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OAL Dkt. No. 08281-22
Agency Dkt. No. 217-8/22

# New Jersey Commissioner of Education

## Final Decision

Yesenia Camilo,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

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

This matter arises from tenure charges filed by the West New York Board of Education (Board) against petitioner. The arbitrator assigned to hear the case ordered that petitioner be reinstated to her position if she successfully completed a fitness for duty examination. Petitioner proposed that the exam be completed by Dr. Daniel Gollin, but the Board rejected her proposal and scheduled the exam with its choice of physician, Dr. Mark White. Petitioner attended the exam but also filed a petition of appeal on the same day.

Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that petitioner did not waive her claim by submitting to the exam with Dr. White. The ALJ also found that both *N.J.S.A.* 18A:16-3 and Board Policy 2161 allow an employee to propose a physician of her choice for a fitness for duty exam and concluded that the Board was required to act in a reasonable manner in reviewing petitioner's proposal. The Board offered no reason whatsoever for its rejection of petitioner's choice of Dr. Gollin and, therefore, the ALJ concluded that the Board's

actions were arbitrary, capricious and unreasonable. The ALJ rejected the Board's argument that, because the arbitrator ordered the Board to schedule the exam, it had unfettered discretion in choosing a doctor, noting that the arbitrator specifically indicated that the exam should be performed pursuant to *N.J.S.A.* 18A:16-3. Accordingly, the ALJ granted petitioner's motion for summary decision.

Upon review, the Commissioner concurs with the ALJ, for the reasons thoroughly detailed in the Initial Decision, that: the Board was required to comply with *N.J.S.A.* 18A:16-3 and should have considered petitioner's choice of doctor in scheduling the exam; the Board's rejection of petitioner's choice of doctor without any explanation was arbitrary, capricious, and unreasonable; and petitioner did not waive her right to make such a claim by attending the exam with Dr. White.

Accordingly, petitioner's motion for summary decision is granted. All reports and exams of Dr. White are null and void. Dr. White and practitioners affiliated with him shall not be used for any future exams of petitioner or to provide testimony in any tenure proceedings against petitioner. Petitioner shall have the opportunity, if she has not already done so, to propose a doctor for a fitness for duty exam. The Board shall not unreasonably withhold its approval of petitioner's choice. If petitioner does not propose a doctor within ten calendar days of the date of mailing of this decision, the exam shall be scheduled with a doctor designated by the Board.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

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

[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 PETITIONER'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S CROSS-MOTION FOR SUMMARY DECISION**
OAL DKT. NO. EDU 08281-22
AGENCY DKT. NO. 217-8/22

**YESENIA CAMILO,**
Petitioner,
v.
**WEST NEW YORK BOARD OF EDUCATION, HUDSON COUNTY,**
Respondent.

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**Albert J. Leonardo**, Esq, for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys)

**David J. Kass**, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, LLC, attorneys)

Record Closed: March 17, 2023 Decided: March 20, 2023

BEFORE: **MATTHEW G. MILLER, ALJ**

## STATEMENT OF THE CASE

Petitioner, Yesenia Camilo, is employed as a teacher in the West New York, New Jersey school district. On September 20, 2020, respondent filed tenure charges against Ms. Camilo, alleging that she engaged in conduct unbecoming a teacher and that there was other just cause for her termination.

On June 3, 2021, an arbitrator assigned by the New Jersey Commissioner of Education sustained the charges in part, dismissed the charges in part and ordered her reinstatement on the condition that she successfully undergo a fitness-for-duty examination. That exam was not completed.

On November 1, 2021, respondent filed revised tenure charges, once again alleging conduct unbecoming and other just cause for termination. In the interim, Ms. Camilo completed a fitness for duty exam on February 1, 2022. Then, by decision dated July 5, 2022, a Commissioner assigned arbitrator sustained the charges in part, but ordered that Ms. Camilo be reinstated if she successfully completed another fitness for duty examination. That exam was to be scheduled within five business days and completed within fourteen business days of the decision.

By letter dated July 8, 2022, Ms. Camilo proposed that the exam be conducted by Daniel B. Gollin, M.D., but that proposal was not approved. Then, by letter dated August 4, 2022, the arbitrator issued a supplemental decision finding that respondent had failed to comply with the terms of his July 5, 2022 decision and ordering reinstatement of petitioner's salary pending the completion of the exam.

On August 8, 2022, respondent scheduled the exam with Mark White, Ph.D. to occur on August 29, 2022. By letter dated August 12, 2022, petitioner objected to Dr. White's selection and once again proposed that the exam be performed by Dr. Gollin. Respondent refused and after an interchange of messages, the examination finally commenced on September 23, 2022, continued briefly on November 17, 2022 and eventually concluded on December 22, 2022.

In a January 9, 2023 report, Dr. White found that Ms. Camilo was fit for duty, but opined that when she was assigned to the middle school, that "it may be necessary…to provide sick leave…to permit her to avail herself of therapy to address adjustment issues." On January 11, respondent sought "clarification" of Dr. White's opinion and the following day, Dr. White authored a report that she was not fit for duty.

Then, on January 21, 2023, the Board again filed tenure charges against Ms. Camilo and same were served on January 26.

