet in the Municipal Court action referenced in the proceeding paragraphs. (Exhibit F., Petition; Exhibit C, April 24, 2020 Demand Letter to Respondent for Graciela Rubet’s Legal Fees, with Invoices. See list paragraph on first page).

20. Petitioner submits documentation of hours spent by her attorneys in representing Rubet in her criminal matter. (Exhibit C, April 24, 2020 Demand Letter to Respondent for Rubet’s Legal Fees, with Invoices).

21. No documentation is provided as to what entity is obligated to pay Rubet’s legal fees and under what conditions, pursuant to contract or other legal vehicle, although it is undisputed that she has no outstanding legal fees.

22. There is no representation in the Petition, or documentation provided by petitioner, New Jersey Education Association indicating that Rubet is responsible for the payment of the \$155,367.27 for legal fees that are sought.

### **LEGAL ANALYSIS AND CONCLUSION**

A party may move for summary decision under N.J.A.C. 1:1-12.5(b), which “may be rendered if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” This Motion shares similarities with the summary judgment rule established in New Jersey Court Rules, R. 4:46-2. See, Judson v. People’s Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Pursuant to this standard, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. Here, both the

respondent and the petitioner are moving parties. Summary Judgment is precluded when it is determined that “there exists a genuine issue of material fact.” Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995).

Petitioner and respondent agree that no genuine issues of material fact exist in this case. Therefore, the primary legal question to be determined is whether respondent is required to reimburse petitioner for the cost of the legal fees associated with Rubet’s criminal defense pursuant to N.J.S.A. 18A:16-6.1.

The indemnity of board of education employees in certain criminal and quasi-criminal actions is governed by N.J.S.A. 18A:16-6.1, which provides in pertinent part:

Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.

In Bower v. East Orange Bd. of Educ. (Bower I) 149 N.J. 416 (1997), the New Jersey Supreme Court interpreted N.J.S.A. 18A:16-6.1 to be read in conjunction with N.J.S.A. 18A:16-6<sup>2</sup> and adopted a two-part standard to determine whether board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges under the statute. To prevail, the employee must demonstrate by a preponderance of the evidence that 1) any act or omission on which

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<sup>2</sup> N.J.S.A. 18A:16-6 provides: “Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher or person assigned to other professional pre-teaching field experience, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; provided that

(a) no employee shall be entitled to be held harmless or have his defense costs defrayed in a disciplinary proceeding instituted against him by the board or when the employee is appealing an action taken by the board...”

the criminal charges are based, arose "out of and in the course of the performance of his duties", and 2) the charges were either dismissed or resulted in a final disposition favorable to the employee. Id. at 423.

Rubet has satisfied the second prong under Bower – all criminal charges against her were ultimately dismissed. The next inquiry then focuses on whether the act on which the criminal charges are based arose out of and in the course of the performance of her duties as a secretary. Respondent contends that N.J.S.A. 18A:16-6.1 does not apply here because the act upon which the criminal charge was based did not arise out of Rubet's performance of her duties as a secretary. Rather, respondent argues, when Rubet allegedly stole a gift bag from another employee's locker, she was acting outside of the scope of her employment duties.

The facts underlying the criminal charge are to be "analyzed strictly rather than liberally, so that reimbursement of legal fees and expenses should only ensue when the circumstances are such as to fit clearly within the legislative limitations." Powers v. Union City Bd. of Ed., 124 N.J. Super. 589 (Law Div.1973) aff'd, 127 N.J. Super 294 (App. Div.), certif. denied, 65 N.J. 575, (1974) (analyzing a prior version of the indemnification provision). This is so because a public employee should not be "encouraged to engage in acts which may constitute crimes by the assurance that an acquittal on the charge will permit him to saddle defense costs upon the taxpayers of the community." Ibid.

In Bower, after setting forth the two-part test for indemnification under N.J.S.A. 18A:16-6.1, the Supreme Court elaborated on the scope of the term "arose out of and in the course of the performance of [the employee's] duties." Bower, a kindergarten teacher, was criminally charged with sexually abusing his students during the school day and on school premises. The charges were ultimately dismissed. Bower requested indemnification from the Board for the legal fees associated with the defense of his criminal action pursuant to N.J.S.A. 18A:16-6.1, which the board denied. Bower appealed to the State Board of Education.

