

OAL DKT. NO. EDU 3765-98  
AGENCY DKT. NO. 64-3/98

IN THE MATTER OF THE TENURE :  
HEARING OF ZENA MITCHELL, :  
STATE-OPERATED SCHOOL : COMMISSIONER OF EDUCATION  
DISTRICT OF THE CITY OF NEWARK, : DECISION  
ESSEX COUNTY. :

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The record of this matter, Initial Decision of the Office of Administrative Law (OAL) and the Stipulation<sup>1</sup> and Settlement Agreement have been reviewed. Initially, the Commissioner notes that once tenure charges are certified to him, such charges may be withdrawn or settled only with his approval. Pursuant to *N.J.A.C. 6A:3-5.6(a)*, any proposed withdrawal or settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled, *In re Cardonick*, 1990 *S.L.D.* 842, 846. Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement, since he cannot be satisfied that it meets the *Cardonick* standards for settlement of tenure matters.

Here, respondent, a tenured teacher, is charged with unbecoming conduct by virtue of her alleged engagement in repeated, inappropriate and unjustified physical contact with students under her care; her failure to attend required training relating to effective student

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<sup>1</sup> The Stipulation, although not appended to the Initial Decision, was referenced therein. It is made a part of the Commissioner's decision.

techniques or crisis intervention; and her failure to properly supervise her students. (Stipulation at 1) The District now affirms that:

[it] does not believe that it can sustain its burden of proof in this tenure proceeding. The settlement of this matter under the proposed terms could save the District and the public substantial legal fees which would be necessary to proceed with this matter and would protect the District from the possibility of a substantial jury verdict, including punitive damage. (Stipulation at 6)

Thus, the Agreement provides, in part, that respondent shall dismiss her civil claim against the District and submit a letter of resignation on the date she receives “approval and confirmation from the Division of Pension and Benefits that her service credits have been purchased.” (*Id.* at 5) The District has agreed, *inter alia*, to withdraw its charges against respondent; reimburse her for salary and pension contributions lost while she was suspended without pay from March 15, 1998 until September 15, 1998; continue to pay her salary and make applicable salary contributions on her behalf until she receives approval and confirmation from the Division of Pension and Benefits that her service credits have been purchased; pay respondent a lump sum of \$100,000 to be applied to the purchase of such service credits; pay applicable health insurance premiums, if respondent so elects, for 18 months after the effective date of her resignation and retirement; remove any reference to her 1997-98 increment withholding or tenure charges from her file; and respond to any request for a reference for respondent by providing only the dates of her employment and her salary upon termination of employment. (*Id.* at 5, 6)

It is clear that where charges are made against any tenured employee of a district, the Commissioner anticipates that the charges are fully investigated and evaluated, vis-a-vis the evidence thereto, prior to the district bringing the weight of the legal process down on the teaching staff member:

Certification of tenure charges by a [district] is predicated on the [district's] belief that the charges \*\*\* and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. *N.J.S.A. 18A:6-11*.

On the basis that the [district] believes the teacher is unfit, it makes the commitment to expend its monetary resources, provide [district] personnel, and hire legal counsel to obtain relief; *i.e.*, dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. *Where it is in the public interest to fully determine the issues, a plenary hearing is required.* (emphasis added) (*Cardonick* at 850)

Notwithstanding the parties' bare assertion that this settlement protects the public's interest, the Commissioner disagrees. In tenure matters such as this, where a teaching staff member loses tenure and/or is dismissed for inefficiency, incapacity, conduct unbecoming or other just cause, the case is forwarded to the State Board of Examiners for a determination as to possible revocation or suspension of the teaching staff member's certificate.<sup>2</sup> Upon such referral, the State Board of Examiners "shall determine by public vote whether or not the offense [*as proven*] is of such a nature as to warrant revocation or suspension consideration, or dismissal of the case." (emphasis added) (*N.J.A.C. 6:11-3.6*) Therefore, even if the agreement had properly acknowledged respondent's awareness of the Commissioner's duty to refer this matter to the State Board of Examiners pursuant to *N.J.A.C. 6:11-3.6*, absent any factual findings on the record with respect to the specific allegations, and noting that respondent continues to dispute the most serious allegations, the Commissioner cannot find that the public good shall be served. The Commissioner underscores that:

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<sup>2</sup> The Commissioner notes that there is no indication in the proposed agreement that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C. 6:11-3.6*, to refer tenure determinations for possible revocation of certificate.

the mere fact that one of the terms of a proposed settlement \*\*\* calls for the teaching staff member's resignation does not in and of itself assure [the Commissioner] that the *Cardonick* standards have been met because concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.\*\*\* (*In Re Robert Barnes Driscoll, Board of Education of Cape May County Vocational-Technical School District, Cape May County*, November 10, 1999, Slip Opinion at 5)

Furthermore, the Commissioner observes that respondent's resignation from the District is essentially contingent upon action to be taken by the Department of Treasury, Division of Pensions and Benefits. (Settlement Agreement at 3) Recognizing that any settlement agreement effectuated by parties to a dispute must be fully dispositive of all issues in controversy so that the agreement may, upon the Commissioner's approval, be deemed a final decision, *N.J.A.C. 1:1-19.1*, the Commissioner cannot approve a settlement where a material term, such as respondent's resignation, is dependent upon the satisfaction of conditions *by another agency*, and where the parties make no provision for that condition's nonoccurrence. In this connection, the Commissioner further notes that the proposed agreement provides no explanation of how the \$100,000 lump sum payment to respondent for the purchase of her service credits is consonant with the public's interest, or more specifically, how this particular sum was calculated.

Next, with respect to the term wherein the District agrees to respond to any request for a reference for respondent with only the dates of her employment and her salary upon termination of employment (Settlement Agreement at 5), the Commissioner cautions that although the District is not specifically required to state publicly the reasons for separation, it must make such information available upon request, pursuant to Executive Order No. 11 (1974). This Order states, in pertinent part, that the following information be public:

- a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation from government service*

*and the reason therefor*; and the amount and type of pension he is receiving;

- b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released. \*\*\* (emphasis added)

The Commissioner cannot sanction terms in a settlement that would infringe in any way on the right of the District to be fully forthcoming in responding to any inquiries that might arise concerning respondent's employment with the District. *See, e.g., John Salsberg v. Board of Education of the Town of Boonton, Morris County*, decided by the Commissioner May 11, 1989.

Finally, with respect to the parties' confidentiality clause in term nine of the proposed agreement (Settlement Agreement at 6), the Commissioner stresses that although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or, for that matter, any other individual to such confidentiality provision. The Commissioner's decision in this matter is a public record.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra*.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for revision of the settlement documents consistent with this decision, which revisions shall specify that respondent *will not* oppose proceedings before the State Board of Examiners pursuant to *N.J.A.C. 6:11-3.6*. However, if the parties are unwilling or unable to reach accord on a modified agreement for

submission to the Commissioner, the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: October 16, 2000

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<sup>3</sup> 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.