## PROCEDURAL HISTORY

On August 26, 2022, Ms. Camilo filed a petition seeking relief from the selection of Dr. White as her fitness for duty examiner. Respondent filed an Answer to the Petition on September 12, 2022 and the matter was transmitted to Office of Administrative Law ("OAL") on September 20, 2022 for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on November 28, 2022 with additional conferences taking place on December 22, 2022 and February 3, 2023. Petitioner then filed this Motion for Summary Decision on February 6, 2023 and following the filing of a Cross-Motion for Summary Decision and an opposition brief by petitioner and a reply brief by petitioner, the record closed on March 17, 2023.

## FINDINGS OF UNDISPUTED FACT

The following **FACTS** of the case are not in dispute:

1. Most of the facts detailed in the Statement of the Case are undisputed and a full timeline of events will be provided below.

2. At all times relevant to this matter, petitioner, Yesenia Camilo, was a tenured teacher employed by the West New York, New Jersey school district.

3. On September 20, 2020, respondent filed tenure charges against petitioner alleging that she engaged in conduct unbecoming a teacher and that there was other just cause for her termination. (Exhibit R-A).

4. On June 3, 2021, an arbitrator assigned by the New Jersey Commissioner of Education sustained the charges in part, denied the charges in part and ordered her reinstatement on the condition that she successfully undergo a fitness-for-duty examination. (Exhibit R-B). That exam, however, was never completed.

5. On November 1, 2021, respondent filed revised tenure charges, once again alleging conduct unbecoming and other just cause for termination, but this time adding a charge of abandonment of position. (Exhibit R-D).

6. In the interim, Ms. Camilo completed a fitness for duty exam on February 1, 2022.

7. Then, by decision dated July 5, 2022, a different Commissioner assigned arbitrator sustained the charges in part, but ordered that Ms. Camilo be reinstated if she successfully completed another fitness-for-duty examination. That exam was to be scheduled within five business days and completed within fourteen business days of the decision. (Exhibit R-C).

8. By letter dated July 8, 2022, Ms. Camilo proposed that the exam be conducted by Daniel B. Gollin, M.D., but that proposal was not approved. (Exhibit P-B).

9. Then, by letter dated August 4, 2022, the arbitrator issued a supplemental decision finding that respondent had failed to comply with the terms of his July 5, 2022 decision and ordering reinstatement of petitioner's salary pending the completion of the exam. (Exhibit R-E).

10. On August 8, 2022, respondent scheduled the exam with Mark White, Ph.D. to occur on August 29, 2022. (Exhibit P-D). By letter dated August 12, 2022,

petitioner objected to Dr. White's selection and once again proposed that the exam be performed by Dr. Gollin. (Exhibit P-E).

11. Respondent refused and after an interchange of messages, on August 26, 2022, through counsel, Ms. Camilo agreed to undergo the examination with Dr. White. However, in doing so, she "reserve(d) all rights to seek relief from the Commissioner of Education in this matter". (Exhibit P-J).

12. That same day, petitioner filed this fair hearing appeal. The examination with Dr. White finally commenced on September 23, 2022, continued briefly on November 17, 2022, and ultimately concluded on December 22, 2022.

13. In a January 9, 2023 report, Dr. White found that Ms. Camilo was fit for duty, but opined that when she was assigned to the middle school, that "it may be necessary…to provide sick leave…to permit her to avail herself of therapy to address adjustment issues." (Exhibit P-L). On January 11, respondent sought "clarification" of Dr. White's opinion and on January 12, Dr. White authored a report in which he opined that she was not fit for duty. (Exhibits P-M and P-N).

14. Then, on January 21, 2023, the Board again filed tenure charges against Ms. Camilo and same were served on January 26. (Exhibit P-O).

15. The parties have agreed that the issue in the case before the OAL does not involve the validity of the tenure charges that have been filed against Ms. Camilo, nor whether she is "fit-for-duty."

16. Rather, the issue is limited to whether respondent's actions in scheduling the examination with Dr. White and refusing to consider petitioner's choice of doctors was lawful and, if not, what, if any, remedy would be appropriate.

## MOTION

Petitioner filed a Motion for Summary Decision, arguing that;

> The Board's directive that Camilo submit to a fitness for duty examination with its chosen doctor and only its chosen doctor violates that law and is invalid.

More specifically, petitioner argues that the law "clearly provides" her the right to reject the Board's chosen doctor and propose her own to perform the exam and that the decision to ignore her choice was improper. N.J.S.A. 18A:16-3.

It is argued that the only reason for the Board insisting on Dr. White as the examining doctor was as a pretext to filing yet another set of tenure charges against petitioner in an effort to terminate her employment. It's decision to outright reject Ms. Camilo's proposed examiner was therefore arbitrary and capricious.

Respondent opposes the Motion and has filed a Cross-Motion for Summary Decision, first arguing that the original Motion was moot, since Ms. Camilo, whether reserving her rights or not, voluntarily underwent the examination. It was also argued that the results of the exam are irrelevant to the sole issue before the court; whether the manner in which the exam was scheduled was legal.

Respondent argued that it followed both the letter and intent of the statute, but that regardless of whether it is found to have violated the statute, the OAL is powerless to assess any penalty for said violation.

## LEGAL POSITIONS

### PETITIONER:

Petitioner argues that despite Ms. Camilo having undergone the examination with Dr. White, respondent's decision to insist upon an examination with this provider violates N.J.S.A. 18A:16-3, which affords her the option of being examined by a physician of her choosing, as long as that choice is approved by the Board.

