

225-00

ELLEN WOOLLEY AND MELVIN
CLARKE,

:

PETITIONERS,

:

V.

:

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE
CITY OF ATLANTIC CITY, ATLANTIC
COUNTY, BERT LOPEZ, PRESIDENT,
THERESA THOMAS, DANIEL
GALLAGHER, MATTHEW DORAN,
JAMES HERZOG AND THERESA KELLY,
INDIVIDUALLY AND JOINTLY,

:

DECISION

:

:

:

RESPONDENTS.

:

SYNOPSIS

Petitioners, a Supervisor of Pupil Personnel Services and an Assistant Superintendent, alleged violations by respondent Board of the New Jersey Law Against Discrimination (NJLAD), the Tenure Employees Hearing Law and the Open Public Meetings Act (OPMA). Respondent Board filed a motion for summary decision, alleging a failure to state a claim upon which relief may be granted.

The ALJ determined that petitioners failed to allege or demonstrate a tangible adverse employment action that is actionable under the NJLAD. The ALJ further concluded that no viable claim pursuant to the Tenure Employees Hearing Law had been set forth because no tenure charges had been discussed by respondent or filed against petitioners. Finally, the ALJ determined that no OPMA violation had been established because no official action was taken or considered by respondent Board.

The Commissioner affirmed the Initial Decision of the ALJ and dismissed the amended petition. The Commissioner held that, to the extent he has jurisdiction over NJLAD claims, no adverse employment action based on petitioners' race or other invidious classification had been established, nor had petitioners demonstrated that they were subjected to adverse employment decisions which would rise to an allegation of reprisal. With respect to the Tenure Employees Hearing Law claims, the Commissioner held that petitioners failed to state a claim that, if true, would constitute a violation of the tenure laws. Finally, the Commissioner concurred with the ALJ's determination that petitioners failed to state a claim pursuant to the OPMA because his incidental jurisdiction over such claims may only be invoked if a valid claim arising under the school laws is established, but no such claim had been established in this case.

JULY 10, 2000

OAL DKT. NO. EDU 4553-99
AGENCY DKT. NO. 86-4/99

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.¹

In their exception arguments, petitioners primarily contend that the ALJ improperly granted summary decision to the Board as a consequence of his misinterpretation of the provisions of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* (NJLAD).²

¹ Petitioners requested, and were granted, an extension until June 16, 2000 to file exceptions in this matter. The Board, having indicated that it did not receive a copy of petitioners' exceptions until June 19, 2000, was accorded until June 26, 2000 to submit replies, *N.J.A.C.* 1:1-18.4(d). However, replies were not received on that date.

² For the first time, petitioners note that, "[w]hile this matter is pending before the Commissioner, the respondent board has voted to remove Clarke as Assistant Superintendent for Personnel from Personnel duties and transfer Woolley from the high school to an elementary guidance position. No explanation has been given for such drastic personnel actions." (Petitioners' Exceptions at 2, footnote 1) Since the Commissioner recognizes that "[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions," *N.J.A.C.* 1:1-18.4(c), such evidence is not considered part of the record before him. This determination, however, does not prevent Petitioner Clarke from filing a Petition of Appeal to challenge the Board's recent action.

Petitioners maintain that the standards set forth in *Lehman, supra*, for sustaining such a claim have been met herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs that summary decision should be granted to the Board, since each count of petitioners' Amended Petition of Appeal must be dismissed for the reasons set forth herein.

The first two counts of petitioners' Amended Petition of Appeal allege violations of the NJLAD. To the extent the Commissioner has jurisdiction to hear and determine these allegations, *See Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 528 (1978)*, he finds with respect to the first count that, even accepting as true the facts alleged by petitioners, they have failed to assert that the "adverse employment actions" which they purport to have suffered (Initial Decision at 20) were actions taken *because of* their respective races, as prohibited by the NJLAD. (Initial Decision at 25) That is, the NJLAD "does not proscribe all discrimination, but only that which is bottomed upon specifically enumerated partialities and prejudices." *Jones v. College of Medicine and Dentistry of New Jersey, 155 N.J. Super. 232, 236 (App. Div 1977), certif. denied, 77 N.J. 482 (1978)*. Here, petitioners argue that the "hostile work environment" they endured would not have occurred "but for" their reporting of the grade fixing scandal and their participation in the investigation subsequent thereto. (Initial Decision at 19) They *do not* allege an unlawful practice or discrimination *based on race*, or any other "invidious classification," *see, Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 80 (1978)*, as prohibited by the NJLAD.