The State Board of Education remanded the matter to the OAL in light of the dismissal of Bower's indictment with prejudice. The State Board instructed, on remand,

that Bower had the burden of establishing both a nexus between the alleged conduct and the performance of his duties and a favorable disposition of the criminal charges. The ALJ recommended the denial of Bower's request for indemnification because he was unable to establish that the conduct alleged in the criminal matter arose out of the performance of his duties as a teacher. The Commission adopted the ALJ's recommendation, noting that the record was devoid of proof that Bower's alleged actions were linked to his teaching responsibilities. The State Board affirmed the Commissioner's ruling, emphasizing that Bower had failed to meet his "affirmative burden" of establishing a relationship between the conduct alleged and the performance of his duties as a teacher.

Bower's attorneys separately filed suit on behalf of Bower and themselves in the Law Division, seeking a judgment for attorney fees and disbursements, representing the work done in defending Bower against both indictments. The Law Division judge concluded that the criminal charges indeed had arisen out of the performance of Bower's duties because his involvement with the children was produced by his contact with them as a teacher. The judge awarded both the attorney fees and disbursements.

The Appellate Division reversed the judgment of the State Board and affirmed the judgment of the Law Division. The Appellate Division found that to arise "out of" the employment responsibilities, the criminal charges "must be of such nature the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it." Bower v. East Orange Bd. of Educ., 287 N.J. Super. 15, 32 (App. Div. 1996). Such a risk "is incidental to the employment when it belongs to or relates to what a teacher has to do in fulfilling his contract of service." Ibid. The Supreme Court affirmed. See, Bower v. East Orange Bd. of Educ., 149 N.J. 416 (1997).

The Court found it "undisputed" that the alleged events "took place in the school, during school hours, and while Bower was required to be engaged in performing his duties as a teacher." Id. at 432. However, the Court denied the Board's assertion of a supplementary requirement that the employee present *specific* testimony that rebuts the charges or explains their specific relationship to the employee's performance of their assigned duties, as the requirement was absent from the statute, nor had it been imposed

by administrative regulation. Id. at 433. All that is required of employees under the statute, the Court concluded, is proof by a preponderance of the evidence that the acts upon which the criminal charges were predicated arose out of and in the course of performance of the duties of employment, which Bower plainly satisfied. Id. at 434.

In McHarris v. North Brunswick Bd. of Educ., EDU 4968-01, Initial Decision (Dec. 8, 2005), McHarris, an In-School Suspension (ISS) supervisor was arrested and charged with criminal sexual contact based on allegations of inappropriate conduct with two students in the ISS classroom. During the time period of the allegations, the two students were not assigned to ISS. McHarris was subsequently acquitted of all criminal charges after a jury returned a verdict of not guilty and he sought indemnification from the board of education.

McHarris had testified that, while the students in question were not assigned to the ISS classroom, he allowed non-ISS assigned students to have their lunch break in the room and that other teachers and staff frequently visited the classroom. The Assistant Principal also confirmed that neither of the two students were assigned to the classroom. She testified that non-ISS students were not permitted to enter that room, however, there was no written policy in this regard and that it was difficult to keep other students out of the room. The ALJ also found that there was no proof of any verbal instruction to McHarris that non-ISS students were not permitted in the room, and that the school administration was on notice that McHarris allowed non-assigned students in the classroom during a free period. As such, the ALJ concluded that the alleged acts arose out of and in the course of McHarris' duties and that he was entitled to reimbursement under N.J.S.A. 18A:16-6.1.

In contrast, in Crews v. Hackensack Bd. of Educ., EDU 07629-06, Initial Decision (May 2, 2007), adopted, Comm'r (May 31, 2007), Crews, a teacher for the Hackensack School District, challenged the board's denial of reimbursement of legal fees incurred in connection with her defense against a criminal complaint for disorderly conduct. While school was in session, Crews was observed to be under the influence of a controlled substance or alcohol. Pursuant to the District's substance abuse policy, Crews was required to immediately undergo a medical examination. While another employee

attempted to accompany her to a doctor, Crews exited the school grounds. Police were summoned and the officers detected the smell of alcohol on her. They summoned an ambulance. When it arrived, Crews became more agitated and louder was flailing her arms, was cursing and said that she did not want to go with the ambulance. She yelled to get the f--- off her and to keep his f---ing hands off her. The officer told her she would be arrested if she did not calm down. The officers arrested her for disorderly conduct when she persisted and tried to push away from the officers. After a bench trial, Crews was acquitted, and the charges were dismissed.