It is further argued that the Board's rejection of Dr. Gollin was arbitrary and capricious and not only violated the statute, but also Board policy.

> What occurred here is simple: he Board coerced Camilo to submit for an examination with its chosen doctor, arbitrarily and unreasonably refused to consider and approve Camilo's proposed doctor.
>
> Petitioner brief at 15.

It is claimed that this refusal was part and parcel of a plan by the Board to file a third set of tenure charges against petitioner "in an effort to terminate her employment."

In support of her position, Ms. Camilo cites to Board of Ed. of City of Pleasantville, Atlantic County v. Chambers, 96 N.J.A.R. 2d (EDU) 447 Final Decision (February 7, 1996).

Petitioner is requesting that Dr. White's report be deemed "invalid" and that it be "rescinded and expunged" and that respondent be compelled "to accept my chosen doctor to perform the fitness for duty examination".

Petitioner also denies waiving any rights by agreeing to appear for the examination with Dr. White, since she only accepted same "under the threat of termination by the Board".

**RESPONDENT:**

Respondent argues that it did nothing wrong, but instead simply followed the language of the July 5, 2022 arbitration award which required that it and not petitioner, schedule the fitness-for-duty examination.

By following the letter of the arbitration award, it *per se* acted in a reasonable manner, which was compliant with the standard enunciated in Chambers.

It was further argued that by attending and ultimately completing the exam with Dr. White after the filing of the fair hearing appeal, petitioner waived any claim that the Board acted improperly. West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144,

152 (1958). See also, George F. Malcolm, Inc. v. Burlington City Loan & Trust Co., 115 N.J. Eq. 227 (Ch. 1934).

Respondent further argues that petitioner's proposed remedy of "striking" Dr. White's evaluation is unauthorized by law and even if petitioner's Motion is granted, there is no appropriate remedy, making the Motion moot.

**CERTIFICATION OF YESENIA CAMILO:**

In support of the Motion for Summary Decision, Ms. Camilo provided a Certification which largely mimics counsel's arguments and timeline. In addition to requesting legal remedies, she provided background information and a history of her employment related issues with respondent.

She certified that she has been employed by respondent as a teacher for twenty-two years and carries certificates as Teacher of English as a Second Language, Teacher of the Handicapped, Teacher of the Deaf and Hard of Hearing and Teacher of Elementary Education.

She then briefly traced the course of her employment difficulties, beginning with the Board's filing of tenure charges in September, 2020 and continuing through the arbitrator's July 5, 2022 decision that she be reinstated if she successfully completed a fitness for duty examination.

She then certified to the course of events that occurred subsequent to the ruling, including the offering of Dr. Gollin, with whom she had never treated nor had contact with, as a potential examiner. She continued to trace the course of the post-arbitration dispute, including her objection to the Board's selection of Dr. White and her interpretation of Board Policy 3161 as permitting her to select her examiner and that the Board could not unreasonably reject her choice.

Ultimately, under threat of legal action, Ms. Camilo, through counsel, agreed to appear for the exam with Dr. White, but argued that her appearance "was not an

agreement that the Board's directive complies with the governing law" and that she "did so without waiver or prejudice" and "in good faith, and in response to the Board's threat to take action against my employment if I did not attend."

Ms. Camilo then reviewed the contents of Dr. White's initial report and the later "clarification" and the subsequent filing of yet another set of tenure charges on January 26, 2023.

## LAW AND POLICY

The law involved in the performance of so called "fit-for-duty" examinations is rather clear and reads in pertinent part:

> **18A:16-2. - Physical examinations; drug testing; requirements**
>
> (a.) Every board of education may require its employees and shall require any candidate for employment who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> **18A:16-3. - Character of examinations**
>
> Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof…shall be borne by the board or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee's expense.

Respondent has also propounded a district policy on this issue which reads, in pertinent part:

> **District Policy 3161 – Examination for Cause**
>
> The Board of Education may, in accordance with law, require the psychiatric or physical examination of any teaching staff

> member who shows evidence of deviation from normal physical or mental health…
>
> This examination shall be at the expense of the school district and the results shall be confidential and only provided to the Director of Human Resources and/or designee…
>
> The teaching staff member may, at his/her option, submit names of physicians or institutions to the Board for consideration to complete the appropriate examination(s). The Board is not required to designate a physician or institution submitted for consideration by the teaching staff member, but the Board will not act unreasonably in withholding its approval of a physician or institution submitted by a teaching staff member. The cost of the examination will be borne by the Board if the Board designates a physician or institution from the names submitted from the teaching staff member.
>
> If the teaching staff member's request is denied, or if the teaching staff member does not request the Board to consider a physician or institution, the staff member may elect to submit to an appropriate examination conducted by a physician or institution of the teaching staff member's own choosing and at his/her expense, provided the physician or institution so chosen is approved by the Board, pursuant to N.J.S.A. 18A:16-3, and is authorized and directed by the member to report the result of the examination to the Board.

Ms. Camilo is not challenging respondent's right to demand the examination but argues that a reasonableness standard should be read into N.J.S.A. 18A:16-3 and that the Board never proffered a reason why her choice of doctor was unacceptable.

Respondent argues that because the exam was ordered by the arbitrator and not by it, N.J.S.A. 18A:16-3 does not apply and that its denial of Ms. Camilo's chosen doctor was appropriate.

