

EDE # 09266-2005N
SBE #EDE 09266-05
SB # 9-06

IN THE MATTER OF THE : STATE BOARD OF EDUCATION
CERTIFICATES OF SUSAN KANDELL. : DECISION ON MOTION

Decision on motion by the State Board of Examiners issued on
January 30, 2006

For the Appellant, Sills, Cummis, Epstein & Gross (Cherie L. Adams, Esq.,
of Counsel)

For the Respondent, Patricia O'Neill, Deputy Attorney General (Zulima V.
Farber, Attorney General of New Jersey)

This matter had its genesis in a letter filed by Cynthia Livengood on June 24, 2002, in which she appealed to the State Board of Examiners from the overall rating of "insufficient" that she had received for her performance as an alternate route candidate for teaching certification. In her letter, Ms. Livengood made allegations against Susan Kandell, the principal of the school in which she had served while an alternate route candidate. Based solely on those allegations, the State Board of Examiners acted on November 14, 2002 to order Ms. Kandell to show cause why her teaching and administrative certifications should not be revoked or suspended. On April 14, 2005, an Order to Show Cause embodying the Board of Examiners' action was mailed to Ms. Kandell, thereby initiating the proceedings in this matter.

The allegations made by Ms. Livengood involved alleged conduct by Ms. Kandell toward Ms. Livengood during the 2001-2002 school year, during which time Ms. Kandell

was supervising Ms. Livengood's candidacy for alternate route certification. As set forth in the Order to Show Cause, Ms. Livengood alleged that Ms. Kandell had allowed personal negative feelings to influence her review and evaluation of Ms. Livengood's performance, had refused Ms. Livengood's request to transfer to another school, had behaved rudely and disrespectfully toward Ms. Livengood, and, it appeared, had either forged Ms. Livengood's signature or planted a copy to make it seem as though Ms. Livengood had refused to sign her evaluation. Ms. Livengood further alleged that Ms. Kandell had threatened to give her a "disapproved" rating on her evaluation if she did not quit her job and that she had received a rating of "insufficient" because she did not quit. She also alleged that Ms. Kandell had not performed her supervisory duties in a timely fashion and had not discussed or issued Ms. Livengood's 20-week evaluation.

Ms. Kandell denied the allegations made by Ms. Livengood, and the matter was transmitted to the Office of Administrative Law for hearing. On October 6, 2005, Ms. Kandell propounded interrogatories and a request for the production of documents to the Board of Examiners seeking the basis for the allegations made by Ms. Livengood. While the Board of Examiners provided Ms. Kandell with the documents that had been filed in Ms. Livengood's appeal of her "insufficient" rating, its response to the interrogatories relating to Ms. Livengood's allegations was to object to the extent that the interrogatories requested information from "a third party" or that was otherwise outside of its possession and/or control.

On December 8, 2005, the Administrative Law Judge ("ALJ") denied Ms. Kandell's motion to dismiss the matter. On December 21, 2005, Ms. Kandell filed a motion to compel Ms. Livengood's deposition, which the ALJ granted. The ALJ issued

her written Order on January 6, 2006, directing the Board of Examiners to produce Ms. Livengood for deposition on January 26, 2006, which was four days before the scheduled hearing.

On January 9, 2006, the Deputy Attorney General representing the Board of Examiners filed a motion with the Board of Examiners seeking interlocutory review of the ALJ's Order. On January 19, 2006, the Board of Examiners granted interlocutory review, and, on January 30, 2006, it reversed the ALJ's Order. In doing so, the Board of Examiners observed that, under the regulations promulgated by the Office of Administrative Law, depositions are only directed for good cause, and it concluded that Ms. Kandell had "made no compelling argument that she cannot solicit information from Livengood during the hearing itself, which was scheduled to commence four days after the deposition." Board of Examiners Order of Interlocutory Review, January 30, 2006. The Board of Examiners also determined that the expense of compelling Ms. Livengood to appear from her home in Florida four days before the hearing at which she was to be a witness further militated against compelling her deposition. The Board of Examiners further noted that that there was no evidence that Ms. Kandell had sought to gather the information through less intrusive methods.

On February 6, 2006, Ms. Kandell filed a motion with the State Board of Education seeking interlocutory review and reversal of the Board of Examiners' Order. After careful consideration of the arguments presented by the parties, we grant Ms. Kandell's motion and reverse the Board of Examiners' determination.

The Order to Show Cause issued by the Board of Examiners is based solely on the allegations made by Ms. Livengood. When Ms. Kandell sought to obtain information

relating to the alleged incidents, the Board of Examiners responded that the information sought was not in its possession or control. Although N.J.A.C. 1:1-10.2(a) provides for discovery through written interrogatories, production of documents and requests for admissions, these methods of discovery may be addressed only to a “party” to the matter. Id. Since Ms. Livengood is not a party to this matter, Ms. Kandell could not obtain the information she sought from Ms. Livengood by invoking N.J.A.C. 1:1-10.2(a). Moreover, while N.J.A.C. 1:1-10.2(b) allows any party to request an informal nontranscribed meeting with witnesses for another party, “[s]uch meetings are voluntary and cannot be compelled.” In fact, counsel for Ms. Kandell requested an informal meeting with Ms. Livengood for January 23, 2006, but Ms. Livengood responded by e-mail on January 11 that she was unable to attend.

Again, the Order to Show Cause is based entirely on the allegations made by Ms. Livengood, and Ms. Kandell’s certifications could be suspended or revoked as a result of the proceedings resulting from these allegations. Given that Ms. Kandell’s livelihood and her career as an educator have been placed at risk by Ms. Livengood’s allegations, it is imperative that Ms. Kandell have the opportunity to prepare an adequate defense against those allegations. This requires that she be able to obtain specific information concerning the allegations being made against her prior to hearing. In that the Board of Examiners has indicated in its response to her interrogatories that it does not have the information she is seeking and cannot provide it to her, it is obvious that Ms. Kandell must have the opportunity to obtain the information directly from Ms. Livengood. In view of the circumstances, including Ms. Livengood’s response to counsel’s request for an informal meeting, an Order directing her deposition is

warranted. We therefore conclude that there is good cause for compelling Ms. Livengood's deposition. N.J.A.C. 1:1-10.2(c).

Our conclusion is reinforced by the fact that it appears that Ms. Livengood will be the Board of Examiners' sole witness at hearing. Providing Ms. Kandell with access to the facts relating to the allegations against her prior to the hearing will facilitate disposition of this matter by allowing her to prepare a defense that addresses those facts. Id. Finally, given that the hearing in this matter, which had been scheduled for January 30 and 31, 2006, has been adjourned until July, the deposition can be scheduled so as to avoid undue hardship and to minimize expense. Id. We therefore reverse the determination of the Board of Examiners and direct the Administrative Law Judge to schedule the deposition of Ms. Livengood as provided by N.J.A.C. 1:1-10.2(c).

May 3, 2006

Date of mailing _____