

#264-12 (OAL Decision: Not yet available online)

DONALD SALAAM, :  
 :  
 PETITIONER, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
 :  
 BOARD OF EDUCATION OF THE CITY : DECISION  
 OF IRVINGTON, ESSEX COUNTY, :  
 :  
 RESPONDENT. :  
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SYNOPSIS

Pursuant to *N.J.S.A.* 18A:16-6.1, the petitioner – on March 8, 2010 – requested reimbursement from the respondent Board for the legal fees and costs expended in the defense of a criminal complaint against him which was dismissed by the court on October 29, 2009. When the Board ignored his request for reimbursement, the petitioner filed the within appeal with the Commissioner. The Board contended, *inter alia*, that petitioner must submit a certification of other attorneys to establish the reasonableness of the hourly rate to be reimbursed, and that the petitioner has no standing to bring this case because the NJEA financed his defense, and as such petitioner has no costs to be reimbursed.

The ALJ found, *inter alia*, that: under *N.J.S.A.* 18A:16-6.1, a board of education shall reimburse an employee for the cost of defending himself in a criminal action should the proceeding be dismissed; petitioner is not required to submit a certification of other attorneys to establish the reasonableness of the hourly rates charged for his defense; *N.J.S.A.* 18A:16-6.1 confers standing to bring this action upon petitioner; the fact that a third party financed the defense does not relieve a board of education of its obligation under the statute to pay for it; only the lead defense attorney in the case testified and submitted certification regarding the billing for petitioner’s defense; without testimony or certification of the other attorneys who billed hours to petitioner, a preponderance of evidence does not exist that the hourly rates they charged were reasonable and accordingly those expenses cannot be reimbursed. The ALJ concluded that the Board must reimburse petitioner in the amount of \$18,755.28 for reasonable counsel fees and expenses.

Upon independent review of the record, the Commissioner concurred with the ALJ’s findings and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 25, 2012

OAL DKT. NO. EDU 13483-10  
AGENCY DKT. NO. 659-11/10

DONALD SALAAM, :  
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent Board filed exceptions to the Initial Decision and such exceptions and the petitioner’s reply thereto<sup>1</sup> were considered by the Commissioner in reaching his determination herein.

The Board’s exceptions replicate its arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that such arguments were fully considered and appropriately resolved in the Initial Decision, they will not be revisited here.

Upon an independent review of the record, which includes a transcript of the hearing conducted at the OAL on February 17, 2012, along with the parties’ exception submissions and all exhibits, the Commissioner adopts the findings and conclusions of the Initial Decision.

Petitioner here seeks reimbursement for legal fees and costs expended in the defense of a criminal complaint filed against him in the Irvington Municipal Court alleging that

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<sup>1</sup> It is noted that petitioner’s reply exceptions also attempted to include two primary exceptions. As primary exceptions raised for the first time in reply exceptions are not authorized or contemplated by *N.J.A.C. 1:1-18.4*, petitioner’s arguments in this regard were not considered.

he assaulted a 15-year old girl in his classroom. Such criminal complaint was ultimately dismissed by the court. The Commissioner notes that *N.J.S.A.* 18A:16-6.1 requires a board to reimburse its employees for reasonable counsel fees and expenses incurred in defending against certain criminal actions. If the requisite statutory standard is satisfied, such indemnification is mandatory. *N.J.S.A.* 18A:16-6.1, read in conjunction with the complementary provisions of the immediately preceding statutory section, *N.J.S.A.* 18A:16-6, sets forth a two-pronged test for determining whether board employees are entitled to indemnification in this regard, *i.e.*, 1) the underlying criminal action must be dismissed or result in a final disposition in favor of the employee, and 2) any act or omission upon which the criminal charge is based must arise out of and during the course of the employee's performance of the duties and responsibilities of his position.

Here, there is no dispute that the first prong of the requisite test was satisfied by the dismissal of the complaint against respondent by the Irvington Municipal Court. As to the second prong, with the dismissal of the complaint there is no proof on this record that respondent engaged in untoward conduct against any child. Rather, the only undisputed conduct existing in this matter is that the alleged events took place at school, during school hours, while respondent was engaged in performing his duties as a teacher. Consequently, the alleged behavior on which the criminal complaint was predicated arose out of and in the course of the performance of the duties of respondent's employment (*See Bower v. Board of Education of the City of East Orange*, 149 *N.J.* 416 (1977)), thereby satisfying the criteria which entitles petitioner to indemnification pursuant to the terms of *N.J.S.A.* 18A:16-6.

Finally, as the "reasonableness" of the legal fees at issue here was specifically challenged by the Board, the Commissioner is compelled to concur with the ALJ's discussion on

p. 5-7 of his decision and his conclusion that – although the reasonableness of the total time expended by attorney Timothy Smith and the hourly rate he charged was justified by virtue of his testimony in this regard – because none of his associates who also appear in the submitted time records either testified or submitted certifications which would allow a determination of whether their experience, skill and reputation would justify a conclusion that the hourly rates charged for their time was “reasonable,” the charges attributable to these individuals must be excluded from petitioner’s indemnification award.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board of Education of the City of Irvington is hereby directed to reimburse petitioner a total of \$18,755.28 – comprised of counsel fees of \$17,650 and expenses of \$1,105.28 – representing the reasonable cost of his defense in the criminal action before the Irvington Municipal Court.

IT IS SO ORDERED.<sup>2</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 25, 2012

Date of Mailing: June 26, 2012

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<sup>2</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).