## WAIVER

Respondent claims that by voluntarily submitting to the examination with Dr. White on September 23, 2022 after having both objected to it and filing this Petition on August 26, 2022, Ms. Camilo legally waived her right to object to both its performance and the utilization of the ensuing report by respondent.

In her Certification, Ms. Camilo, while agreeing to attend the exam, noted that this agreement, per her attorney's email "is not an agreement that the Board's directive complies with the Arbitrator's Award and the school laws governing fitness for duty examinations." She also "reserves all rights to seek relief from the Commissioner of Education in this matter" and further claimed that the only reason she agreed to undergo the examination was "under the threat of termination by the Board".

This issue is effectively independent of the underlying issue of whether the examination in a broad sense was properly scheduled.

The doctrine of waiver was discussed in detail in Sroczynski v. Milek, 197 N.J. 36 (2008):

> It hardly needs repeating that "[w]aiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958)). *See also* Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 89 (2008). It is beyond question that "[a]n effective waiver requires a party to have full knowledge of his legal rights and inten[d] to surrender those rights." Knorr, supra, 178 N.J. at 177 (citing W. Jersey Title & Guar. Co., supra, 27 N.J. at 153). A waiver cannot be divined but, instead, must be the product of objective proofs: "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." *Ibid*. (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962)). That benchmark standard leaves little room for doubt, as "[t]he party waiving a known right must do so clearly, unequivocally, and decisively." Ibid. (citing County Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). *See also* Shotmeyer, supra, 195 N.J. at 89 (quoting Knorr, supra). Specifically, "waiver 'presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact.'" County of Morris v. Fauver, 153 N.J. 80, 104-05 (1998) (quoting W. Jersey Title & Guar. Co., supra, 27 N.J. at 153).
>
> Id. at 63-64.

The cases cited by petitioner is her brief are not entirely on point but do provide some basic guidance. For example, in Rieder v. Caldwell-West Caldwell Bd. of Ed., 1999 N.J. AGEN LEXIS 60, EDU 7609-97, Initial Decision, (Jan. 22, 1999), adopted, Comm'r. (March 10, 1999), aff'd, St. Bd. (July 7, 1999), while the Board did adopt the basic "waiver law" cited above, the factual circumstances are much different. There, a teacher on the preferred eligible list remained silent, despite learning that another individual had been appointed ahead of her. The court found that this alone was insufficient to "warrant the inference that (she) intended to waive her right to remain on the…list." Id. at 8.

Tribbett v. Board of Ed. Twp. of Willingboro, 2012 N.J. Agen. LEXIS 343, Agency Dkt. No. 231-8/11, (May 10, 2012), adopted, Comm'r (August 1, 2011) is a tenure case, where like in multiple other cases, "a waiver of tenure rights requires a clear and unequivocal rejection of an offer of employment". Id. at 21.

Evaul v. Bd. of Ed. of City of Camden, 35 N.J. 244 (1961) may be the most illustrative case. While this is another tenure case where an employee resigned, the Court held that the resignation had been proffered under "emotionally charged" circumstances and had been "an impetuous act prompted by her understandably distraught condition." While she was reinstated to her position, the Court held that based on equitable principles, she was not entitled to back pay. Id. at 249-50.

Petitioner argues that she was essentially forced to agree to undergo the exam with Dr. White, certifying:

> Notwithstanding my objection to the Board's chosen doctor and my Petition, I, in good faith, and in response to the Board's threat to take action against my employment if I did not attend, attended and completed the fitness for duty examination with Dr. White.
>
> Camilo certification at ¶24.

Ms. Camilo cites to respondent counsel's August 15, 2022 letter to her attorney to support her allegation that her job was being threatened by her refusal to accept the

Board's unilateral selection of Dr. White. The letter was essentially a legal discussion/disagreement until the final paragraph, which read as follows;

> We urge Ms. Camilo to reconsider her refusal to attend the fitness for duty examination with Dr. White on August 29, 2022 at 9:00 A.M. Pursuant to Arbitrator Pecklers' award, 'the failure of Ms. Camilo to attend the Fitness For Duty shall result in an adverse inference being drawn that she is unfit for duty.' In such event, the Board reserves its right to pursue any and all legal remedies available.
>
> (Exhibit P-G).

There is surprisingly little case law concerning the issue of waiver and most of what there is concerns insurance companies providing coverage under a reservation of rights.

However, there was a statement by the Court In the Matter of State of New Jersey, Department of Human Services, Division of Public Welfare and Union County Welfare Board, Respondents - and - Communications Workers of America, AFL-CIO, Charging Party, 1980 NJ Perc. LEXIS 235 (April 18, 1980) that is notable:

> It should be apparent that the State's defense of waiver on the part of the Union has been rejected. The CWA's consistent oral reservation of rights in the face of County intention to seek State approval, particularly the Union's stated reservations of right to litigate the justification for inclusion of the subject to State approval clause in the agreement has preserved the Union's objections. Its practical approach to making its agreement with the County effective is in no sense the equivalent of a waiver of rights. The clear and convincing proof of a relinquishment of rights necessary to support the State's position is thus lacking.
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> Id. at n.35.

