

EDU #3765-98
C # 343-00
SB # 66-00

IN THE MATTER OF THE TENURE :
HEARING OF ZENA MITCHELL, : STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT : DECISION
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :

Decided by the Commissioner of Education, October 16, 2000

For the Respondent-Appellant, Claudene M. Liss, Esq.

For the Petitioner-Cross Appellant, Sills, Cummis, Tischman, Epstein & Gross
(Cherie L. Maxwell, Esq., of Counsel)

This matter involves a proposed settlement of both tenure charges that had been certified against Zena Mitchell (hereinafter "respondent") by the State-Operated School District of the City of Newark (hereinafter "District") and a civil action that had been commenced by respondent in Superior Court of New Jersey, Law Division, Essex County. The tenure charges alleged that respondent had engaged in repeated inappropriate and unjustified physical contact with students, that she had failed to attend required training related to effective student techniques or crisis intervention, and that she had failed to properly supervise her students. The civil suit was filed after the Commissioner rendered a decision in another matter arising from the District's action in withholding respondent's increment for 1995-96. In that decision, the Commissioner adopted the findings of the Administrative Law Judge and concluded that the District

had acted in bad faith to withhold respondent's increment for 1995-96 in retaliation for the discrimination claims she had filed against it.¹ Similarly, in her civil action, respondent alleges that the District retaliated against her for a complaint she had filed under the New Jersey Law Against Discrimination. In the civil suit, respondent claims that such retaliation was in violation of the Conscientious Employee Protection Act ("CEPA"), and she is seeking relief, including punitive damages, under that Act.

The settlement was proposed by the parties after the tenure charges against respondent had been transmitted to the Office of Administrative Law ("OAL"). The proposed settlement was reviewed by the ALJ pursuant to N.J.A.C. 1:1-19.1. Finding that the parties had voluntarily agreed to the settlement and that the settlement both disposed of all issues in controversy and was consistent with law, the ALJ concluded that the settlement met the requirements of N.J.A.C. 1:1-19.1 and should be approved.

The Commissioner rejected the ALJ's recommendation, stating that he was compelled to do so because he was not satisfied that the settlement met the standards set forth in In re Cardonick, decided by the Commissioner of Education, April 7, 1982, aff'd by the State Board of Education, April 6, 1983. The Commissioner remanded the matter to OAL for revision of the settlement. In doing so, the Commissioner specifically required that the agreement be revised to provide that "respondent will not oppose proceedings before the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6." Commissioner's Decision, slip op. at 8 (emphasis in the original).

¹ See Zena Mitchell v. State-Operated School District of the City of Newark, decided by the Commissioner of Education, June 30, 1997. We note that by interlocutory decision of March 12, 1999 in the tenure matter, the Administrative Law Judge issued an order taking official notice of the Initial Decision in the increment matter and directing that the doctrine of collateral estoppel apply to the factual findings and conclusions set forth in that decision.

The Commissioner also construed the settlement as making respondent's resignation contingent on action by the Department of Treasury, Division of Pensions and Benefits, and rejected the settlement on the grounds that he could not approve a settlement where a material term was dependent on the actions of another agency. He further indicated that the District's agreement to respond to requests for references with only the dates of respondent's employment and her salary might infringe on its obligation to disclose upon request the reason for her separation from employment as required by Executive Order No. 11 (1974). Finally, the Commissioner expressed concern with the parties' confidentiality clause, stressing that they could not bind anyone other than the parties by such provision.

Respondent appealed to the State Board of Education, seeking approval of the proposed settlement. Respondent contends that the Commissioner could not require her to waive her right to oppose proceedings before the Board of Examiners as a condition of settling her tenure matter.

The District cross-appealed, also seeking approval of the settlement. Like respondent, the District argues that the Commissioner could not properly require respondent to agree not to oppose proceedings before the Board of Examiners. In addition, the District contends that the Commissioner misconstrued the settlement and that it does in fact meet the Cardonick standards. In this respect, the District argues that, contrary to the Commissioner's interpretation, the terms of the agreement do not require the Division of Pensions to take any action in order for the agreement between the District and respondent to be effectuated. Rather, the agreement requires that respondent use the lump sum payment of \$100,000 from the District to purchase

service credit and to confirm that she has complied with this term by providing the notice of purchase that she will receive from the Division of Pensions. The District also points out that the agreement limits its response to inquiries concerning respondent except as required by law or regulation so that it does permit the District to comply with Executive Order No. 11.

