

#246-15 (OAL Decision: Not yet available online)

ASKIAA NASH, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
STATE-OPERATED SCHOOL DISTRICT : DECISION  
OF THE CITY OF NEWARK,  
ESSEX COUNTY, :

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### SYNOPSIS

The petitioner herein was imprisoned on May 16, 2002 and released in 2013 after the Supreme Court found that – based on new evidence that would likely change the jury’s verdict – a new trial for Mr. Nash was essential. In April 2013, the Judgments of Conviction against petitioner were vacated, and the indictments against him dismissed in their entirety upon motion from the Essex County Prosecutor. In the instant matter, petitioner seeks indemnification pursuant to *N.J.S.A. 18A:6-6.1* for legal fees and costs expended between 2001 and 2003 relating to his criminal trial and subsequent application for a new trial following his conviction in 2002.

The ALJ found, *inter alia*, that: petitioner bears the burden of demonstrating his claims under *N.J.S.A. 18A:6-6.1* by a preponderance of the evidence; it is undisputed that the criminal charges against petitioner arose from his employment as a teaching staff member in respondent’s school district, that his convictions have been reversed, and that the Essex County Prosecutor’s Office has dismissed the indictments. The initial decision also recited that *N.J.S.A. 18A:6-6.1* provides a board of education shall reimburse a staff member for the reasonable counsel fees and expenses of the “original hearing or trial and all appeals,” the respondent’s argument that petitioner is unable to demonstrate the reasonableness of the counsel fees that he incurred, and is therefore ineligible for reimbursement, is without merit and that under the circumstances present in this matter, petitioner has demonstrated that the fees paid to his attorneys were reasonable and subject to reimbursement by the district. Certain other documented fees clearly related to petitioner’s defense, which were raised at hearing, are also subject to reimbursement, but other fees claimed by petitioner for which inadequate documentation was provided, or which were first raised in a post-hearing brief, are not subject to reimbursement. Accordingly, the ALJ concluded that petitioner demonstrated that the legal fees and costs specifically delineated in the Initial Decision are reasonable and should be reimbursed by the school district pursuant to *N.J.S.A. 18A:6-6.1*.

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. The respondent was ordered to reimburse petitioner in the amount of \$44,112.00, representing the reasonable fees and costs expended for his defense.

<p>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.</p>
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July 29, 2015

ASKIAA NASH, :  
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 PETITIONER, :  
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 V. : COMMISSIONER OF EDUCATION  
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 STATE-OPERATED SCHOOL DISTRICT : DECISION  
 OF THE CITY OF NEWARK, :  
 ESSEX COUNTY, :  
 :  
 RESPONDENT. :

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This matter involves the application of *N.J.S.A.* 18A:16-6.1 and whether the counsel fees expended between 2001 and 2003 for which petitioner sought reimbursement – following lengthy criminal proceedings, appeals, and ultimate dismissal of the indictments<sup>1</sup> lodged against him – are reasonable.

*N.J.S.A.* 18A:16-6.1 provides, in pertinent part: “Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including *reasonable counsel fees and expenses of the original hearing or trial and all appeals.*”<sup>2</sup> (emphasis added)

Based upon the testimony and certifications of Felix Lopez Montalvo, Esq. and Jonathan Gordon, Esq. – the two attorneys who represented petitioner between 2001 and 2003 – as well as the extensive trial and new-trial-motion transcripts, the Administrative Law Judge

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<sup>1</sup> Because the Initial Decision contains a detailed recitation of the procedural history in this matter, which spans over 13 years, it will not be reiterated here. On April 29, 2013, the Judgment of Conviction entered against petitioner was vacated, and the indictments were dismissed by the Essex County Prosecutor. (Initial Decision at 4)

<sup>2</sup> It is uncontroverted that petitioner is eligible for reimbursement. (Initial Decision at 14)

(ALJ) determined that the record contains sufficient evidence to demonstrate that the costs and fees incurred by, and on behalf of, petitioner were reasonable under all of the circumstances.<sup>3</sup>

In his exceptions, petitioner seeks modification of the Initial Decision to include reimbursement for \$1,546.44 in outstanding fees and costs due to the Office of the Public Defender, but concedes that reimbursement of same was not sought during the proceedings until the submission of post-hearing briefs – and after the record was closed. Respondent maintains that, because the judgments memorializing said costs were recorded against petitioner sometime between 2003 and 2006, petitioner could have included this request for reimbursement in his petition of appeal. In addition, respondent contends that because the relevant evidence was not presented at the hearing, petitioner is precluded from discussing it in his exceptions per *N.J.A.C. 1:1-18.4*.