While respondent claims that the reservation of rights statement contained in Ms. Camilo's attorney's email (Exhibit P-J) "is no more legally operative than a boilerplate attorney salutation", he notably fails to produce any case law that is really on point. The citation to Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), which concerned a contractual arbitration clause (another common fact pattern in waiver cases), is correct in that there need not necessarily be an expressed statement of waiver, but it also states

that if "the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference", then as long as those actions/inactions demonstrated waiver "clearly, unequivocally, and decisively", then waiver could be found. Id. at 277, cit. Knorr, 178 N.J. at 177.

I **FIND** that Ms. Camilo did not waive her rights to contest respondent's unilateral scheduling of the exam with Dr. White. It was very clear from the onset of the issues concerning scheduling and its timing, that petitioner was challenging the manner in which the examination was going to be performed.

After the back-and-forth interaction between counsel, as was noted by respondent's counsel, they "clearly disagree(d)" as to the application of the statute and the Board policy. (Exhibit P-I). After it was obvious that the Board would not accept Dr. Gollin as the examining doctor, petitioner agreed to be examined by Dr. White, but very clearly stated that the agreement to do so was not a concession that the Board was acting properly and she explicitly reserved the right to contest respondent's decision, as it ultimately did. In fact, the day that she agreed to the exam, the petition which led to the referral to the OAL was filed. (Exhibit P-K)

There is nothing in this fact pattern that demonstrated that Ms. Camilo intended to relinquish any rights, let alone that she gave them up "clearly, unequivocally, and decisively". Deeming the verbiage to be "boilerplate" does not make it so and given the history of conflict over the specific issue that was the subject of said language, it simply cannot be dismissed as meaningless legalese. This is particularly true given the filing of the Petition of Appeal on August 26, 2022.

While I appreciate that the exam was performed during the pendency of this litigation, I **FIND** that the doctrine of waiver does not apply in this case and that this matter should be decided on the merits.

## LAW AND ANALYSIS

Summary decision may be granted "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." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
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> [R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby,

> supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

While respondent's issues (the details of which are irrelevant for the purposes of this Motion) with Ms. Camilo apparently began in September, 2019, the procedural events that led to this specific dispute began with an October 16, 2019 memo to Ms. Camilo from the district placing her on administrative leave and ordering that she undergo a fitness-for-duty examination. (Exhibit R-A13). The Board resolution ordering same specifically cited N.J.S.A. 18A:16-2 as the basis for the exam. (Exhibit R-A14). That exam was scheduled by respondent to take place on October 28, 2019, but was thereafter rescheduled to take place on January 23, 2020. (Exhibits R-A15 and R-A16).

Despite having yet to appear for the scheduled fitness-for-duty examinations, the tenure charges were forwarded to an arbitrator by the Department of Education's Bureau of Controversies and Disputes on September 24, 2020 and hearings were held on March 19 and March 25, 2021. The arbitrator then issued her decision on June 3, 2021, with Ms. Camilo still not having appeared for the exam. The arbitrator sustained the tenure charges in part, dismissed them in part and ordered Ms. Camilo's reinstatement on the condition that she successfully undergo a fitness-for-duty examination. (Exhibit R-B).

Following petitioner's failure to appear for the examination, on November 29, 2021 the Board filed a "revised" set of tenure charges against Ms. Camilo (Exhibit R-D). After motion practice, a hearing was held on May 12, 2022 during which the arbitrator reviewed the litany of reasons/excuses why petitioner had failed to attend various scheduled exams before enrolling in an Employee Assistance Program for psychological treatment.

The arbitrator also noted that Ms. Camilo had undergone a "successful" fitness-for-duty examination on February 1, 2022 with the Board's "in-house doctor", Vincent C. Ruiz, M.D. However, the arbitrator did not find the exam to be "dispositive", since the language utilized by the doctor in this "fitness-for-duty" exam, did not specifically address Ms. Camilo's fitness for duty. Ultimately, in a July 5, 2022 award, the arbitrator sustained the charges in part and dismissed them in part and ordered, in pertinent part:

> Within five (5) business days of the receipt of this AWARD, the Board shall schedule a psychiatric Fitness For Duty examination for Ms. Camilo pursuant to N.J.S.A. 18A:16-3, which shall be held within fourteen (14) business days. The doctor administering the Fitness For Duty exam shall definitely state in the report that Ms. Camilo "is" or "is not" fit to return to her teaching duties. This timeline may be amended by mutual agreement of counsel in the event of scheduling difficulties. The failure of Ms. Camilo to attend the Fitness For Duty shall result in an adverse inference being drawn that she is unfit for duty. An absence may be excused only for an emergent and documented circumstances.
>
> (Exhibit R-C)

In an Award Clarification letter dated August 4, 2022, the arbitrator addressed another scheduling issue. On July 8, 2022, petitioner's counsel, as he did here, had sent a letter to the Board proposing that the exam be performed by Dr. Gollin[1] and complained to the arbitrator that respondent had failed to respond to the request and had further failed to suggest any other doctor. Despite promises to schedule the exam, respondent failed to do so. The arbitrator then authored his clarification and ordered Ms. Camilo to be "immediately paid her salary, pending the results of the Fitness For Duty examination." (Exhibit R-E).