The District further maintains that the proposed settlement is in the public interest. It stresses that the tenure charges would be difficult to prosecute because of the finding made by the ALJ and adopted by the Commissioner in deciding respondent's challenge to the District's action in withholding her increment for 1995-96, i.e., that the District acted in bad faith and in retaliation against respondent for filing discrimination claims. This finding, argues the District, would also affect the District's ability to defend itself in the civil action that respondent initiated under the Conscientious Employee Protection Act. By disposing of both the tenure charges and the civil action and by providing for a lump sum payment of \$100,000, the proposed settlement allows the District to avoid the potential costs that would attend litigating these matters, as well as the risk that respondent would be awarded punitive damages in the civil action. This outcome, asserts the District, is in the public good.

We agree with the parties that the proposed agreement meets the standards established in Cardonick, supra. As we stressed in In the Matter of the Tenure Hearing of Lenore M. Allen, decided by the State Board of Education, November 1, 2000, Cardonick requires that a proposed tenure settlement be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent by the district board and teacher to the agreement, and the ALJ's findings that

the agreement is consistent with the public interest and was entered into by the teacher with a full understanding of his or her rights, including the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of certification. It does not, however, require that a respondent relinquish the right to defend herself before that board. Moreover, as we indicated in Lenore Allen, principles of due process would not permit either the Commissioner or the State Board to condition approval of a proposed tenure settlement on such an agreement. Lenore Allen, supra, slip op. at 4.

Moreover, as expressed by the State Board of Education:

...dismissal from a tenured position and revocation of certification serve different purposes and...the responsibilities of the Commissioner under N.J.S.A. 18A:6-10 are distinct from those of the Board of Examiners under N.J.S.A. 18A:6-38. E.g., In the Matter of the Revocation of the Teaching Certificates of John Ahern, rev'd and remanded by the State Board of Education, August 5, 1987 (subsequent history omitted).

N.J.S.A. 18A:6-38 confers original jurisdiction on the State Board of Examiners to act under rules prescribed by the State Board of Education to revoke the certificates that it issues. Consequently, it is the determination by the State Board of Examiners that may preclude a teacher who has been dismissed from tenured employment from future employment in any school district in New Jersey. Accordingly, the pertinent regulations set forth procedures under which cases involving offenses of such nature as to warrant suspension or revocation of certification may be decided by the State Board of Examiners following an appropriate hearing. N.J.A.C. 6:11-3.6. Those procedures include transmittal to the Office of Administrative Law, thereby enabling the State Board of Examiners to resolve cases involving disputes as to the material facts. Id. Such disputes may involve, where appropriate, facts relating to the conduct underlying the tenure charges. Id. Given the statutory authority possessed by the State Board of Examiners and the regulations we have adopted to

implement that authority, we are confident that upon referral of this matter to the State Board of Examiners, that board will insure that the interests of the public are protected.

Lenore Allen, supra, slip op. at 5-6.

Hence, all that was required of the parties in this case with respect to referral to the State Board of Examiners was the inclusion in the proposed settlement of an acknowledgement by respondent that one of the implications of the settlement is referral to the Board of Examiners and that, consequently, there is the potential for that board to initiate proceedings to revoke or suspend her certification. Although not included in the proposed settlement executed by respondent and the State District Superintendent on June 9, 2000, such acknowledgement is set forth in the Stipulation of Agreement executed by the attorneys for the parties on June 26, 2000. In that the final version of the agreement, by which respondent is bound, includes the required acknowledgement, this requirement of Cardonick is satisfied.

Upon review of its terms, we find that the final version of the agreement also conforms to the requirements of Cardonick in all other respects. As more clearly set forth in the Stipulation of Agreement than in the earlier version, the agreement is not dependant on any action by the Division of Pensions. Rather, as the District points out, the notice of purchase that will be generated once respondent purchases her service credit will serve only to evidence that respondent has complied with the agreement by using the \$100,000 payment to purchase such credit. Similarly, we find no reason to be concerned about the fact that the agreement requires confidentiality by the parties or would limit the District's response to inquiries about respondent's employment. Again,

as the District argues, the confidentiality agreement binds no one except the parties and the settlement expressly allows the District to comply with Executive Order No. 11.

Finally, we agree with the District that under the circumstances set forth in the Stipulation of Agreement, this settlement is in the public interest. In this respect, we concur that given the finding arrived at in the administrative proceedings related to the withholding of respondent's increment for 1995-96, the District's ability to prosecute the tenure charges would be limited. For the same reason, it would find it difficult to defend itself in the civil action, and we stress that the combined cost of litigating the tenure charges and defending the civil suit would be considerable. The availability of punitive damages in the civil action increases the District's potential liability so that, on balance, agreement to the \$100,000 payment is not unreasonable.

Therefore, for the reasons expressed herein, the State Board of Education reverses the Commissioner's decision and approves the settlement proposed by the parties as embodied in the Stipulation executed by the attorneys for the parties in this matter.

March 7, 2001

Date of mailing _____