Additionally, in its own exceptions, respondent argues that the ALJ erred in finding that petitioner demonstrated the legal fees and costs incurred through representation by attorneys Montalvo and Gordon were reasonable, and therefore reimbursable, under *N.J.S.A. 18A:16-6.1*. In essence, respondent asserts that petitioner failed to provide sufficient information for calculation of the lodestar (*i.e.* the number of hours an attorney reasonably devoted to the case multiplied by a reasonable hourly rate), thereby rendering it impossible for the ALJ to determine whether the fees incurred were reasonable. Because respondent's contentions as to reasonableness were asserted below, and thoroughly addressed by the

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<sup>3</sup> Because Montalvo and Gordon represented petitioner more than 11 years ago, neither attorney could provide a copy of their retainer agreement or detailed hourly billing records. As noted by the ALJ, however, "the applicable ethics guidelines only require an attorney to retain a file for seven years after the file has been closed." *See* Advisory Committee on Professional Ethics Opinion No. 692, [http://njlaw.rutgers.edu/collections/ethics/acpe/acp692\\_1.html](http://njlaw.rutgers.edu/collections/ethics/acpe/acp692_1.html) (Initial Decision at 17)

ALJ in her Initial Decision, the Commissioner will not recapitulate them here. (Initial Decision at 16-20)

Upon independent review of the record<sup>4</sup> and the Initial Decision of the Office of Administrative Law (OAL), plus the parties' exceptions and respondent's reply to petitioner's exceptions filed pursuant to *N.J.A.C. 1:1-18.4*, the Commissioner concurs with the findings and conclusions of the ALJ. Petitioner has demonstrated, by a preponderance of evidence, the reasonableness of the legal fees and costs incurred as delineated in the ALJ's comprehensive Initial Decision.

The ALJ's findings in this regard are adequately supported by the record, and consonant with the purpose of *N.J.S.A. 18A:16-6.1* – to require the Board to reimburse the legal expenses of an employee successful in defending against a criminal action that arose out of the course of his or her employment. See *Bower v. Board of Educ.*, 287 *N.J. Super.* 15, (App. Div. 1996), *aff'd* 149 *N.J.* 416 (1997). Montalvo, who had been in private practice for more than 10 years when he represented petitioner, “provided both testimony and a certification as to the fees he was [sic] charged, the fees he received, and the reasonableness of his fees.” (Initial Decision at 14) Gordon, who was also in private practice for more than 10 years when he represented petitioner, “provided both testimony and a certification as to the fees he received (i.e., that he had been ‘paid in full’ for his services), and to their reasonableness.” (Initial Decision at 14) Furthermore, “the work performed by both attorneys is self-evident from the extensive trial and new-trial-motion transcripts.” (Initial Decision at 14) Finally, in accordance with *Rendine v. Pantzer*, 141 *N.J.* 292 (1995), the ALJ's analysis included the calculation and comparison of appropriate lodestar amounts – taking into account that, here, counsel for petitioner both charged

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<sup>4</sup> The record included transcripts of recorded proceedings at the Office of Administrative Law, which took place on December 15, 2014 and January 21, 2015.

flat fees – in an effort to ensure the reasonableness of the recommended fee reimbursement under the unique circumstances presented here. (Initial Decision at 19-20)

As to the additional monies requested by petitioner in his exceptions, the Commissioner declines to award \$1,546.44 due to the Office of the Public Defender at this time since – as recognized by the ALJ – petitioner did not request reimbursement of same in his petition, nor did he raise the issue during the hearing.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent shall reimburse petitioner in the amount of \$44,112.00 (\$9,220/Montalvo + \$30,700/Gordon + \$2,392/transcripts + \$1,800/expert) representing the reasonable fees and costs expended for his defense.

IT IS SO ORDERED.<sup>5</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 29, 2015

Date of Mailing: July 30, 2015

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<sup>5</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).