The ALJ concluded that Crew's disorderly conduct charge neither arose out of nor arose in the course of the performance of her duties as a teacher. In so finding, the ALJ noted that the arrest occurred off school property on a public street when she was not in the process of educating children or attempting to fulfill her obligation to undergo a medical test under the substance abuse program. As such, the ALJ found that Crews was not entitled to reimbursement under N.J.S.A. 18A:16-6.1.

Here, as was the case in Bower and McHarris, but in contrast to Crews, Rubet was charged with a crime that allegedly occurred on school premises. She was charged with the theft of a gift bag that was in the locker of a fellow employee, Mr. Sellmeyer. The risk of a secretary being charged with the theft of an item in the school is "of such nature that the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it." Bower, 287 N.J. Super. at 32. Rubet's presence on school grounds demonstrates that this risk was at least incidental to Rubet's position as a school secretary. Thus, the criminal charge against Rubet arose out of her employment in the district and the first requirement of the two-part test is satisfied.

I therefore **CONCLUDE** that the criminal charge against Rubet arose out of and occurred in the course of the performance of her position as a secretary for HCST.

Respondent next contends that the exception carved out in N.J.S.A. 18A:16-6.1, which denies indemnity for an employee when the criminal or quasi criminal matter was filed "by or on behalf of the board of education" applies here. Respondent asserts that because Board Counsel and the Acting Superintendent requested that the District and

the Police Department file criminal charges against Rubet, the Criminal Complaint was filed on behalf of the district.

A person is guilty of theft if they “unlawfully take, or exercise unlawful control over, movable property of another with the purpose to deprive him thereof.” N.J.S.A. 2C:20-3A. “Victim” is defined as “a person who suffers a personal, physical or psychological injury or death or incurs loss or injury to personal or real property as a result of a crime committed against that person . . .” N.J.S.A. 2C:43-3(e). An individual convicted of theft may be ordered to pay restitution to the victim. N.J.S.A. 2C:43-3.

Here, Edward Sellmeyer, meets the statutory definition of “victim,” because he alone allegedly suffered a loss of property in the form of a gift bag worth approximately \$200. Additionally, the criminal complaint was signed by Officer Eric Weyand, who charged Rubet with the violation of N.J.S.A. 2C:20-3A, the offense of Theft by Unlawful Taking in the Fourth Degree. While respondent may have wanted and advocated for criminal charges to be filed against Rubet, the charges were not filed “on behalf of” respondent. Criminal charges such as the one at issue here are filed by or on behalf of the victim, and here, Mr. Sellmeyer fits that definition. No action was or could have been taken by respondent to officially press charges against Rubet – its only connection to the incident was that it took place on school property.

I therefore **CONCLUDE** that the Complaint was filed by Officer Weyand on behalf of Mr. Sellmeyer, not on the behalf of respondent. Accordingly, the exception carved out in N.J.S.A. 18A:16-6.1 is not applicable here.

Respondent next argues that the indemnification statute refers only to an employee, not to other entities that may pay the employee’s legal fees.

A board’s obligation to pay for the indemnification of third parties under N.J.S.A. 18A:16-6.1 is not relieved even if the employees themselves did not shoulder any of the costs. In Salaam v. Irvington Bd. of Educ., EDU 13483-10, Initial Decision (May 17, 2012), adopted, Comm’r (June 25, 2012), a criminal complaint was filed against Salaam, a teacher employed by the Irvington Board of Education, for allegedly assaulting a fifteen-



year-old student. The criminal complaint was eventually dismissed. Salaam was a member of the NJEA and had obtained his legal services through a law firm that participated in the program. Salaam requested reimbursement for his attorney fees under N.J.S.A. 18A:16-6.1. The Board of Education ignored his request and Salaam appealed.

The ALJ concluded that the Board was required to reimburse the NJEA for Salaam's fees even though Salaam himself did not pay the fees. The ALJ rejected the Board's argument that Salaam had no standing to bring the case because NJEA financed his defense, and that Salaam had no fees to be reimbursed. The ALJ explained that:

the fact that a third party finances the defense is irrelevant as the obligation to pay for the cost remains with the board of education. In other words, the fact that a third party finances the defense does not relieve a board of education of its obligation under the statute to pay for it.