[1] (Exhibit P-B)

Following the Clarification Award, the back-and-forth which led to Ms. Camilo's exam with Dr. White ensued. First, there was an August 8, 2022 email from respondent's counsel to petitioner's counsel scheduling the exam for August 29, 2022 with Dr. White. (Exhibit P-D). Petitioner's counsel replied in an August 12, 2022 letter in which she declined to be examined by Dr. White and again proposed Dr. Gollin. (Exhibit P-E).

The back-and-forth continued with a letter from respondent's counsel which seems to ignore petitioner's suggestion of Dr. Gollin and infers that once the Board makes a selection, the option for the employee to counter that suggestion disappears. (Exhibit P-G). In reply, petitioner's counsel sent an August 15, 2022 letter in which he noted that the arbitrator had cited specifically to N.J.S.A. 18A:16-3 and that both the language of the statute and District Policy 3161 permit the employee to propose a doctor to conduct the exam. Counsel further argues that the Board cannot unreasonably or arbitrarily withhold approval of that doctor. He also noted that Ms. Camilo "reserves all rights to file a petition with the New Jersey Commissioner of Education to enforce her rights in this matter." (Exhibit P-H).

Respondent's counsel replied by letter dated August 16, 2022, noting that "the Board maintains that unless same is either vacated or modified on appeal, the Board remains responsible for scheduling Ms. Camilo's Psychiatric Fitness for Duty examination, which necessarily includes selecting the examining physician." (Exhibit P-I).

There was then an August 26, 2022 email exchange between counsel in which, ultimately, Ms. Camilo agreed to attend the exam with Dr. White, but also that she "reserves all rights to seek relief from the Commissioner of Education". (Exhibit P-J).

That was immediately followed by the filing of a Petition of Appeal arguing that the Board's actions violated N.J.S.A. 18A:16-3. (Exhibit P-K).

In analyzing this case, perhaps the best way to summarize respondent's position is that it insists on all parties following the portions of the law and policies it likes and then ignoring those that it doesn't.

Despite the somewhat tortured procedural history, the underlying facts are rather basic. This entire case started with what appears, for what it's worth, to be an entirely justified request that Ms. Camilo undergo a fitness-for-duty examination per N.J.S.A. 18A:16-2.

Ultimately, an arbitrator, despite Ms. Camilo actually having already undergone a fitness-for-duty exam by the Board's chosen doctor, ordered another fitness-for-duty examination to be performed "pursuant to N.J.S.A. 18A:16-3".

As argued by respondent, the language of N.J.S.A. 18A:16-3 is unambiguous. The Board can designate the physician to perform the exam "or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board".

There simply is not a lot of room for interpretation in this language. The Board can designate the physician and the employee can accept that choice, or the employee can propose their own doctor to perform the exam (at their own expense). That choice must then be approved by the Board.

Respondent argues that there is no requirement for it to accept the employee's choice and infers that it has unfettered discretion in making its decision. That is incorrect. Not only does District Policy 3161 mandate that the Board act in a reasonable manner, but case law supports that standard as well.

While respondent attempts to distinguish this examination from, for instance, the exam which it initially attempted to schedule back in 2019, that is a distinction without a difference. In essence, respondent argues that since the arbitrator ordered the exam, it can ignore the statute and do whatever it wants. Whether it was ordered to take place by the arbitrator or not, this is an exam that is being required by the Board for petitioner to

return to work and that has been true from the first requested examination until today and that exam was to be performed per the dictates of N.J.S.A. 18A:16-3.

Both parties argue that Chambers v. Pleasantville Board of Education, 1998 N.J. Agen. LEXIS 263 (May 1, 1998) supports their respective positions. In Chambers, the petitioner was a teacher who was having difficulties on the job and the Board requested that he undergo a psychiatric examination. Chambers refused to be examined by the Board selected doctor, but in the underlying action before State Board of Education, he was ordered to "propose a psychiatrist for his examination and ordered that the BOE not unreasonably withhold its approval of such psychiatrist." Id. at 11, citing Pleasantville City Board of Education v. Chambers, 96 N.J.A.R. 2d (EDU) 447, 448.

While the Board ultimately agreed to petitioner's selection of doctor and the controversy here was avoided, petitioner points out that a reasonableness factor must be built into the decision-making process or else that process is meaningless.

This issue is discussed in G.H. and E.H. on behalf of K.H. v. Board of Education of Franklin Lakes, 2014 N.J. Agen. LEXIS 19 (February 24, 2014). While this was a bullying case, the manner in which a Board must act is discussed, with the court noting that the Commissioner "will not overturn a local board in the absence of a finding that its actions were arbitrary, capricious, or unreasonable." Id. at 19, cit. Thomas v. Board of Education, 89 N.J. Super. 327 (App. Div. 1965).

The court continued, citing to Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960), that;

> The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives."
>
> K.H., 2014 N.J. Agen. LEXIS at 19, quot. Kopera, 60 N.J. Super. at 294.

This sentiment was also expressed in J.A.H. on behalf of minor child, C.H. v. Township of Pittsgrove Board of Education, 2013 N.J. Agen. LEXIS 58 (March 11, 2013), aff'd. 2013 N.J. Agen. LEXIS 436 (April 25, 2018), another bullying case.

> The standard before me one that is comparable to appellate review -- arbitrary and capricious, since the matter under review is a final decision of a school board. When an administrative body such as a school board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960) Thomas v. Bd. of Ed. Of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965)Thus, the Commissioner, and consequently the ALJ, cannot overturn a local board's decision absent the required affirmative showing of arbitrariness.
>
> Id. at 11. See also, Klapach v. Board of Education of Fort Lee, 2021 N.J. Agen. LEXIS 89 (April 6, 2021).

