

EDU #9451-01
C # 356-02L
SB # 43-02
C # 448-07
SB # 31-07

VICTOR EISENBERG, :
PETITIONER-RESPONDENT, : STATE BOARD OF EDUCATION
V. : DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH :
OF FORT LEE, BERGEN COUNTY, :
RESPONDENT-APPELLANT. :
_____ :

Decided by the Commissioner of Education, October 3, 2002

Decision on motion by the Commissioner of Education,
November 20, 2002

Remanded by the State Board of Education, November 5, 2003

Decision on motion by the Commissioner of Education,
November 15, 2007

For the Petitioner-Respondent, Victor Eisenberg, pro se

For the Respondent-Appellant, Schenck, Price, Smith & King (Joanne L.
Butler, Esq., of Counsel)

Victor Eisenberg (hereinafter "petitioner") was employed as a teacher by the Board of Education of the Borough of Fort Lee (hereinafter "Board") commencing in the 1998-99 school year. By letter dated April 3, 2001, the Superintendent notified the petitioner that the Board had determined not to renew his employment for the 2001-02 school year. On September 29, 2001, the petitioner filed a petition of appeal with the Commissioner challenging the Board's action. In his petition, the petitioner claimed that

he recently had become aware of the fact that he had not been “given a fair chance at reemployment.” Petition of Appeal, at 4. The petitioner alleged that the school’s former principal had told another teacher that he had received instructions from the Superintendent to make sure that he “papered” the petitioner’s personnel file to justify the decision not to renew his employment. The petitioner also alleged that his positive performance evaluations were missing from his personnel file.

The Board filed a motion to dismiss the petition, contending that it was not filed within the 90-day period set forth in N.J.A.C. 6A:3-1.3(d) [now codified at N.J.A.C. 6A:3-1.3(i)]. The Commissioner granted the Board’s motion and dismissed the petition. However, on November 5, 2003, the State Board reversed the Commissioner’s decision, concluding that the petition had been filed in a timely manner, and we remanded this matter to the Commissioner for such further proceedings as were necessary to resolve it.

The petitioner also filed a civil complaint in Superior Court against the Board and its administrators claiming defamation, breach of contract, breach of covenant of good faith and fair dealing, and age and religious discrimination. The petitioner sought reinstatement to his teaching position and damages. In an oral decision rendered on July 16, 2004, the Hon. Sybil Moses, A.J.S.C. granted the Board’s motion for summary judgment and dismissed the complaint. On November 3, 2005, the Appellate Division affirmed Judge Moses’ decision and remanded the matter to the Office of Administrative Law (“OAL”).

During the proceedings in OAL, the Board filed a motion to limit the scope of the proceeding, arguing that the only remaining issue was whether the Board had acted

properly in not renewing the petitioner's employment, and, if not, whether its action was arbitrary and capricious. On October 17, 2007, the Administrative Law Judge ("ALJ") recommended granting the motion, finding that the doctrines of res judicata and collateral estoppel precluded the petitioner from relitigating his claims that he had been denied due process and that his file had been "papered" or otherwise altered. The ALJ found that those claims had been determined by Judge Moses in her decision. Therefore, the ALJ concluded that the only remaining issue in this matter was whether the Board had followed the proper procedure in not renewing the petitioner's employment and whether the Board had acted in an arbitrary and capricious manner in taking the action that it did.

The petitioner requested that the Commissioner review the ALJ's interlocutory decision. On November 15, 2007, the Commissioner granted the petitioner's request. Upon review, the Commissioner agreed with the ALJ that the petitioner's due process claim should be removed from consideration at hearing as a result of Judge Moses' decision, but she rejected the ALJ's determination that the petitioner's claim that his file had been "papered" or otherwise altered should also be removed from consideration. The Commissioner agreed with the petitioner that the latter issue was not directly resolved in the Superior Court action, explaining:

The issue of whether respondents acted arbitrarily and unreasonably in terminating petitioner based upon a personnel file which he contends was unfavorably altered, was not squarely addressed. The doctrine of issue preclusion does not apply.

. . . .

[Judge Moses] ruled on a "spoliation" of evidence claim pressed by petitioner, but that claim pertained to a missing attachment to one specific memorandum from January 2001. That memorandum does not appear to be at

issue in the present interlocutory motion for review of [the ALJ's] order.

. . . .
[T]he judge did not reach a decision on petitioner's claims about the alteration of his file; she told petitioner that the Commissioner of Education is the correct arbiter of those claims, and that petitioner needed to exhaust his administrative remedies. The doctrine of issue preclusion does not attach to petitioner's contentions about the alleged manipulation of his file because Judge Moses herself told petitioner to take it up with the Commissioner of Education.

Commissioner's Decision, slip op. at 2-3.

The Board filed a motion with the State Board for leave to appeal the Commissioner's interlocutory decision, reiterating its contention that res judicata and collateral estoppel precluded the petitioner from relitigating his claim that the Board had altered his personnel file. The petitioner filed a brief in opposition to the motion.

After consideration of the papers filed by the parties, we grant the Board's motion for leave to appeal and, upon review, affirm the Commissioner's determination.

It is well-established that an agency head has:

broad discretion to decide which ALJ orders are subject to review on an interlocutory basis. As in a court case, interlocutory review may be granted only in the interest of justice or for good cause shown. In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case. Interlocutory orders of this character can influence the soundness of the adjudication and the integrity of administrative regulations. In the context of public administration, the interests of justice require that such orders be subject to interlocutory review.

In re Uniform Admin. Procedure Rules, 90 N.J. 85, 100-01 (1982).

We conclude that the interests of justice require that we review the Commissioner's interlocutory decision, which involves the scope of the issues remaining in this matter, in order to ensure that the proper issues are litigated at hearing. Upon review of the briefs and appendices filed by the parties, including the transcript of Judge Moses' oral decision, we fully agree with the Commissioner that the petitioner's claim that his personnel file was "papered" was not determined by Judge Moses and should not be removed from consideration in these proceedings. Accordingly, we affirm the Commissioner's interlocutory decision of November 15, 2007 for the reasons expressed therein.

Dorothy Strickland abstained.

January 9, 2008

Date of mailing _____