The ALJ further found that NJEA was entitled to indemnification, as the fact that Salaam "chose to protect himself from potentially ruinous defense costs" should not "inure to the benefit of the Board of Education." The Commissioner adopted the ALJ's decision in full. On appeal, the Appellate Division affirmed these rulings. See, Salaam v. Bd. of Educ. of Irvington, Essex County, 2014 N.J. Super. Unpub. Lexis 268 (App. Div. February 4, 2014).

Similarly, a qualifying employee who is defended by an insurance company is entitled to indemnification pursuant to N.J.S.A. 18A:16-6 and 6.1, even when the reimbursement monies will ultimately be paid to the defending insurer rather than the employee. In Waters & Horace Mann Co. v. Tom's River Bd. of Educ, EDU 2611-10, Initial Decision (April 4, 2011), adopted, Comm'r (May 11, 2011), Waters, an Art Teacher, was alleged to have made inappropriate sexual comments to a student. Waters was named as a defendant, among others, in a lawsuit brought by the student. The claims included negligent supervision as well as violation of the Anti-Bullying Bill of Rights Act. Waters sought coverage through the NJEA, and the Horace Mann Insurance Company provided his defense. This policy contained a Subrogation Clause, which stated that:

In the event of any payment under this contract, the Company shall be subrogated to all the **Insured's** rights of recovery therefore against any person or organization and the **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing after loss of prejudice to such rights.

The lawsuit was dismissed against Waters without any finding of liability. Waters & the Horace Mann Co. brought an N.J.S.A. 18A:16-6 claim (involving civil actions) seeking reimbursement in the amount of \$59,023.82, representing the settlement as well as attorney's fees and costs incurred in defending Waters. The board refused, arguing that Waters had not actually incurred any expense in his defense, only Horace Mann had, and that Horace Mann is not an "employee" and therefore did not have standing to bring a claim.

The ALJ noted that Waters was faced with four choices following the Board's refusal to provide him with a defense: "raise the money himself; persuade a defense counsel to take the case and cover the upfront costs in hopes of indemnification; forgo hiring counsel to provide a defense; or draw upon the insurance policy." The ALJ concluded that the intent of N.J.S.A. 18A:16-6 was to defray the employee's expenses; the subrogation clause in the insurance policy clearly stated that the Company shall be subrogated to all the Insured's rights of recovery against any person or organization; the petitioners' contention that the statute does not require an employee to personally go out of pocket to claim indemnification, and that it is sufficient that Waters petitioned for reimbursement, as in line with the Appellate Division's holdings in Sekuler v. Montgomery Township Board of Education, A-000091- 96T1 (App. Div. May 8, 1997) certif. denied, 151 N.J. 464 (1997); and the interpretation urged by the Board was overly mechanistic and not within the statute or existing case law. Accordingly, the ALJ granted the petitioners' request for relief and ordered the board to reimburse petitioners for all costs and fees expended on behalf of Waters in connection with the defense and settlement of the Superior Court lawsuit. The Commissioner adopted the decision in full.

The Appellate Division affirmed, holding that the subrogation clause was valid, and that nothing in the legislative history supports the Board's position that Horace Mann cannot seek reimbursement under the statute because it is not a board employee. See,

Waters v. Bd. of Educ. of Toms River, 2011 N.J. Super. Unpub. LEXIS 3083 (App. Div. Dec. 22, 2011). The Court determined that the purposes and policies of the statute are advanced by allowing for reimbursement of costs in situations in which, in the face of board refusal to defend a case, a school employee relies on his union's insurance policy to fund legal representation. To conclude otherwise, the court held, that it "would create a loophole for school boards that would undermine the statutory purpose of defraying the costs of a school employee's defense of a suit." Id. at \*19. Thus, a qualifying employee who is defended by an insurance company is entitled to indemnification pursuant to N.J.S.A. 18A:16-6 and 6.1, "even when the reimbursement monies will ultimately be paid to the defending insurer rather than the employee." Ibid.