There is no question that there is a reasonableness standard that governs a Board's actions and interpretations of law, policy and procedure. And there is no material fact in dispute that would lead me to conclude that the Board acted in a reasonable manner in declining to approve petitioner's proposed examiner. The Board has never expressed any reason why Dr. Gollin was unacceptable, but only insisted upon Ms. Camilo appearing before Dr. White.

District Policy 3161 actually contains a reasonableness clause ("the Board will not act unreasonably in withholding its approval of a physician or institution submitted by a teaching staff member"), which respondent never gave any indication of intending to follow.

When combined with case law which clearly indicates that the Board must act in a reasonable manner when applying the dictates of N.J.S.A. 18A:16-3, I **CONCLUDE** that petitioner has proven by a preponderance of the credible evidence that respondent, in rejecting Ms. Camilo's choice of Dr. Gollin without positing any reason for that rejection, acted in a manner that was arbitrary, capricious and unreasonable.

Now that it has been determined that the Board acted improperly, the question that remains is what, if anything, the remedy for its improper actions should be. Unsurprisingly and ultimately unsuccessfully, respondent argues that since the statute does not contain a penalty provision, there should be no adverse action taken and that rescinding Dr. White's reports would be "an extraordinary, unjustifiable remedy".

Petitioner emphatically disagrees, pointing to multiple cases which demonstrate that both ALJs and Commissioners have broad discretion in formulating remedies for similar violations.

In Board of Education v. Levitt, 197 N.J. Super. 239 (App. Div. 1984), a case involving the improper denial of tenure to substitute teachers, the court held that;

> It is a well-settled principle of administrative law that the statutory powers accorded an agency "should be liberally construed to permit the agency to achieve the task assigned to it, and that such administrative agency has such implied incidental powers as may reasonably be adapted to that end." In re Suspension of Heller, 73 N.J. 292, 303 (1977), quoting In re Com'r of Bank. v. Parkwood Co., 98 N.J. Super. 263, 271-272 (App.Div.1967). These incidental powers have been extended to the fashioning of remedies, including the award of specific items of compensatory damages not expressly enumerated by statute. (Citations omitted)
>
> Id. at 245.

The theory underlying Levitt was followed by the Court in Klapach, another bullying case in which the court, after a finding reversing an HIB[2] violation, ordered the Board to "remove any references to the…investigation and findings from petitioner's personnel file." Id. at 4.

The Court in Graziano v. Grant, 326 N.J. Super. 342 (App. Div. 1999) expressed this proposition well. In this matter involving a contract dispute concerning the ownership of a medical practice, the court wrote that;

[2] Harassment, Intimidation and Bullying

> Applying principles of fairness and justice, a judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law.
>
> Id. at 343.

The court continued;

> The imposition, under these circumstances, of a reasonable covenant against competition is consistent with the broad equitable powers entrusted to him. We therefore conclude that the judge did not mistakenly exercise his discretion in deciding to impose a restrictive covenant against Grant.
>
> Ibid. See also, Crane v. Bielski, 15 N.J. 342 (1954).

Given this discretion, I **FIND** that the Court has the power to formulate a remedy to compensate petitioner for the Board's violation of N.J.S.A. 18A:16-3 and District Policy 3161. That remedy will be fashioned below.

## FINDINGS & CONCLUSIONS

The nature of this dispute is limited and this decision is not a referendum on Ms. Camilo's fitness for duty. Rather, what this decision does is emphasize that if someone's career and livelihood is under threat and procedures are in place that dictate how the matter should proceed, those procedures must be followed. That protects both the rights of the employee and the integrity of the disciplinary decision made by the Board.

With that being said, I **CONCLUDE** that there are no issues of material fact in dispute that would preclude the disposing of this case via Motion for Summary Decision.

Given the totality of the evidence and argument, I **FIND** the following:

1. That respondent acted in an arbitrary, capricious and unreasonable manner in violation of both N.J.S.A. 18A:16-3 and District Policy 3161 by failing to approve Ms. Camilo's selection of Dr. Gollin as her examining physician and by further failing to provide a reasonable (or any) explanation for its failure to do so.

2. That Ms. Camilo did not waive her right to contest the Board's decision.

3. That this Court has the authority to formulate a remedy to compensate petitioner for the Board's improper actions.

I therefore **CONCLUDE** that summary decision shall be granted in favor of petitioner and denied on behalf of respondent.

Given the nature of the both the dispute and the violation and the manner in which this case has proceeded since 2019, I **FIND** that the following remedies are appropriate, and it is hereby **ORDERED**:

1. That the examination performed by Dr. White on September 23, 2022, November 17, 2022 and December 22, 2022 shall be considered null and void.

2. That the reports authored by Dr. White on January 9, 2023 and January 12, 2023 shall be considered null and void and should not be considered by any party for any reason.

3. That Dr. White shall be barred from acting as the fitness-for-duty examiner in any and all matters involving petitioner and shall further be barred from testifying or providing any evidence in any proceedings involving Ms. Camilo's current or any potential future tenure charges.

4. That the parties shall comply with the dictates of N.J.S.A. 18A:16-3 concerning the selection of the examining doctor.