In the second count, petitioners contend that they have suffered unlawful reprisals as a consequence of their involvement in reporting the aforementioned grading scandal, in

violation of the NJLAD. As the ALJ notes on page 26 of the Initial Decision, the statute provides that:

It shall be unlawful employment practice, or as the case may be, an unlawful discrimination: ***

For any person to take reprisals against any person because he has opposed any practice or practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act. *N.J.S.A. 10:5-12(d)*.

In their Amended Petition of Appeal, petitioners allege that they suffered such reprisals “for filing this lawsuit ***.” (Amended Petition at 6, paragraphs 29, 30) However, in their exception arguments before the Commissioner, they *also* appear to attribute such retaliation to their involvement in uncovering the aforementioned grade-fixing scandal. (Petitioners’ Exceptions at 4, 5). In any event, the retaliations which they claim to have suffered consist of the following: statements by Respondent Loggi to Petitioner Clarke that other respondent Board members “were running the district and ‘they had the votes to do what they wanted’”; Clarke’s exclusion, by Respondent Loggi, from attending “a very important meeting with officials from the Department of Education”; Clarke’s attendance at a Board meeting on August 17, 1999 where he was *not* permitted to represent the administration, as he had in the past; Clarke’s public “reprimand” from Theresa Kelly for issuing a “Rice” letter to an employee; the Board’s failure to discipline *other* staff members when they made disrespectful comments and took offensive actions against Woolley; and Woolley’s exclusion, during the 1999-2000 school year, from participation on the school management team at the high school. (Amended Petition. at 6, 7)

Although the NJLAD does not define “reprisals,” the plain meaning of the word is “any action taken by one person either in spite or as a retaliation for an assumed or real wrong by another.”³ Further, the Commissioner recognizes that:

***claim of retaliation involves several tiers of proof. The initial tier requires the claimant to establish a *prima facie* case. This is done by demonstrating by a preponderance of the evidence that (1) claimant engaged in protected activity known to the employer, (2) claimant thereafter was subjected to adverse employment decision by the employer, and (3) there was a causal link between the two. (Citations omitted). *Jamison v. Rockaway Twp. Bd. of Educ.* 242 N.J. Super. 436, 445 (App. Div. 1990).

Even assuming, *arguendo*, that petitioners’ dual argument as to the basis of the retaliation suffices to satisfy the first prong, and, further assuming petitioners’ allegations are true, the Commissioner, like the ALJ, cannot find on the record before him that the petitioners have been subjected to adverse employment decisions “which would rise to an allegation of reprisal ***.” (Initial Decision at 26)

Next, petitioners assert that respondents have violated the Tenure Employee’s Hearing Law, N.J.S.A. 18A:6-10 *et seq.*, as well as their “privacy rights,” which rights, they aver, are protected by the tenure statute. In this connection, petitioners claim that respondents have made public statements indicating the Board’s intent to terminate their employment. (Amended Petition of Appeal at 8) Notably, however, petitioners’ exceptions do not challenge the ALJ’s conclusion, herein affirmed by the Commissioner, that petitioners have failed to state a claim, which would, if true, constitute a violation of the tenure laws. Rather, petitioners merely assert that if their allegations are true, “this conduct by a public official is repugnant and should be punished.” (Petitioners’ Exceptions at 6) The Commissioner finds, therefore, with respect to the third count of the petition, that petitioners fail to state a claim upon which relief may be granted.

³ *Black’s Law Dictionary*, Fifth Edition.

Finally, petitioners claim that respondents violated the Open Public Meetings Act, *N.J.S.A. 10:4-1 et seq.* (OPMA) “by making public statements regarding petitioners’ removal and/or performance ***.” (Amended Petition of Appeal at 9) However, since the Commissioner has incidental jurisdiction to hear and determine OPMA claims only “as they relate to controversies arising under the school laws,” *Sukin v. Northfield Bd. of Education*, 171 *N.J. Super.* 184, 187 (App. Div. 1979), and noting that petitioners have failed to establish any such valid school law claim, *supra*, the Commissioner finds he is without jurisdiction to consider the fourth count of the Amended Petition of Appeal.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: July 10, 2000

Date of Mailing: July 10, 2000

⁴ This decision, as the Commissioner’s final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.