The Court also questioned the decision of Meisenbacher v. Newark Bd. of Educ., 1 N.J.A.R. 162, 165 (Dep't of Educ. 1980), certif. granted, remanded, 91 N.J. 251 (1982), which the board had relied upon in its arguments. In that case, the ALJ held that an attorney who represented a school employee in a civil matter did not have standing to seek reimbursement from the Newark Board of Education. The court concluded that the reasoning in Meisenbacher was "questionable" because the ALJ relied on broad language in Hartmann v. Maplewood Sch. Transp. Co., 106 N.J. Super. 187, 192 (Law Div. 1969), aff'd 109 N.J. Super. 497 (App. Div. 1970) without acknowledging the factual differences between Hartmann, which involved a school bus company's driver and the issue of whether the driver was a "school employee" for the purposes of N.J.S.A. 18A:16-6, and the facts of the case before him, namely, the defense of a teacher in the district. Id. at \*15-16 n.1

Here, because Rubet is entitled to reimbursement of legal fees for the cost of her criminal defense, the NJEA, who provided the funding for these fees, is entitled to same. As stated in Salaam and Waters, the Board is not relieved of its obligation under the statute to pay simply because the NJEA is not an "employee" of the Board. It does not make a difference which party filed the petition under N.J.S.A. 18A:16-16.1, and the Board has not cited any authority to the contrary.

I therefore **CONCLUDE** that the NJEA, who defended Rubet, a qualifying employee, is entitled to indemnification pursuant to N.J.S.A. 18A:16-6.1 even when the

reimbursement monies will ultimately be paid to the defending attorneys rather than Rubet herself. Accordingly, the NJEA is entitled to restitution for legal fees under N.J.S.A. 18A:16-6.1.

Finally, respondent contends that, even if Rubet is found to be entitled to reimbursement under N.J.S.A. 18A:16-6.1, she waived such entitlement pursuant to her prior Settlement Agreement with respondent.

The New Jersey Supreme Court has enunciated the standard to determine whether a party has waived its legal rights. As a threshold matter, "[w]aiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). The party must "have full knowledge of [its] legal rights and intent to surrender those rights." Ibid. A party need not expressly state its intent to waive a right; rather, waiver can occur implicitly if "the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Ibid. Such a waiver must be done "clearly, unequivocally, and decisively." Ibid. Determining whether a party waived a right is a fact-sensitive analysis. See, Ibid.

In the Settlement Agreement, Rubet waived any future claims that she personally may be entitled to against the respondent. However, Rubet did not claim to waive any rights on behalf of NJEA. Significantly, she did not and does not have the authority to waive any rights on behalf of the NJEA. The NJEA itself did not sign any form of release as part of agreement between Rubet and the respondent, nor was it a party to any of the previous actions involving Rubet. It never demonstrated a voluntary and intentional relinquishment of its right to seek reimbursement under N.J.S.A. 18A:16.6.1, as is required under New Jersey law. Accordingly, the District cannot use Rubet's Settlement Agreement as a shield to avoid its financial obligations under N.J.S.A. 18A:16.6.1.

I therefore **CONCLUDE** that Rubet's Settlement Agreement did not affect NJEA's legal rights under N.J.S.A. 18A:16-6.1 because the NJEA was not a party to the agreement and because Rubet did not have authority to waive NJEA's legal rights.

## **CONCLUSION**

I **CONCLUDE** that the NJEA is entitled to reimbursement for legal fees and costs associated with defending Rubert in the criminal matter. Rubert was charged with a Criminal Complaint connected with on-duty conduct and the charges were subsequently dismissed. As a result, Rubert would be entitled to reimbursement of reasonable legal fees under N.J.S.A. 18A:16.6.1. Since Rubert would be entitled to reimbursement of legal fees, the NJEA, who funded those legal fees, is accordingly entitled to reimbursement.

Therefore, having reviewed both parties' submissions, I **CONCLUDE** that no issues of material fact exist. I further **CONCLUDE** that respondent is in violation of N.J.S.A. 18A:16.6.1 and that petitioner is entitled to reimbursement for Rubert's legal fees and costs.

## **ORDER**

It is therefore **ORDERED** that the petitioner's Motion for Summary Decision be and hereby is **GRANTED**. It is further **ORDERED** that the respondent's Motion for Summary Decision be and hereby is **DENIED**.

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.

February 3, 2023



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DATE

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**ELISSA MIZZONE TESTA, ALJ**

Date Received at Agency:

February 3, 2023

Date Mailed to Parties:

February 3, 2023

EMT/sej

**BRIEFS RELIED ON**

For Petitioner

Cross-Motion for Summary Decision with Supporting Brief  
Opposition to Respondent's Motion

For Respondent

Motion for Summary Decision with Supporting Brief  
Opposition to Petitioner's Cross-Motion