5. That if petitioner proposes a doctor to conduct the fitness-for-duty examination per N.J.S.A. 18A:16-3, respondent must approve that physician or, if that physician is unacceptable, advise petitioner of the basis for that rejection and explain why that rejection is not arbitrary, capricious and/or unreasonable.

6. That petitioner shall have ten calendar days from the issuance of this Initial Decision to propose a doctor to conduct the fitness-for-duty examination to the Board. If no such proposal is forthcoming from petitioner in that timeframe, the examination shall be scheduled with a physician designated by the Board, except that the Board shall not schedule the examination to take place with Dr. White or practitioners affiliated with him (including, but not limited to Kyle Barr, Psy.D. and Julie Wikman, M.A., L.A.C.) (Exhibit P-N).

## ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's Motion for Summary Decision be and is hereby **GRANTED** and it is further;

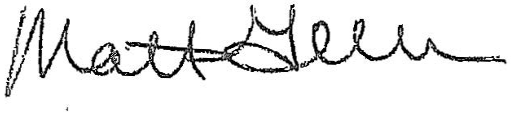
**ORDERED** that respondent's Cross-Motion for Summary Decision be and is hereby **DENIED**, and it is further;

**ORDERED** that the remedies enumerated above shall be enacted by the parties.

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.



March 20, 2023
DATE

**MATTHEW G. MILLER**, ALJ

Date Received at Agency: March 21, 2023

Date Mailed to Parties: March 21, 2023

MGM/sej

# APPENDIX

## EXHIBITS

**FOR PETITIONER:**

P-A July 5, 2022 Arbitration Award

P-B July 8, 2022 letter from petitioner's counsel to respondent's counsel proposing that Dr. Gollin perform the Fitness for Duty exam

P-C August 4, 2022 Clarification of Award

P-C1 July 18, 2022 status letter from petitioner's counsel to respondent's counsel

P-C2 Same as P-B

P-C3 August 2, 2022 status letter from petitioner's counsel to respondent's counsel

PC-4 July 29, 2022 status email from petitioner's counsel to respondent's counsel

P-D August 8, 2022 email from respondent's counsel to petitioner's counsel scheduling the Fitness for Duty exam with Dr. White for August 29, 2022.

P-E August 12, 2022 letter from petitioner's counsel to respondent's counsel declining to be examined by Dr. White.

P-F District Policy 3161 – Examination for Cause

P-G August 15, 2022 letter from respondent's counsel to petitioner's counsel, Fitness for Duty examination.

P-H August 15, 2022 letter from petitioner's counsel to respondent's counsel; reply to P-G.

P-I August 16, 2022 letter from respondent's counsel to petitioner's counsel; reply to P-G.

P-J August 26, 2022 email exchange between respondent's counsel and petitioner's counsel; September 23, 2022 Fitness for Duty exam with Dr. White.

P-K August 26, 2022 Petition of Appeal

P-L January 9, 2023 report of Mark White, Ph.D.

P-M January 11, 2023 letter from respondent's attorney to Dr. White.

P-N January 12, 2023 report of Mark White, Ph.D.

P-O January 21, 2023 Tenure Charges

P-Q February 3, 2023 Certification of Yesenia Camilo

**FOR RESPONDENT:**

R-A August 11, 2020 Tenure Charges

R-A1 June 18, 2003 Employment Contract

R-A2 Petitioner teaching certificates

R-A3 West New York District Policy 3150 - Discipline

R-A4 West New York District Policy 3161 – Examination for Cause

R-A5 West New York District Policy 3270 – Professional Responsibilities

R-A6 West New York District Policy 3280 – Liability for Pupil Welfare

R-A7 West New York District Policy 3161 – Inappropriate Staff Conduct

R-A8 October 7, 2019 e-mail from Frank Gagliardi to Petitioner

R-A9 September 18, 2019 instructional counseling notice

R-A10 September 18, 2019 letter from Yoleisy Yanez to Christian Cardenas

R-A11 October 7, 2019 letter from Yoleisy Yanez

R-A12 October 8, 2019 reprimand

R-A13 October 16, 2019 memo to petitioner from Allan C. Roth re: Fitness-for-Duty examination

R-A14 Fitness-for-Duty resolution

R-A15 October 22, 2019 letter from Allan C. Roth scheduling petitioner's Fitness-for-Duty examination for October 28, 2019

R-A16 January 14, 2020 letter from Allan C. Roth scheduling petitioner's Fitness-for-Duty examination for January 23, 2020

R-A17 October 18, 2019 e-mail from Patrick Gagliardi, re: "I owe you" incident

R-B June 3, 2021 Arbitration Award of Joyce M. Klein

R-C July 5, 2022 Arbitration Award of Michael J. Picklers

R-D November 1, 2021 revised Tenure Charges

R-E August 4, 2022 Arbitration Award Clarification of Michael J. Picklers

R-F January 9, 2023 report of Mark White, Ph.D.

R-G January 11, 2023 letter from respondent's attorney to Dr. White.

R-H January 12, 2023 report of Mark White, Ph.D.

R-I January 21, 2023 tenure charges and February 9, 2023 Certificate of Determination, suspending petitioner without pay

R-J August 15, 2022 letter from petitioner's counsel to respondent's counsel

R-K August 16, 2022 letter from respondent's counsel to petitioner's counsel