59-06 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu00213-05_1.html)

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LEWIS C. SHINKLE, JR.,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board sought to recover salary and benefits paid to respondent while he was suspended pending resolution of both criminal and tenure charges based on allegations of sexual misconduct with a student. Respondent had received salary and benefits totaling $312,347.46 from the date of his suspension in May 1997 until tenure charges were sustained by the Commissioner in August 2004. Respondent filed a counterclaim seeking indemnification for expenses he had incurred while defending against a civil suit and the criminal charges that were dismissed. The parties filed cross motions for summary decision.

The ALJ found that: 1) respondent withheld records which would have quantified set-off income that respondent had received from substituted employment during his period of suspension; 2) respondent's failure to provide requested records pursuant to *N.J.S.A.* 18A:6-14 warranted an adverse inference concerning the scope of his outside earnings; and 3) respondent is therefore obligated to pay full restitution of all income received from petitioner during his suspension. The ALJ also found that respondent's motion for indemnification is without merit, as the criminal and civil charges against respondent did not arise from the performance of his duties as a teacher. Thus, the ALJ concluded that the petitioner is entitled to recoup $312,347.46, and that respondent is not entitled to indemnification.

The Commissioner concurs with the determinations of the ALJ, and adopts the Initial Decision, with supplementation, as the final decision in this matter. In so deciding, the Commissioner emphasizes that: the amount of respondent's "substituted" income during the period of his suspension is clearly relevant to the application of *N.J.S.A.* 18A:6-14 and was not independently ascertainable without respondent's W-2 forms; respondent did not meet his burden to show that his substitute earnings were less than the total amount paid out by petitioner; respondent's failure to produce records warrants the inference that they are unfavorable to respondent's position; and the conduct which precipitated the criminal and civil proceedings against respondent – engaging in sexual relations with a minor – clearly did not arise from the duties of his employment. The Commissioner dismisses respondent's counter-claim, and respondent is ordered to pay petitioner $312,347.46.

February 9, 2006

OAL DKT. NO. EDU 213-05
AGENCY DKT. NO. 436-12/04

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LEWIS C. SHINKLE, JR.,	:	DECISION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's replies to the exceptions were fully considered by the Commissioner of Education (Commissioner) in reaching her determination.

Pursuant to *N.J.S.A.* 18A:6-14, petitioner seeks the recoupment of seven years of salary and payments in lieu of benefits that it paid respondent during the pendency of tenure charges which were sustained in a prior proceeding (the tenure case). Respondent counterclaims for indemnification for attorney fees and costs incurred in defending against criminal charges and civil litigation that arose from the same set of facts which triggered the tenure charges. The matter was decided in the OAL by way of cross motions for summary judgment. For the reasons which follow, the Commissioner herein adopts the findings and conclusions in the initial decision, as supplemented herein.

The record reveals that on May 5, 1997, upon receipt of allegations that respondent had had sexual relations with a 16-year-old student between February 28 and May 1 of 1997, petitioner suspended respondent with pay. On November 25, 1997, after the conclusion

of a local criminal investigation, petitioner instituted tenure charges against respondent. The tenure matter was held in abeyance while county and State criminal proceedings progressed to their conclusion in November 2000. The tenure charges were ultimately decided on August 19, 2004, when the Commissioner adopted the findings and determinations of the Administrative Law Judge (ALJ), and ordered that respondent be dismissed from his teaching position for unbecoming conduct.

The ALJ in the tenure case found that during the 1997/1998 school year respondent had been employed by petitioner as a social studies teacher at Nottingham High School. He had also served as the yearbook advisor and as the stage crew manager for the annual school play. A sixteen-year-old eleventh grader had served as assistant stage manager for the play. This student reported that on February 28, 1997 respondent had initiated an affair with her by asking her to accompany him to the school's audio-visual room to get extension cords, and initiating sexual contact after finding the cords. Later that evening respondent invited her into the music room, where he pulled her onto his lap and rubbed her back.

After a few more meetings the two engaged in sexual intercourse in a number of locations in the school, including the girls' locker room, respondent's classroom, the yearbook room, the audio-visual room, and a loft above the janitor's closet; one encounter occurred in the respondent's home. The student kept a diary with reflections on these events, which diary was entered into evidence as P-55 at the tenure hearing.

On one occasion in the loft above the janitor's closet, the student and respondent had sexual relations while leaning against a ladder. Testing of semen on the ladder conclusively identified respondent as the donor. In addition, the chairperson of respondent's department at the high school, who was friendly with respondent, testified that after respondent had been

suspended, he had asked this friend to go to the loft with cleaning supplies and wipe away any ejaculate that might be present. The ALJ, three counsel and an assistant principal visited the loft and found it large enough to accommodate the alleged activities.

Other school employees reported seeing respondent and the student, after hours, exiting the darkened and locked yearbook room, with respondent's undershirt hanging from under his shirt, and his belt hanging loosely. In addition, the high school principal came into possession of a spiral notebook, entered as P-72 at the tenure hearing, in which the student and some of her friends discussed her relationship with respondent.

It is undisputed that from respondent's May 5, 1997 suspension to his August 19, 2004 dismissal, petitioner paid respondent full salary and payments in lieu of benefits totaling $312,347.46. Petitioner maintains, and respondent does not contradict, that the salary petitioner paid to respondent during his suspension included salary increases.

In his answer to the petition in the present case, respondent admits that between the date of his suspension and the date of his dismissal he realized "income, salary, wages, and/or other remuneration from sources other than and in addition to the salary/or other funds paid to him by" respondent. Petitioner maintains that under *N.J.S.A.*18A:6-14, petitioner is entitled to recoup this remuneration from respondent, up to the sum of $312,347.46. There is correspondence in the record indicating that in a telephone conference prior to November 15, 2005, the ALJ had asked the parties to submit a joint stipulation regarding the amount of salary that respondent had received for the other employment during his suspension. The same correspondence, from petitioner's counsel to the ALJ, stated that the parties were collecting the information. A subsequent letter from respondent's counsel advised the ALJ that

respondent's W-2 forms would not be forthcoming because respondent had not forwarded them to counsel.

There is no dispute that respondent was the subject of local and state criminal investigations into the same facts that underlay the tenure charges, and that he was indicted by a State grand jury on March 22, 1999, on nine counts of sexual assault, three counts of criminal sexual contact, one count of official misconduct, one count of tampering with witnesses and informants and one count of hindering apprehension or prosecution. *State v. Lewis C. Shinkle, Jr.,* State Grand Jury No. SCJ-409-99-10. It is also undisputed that the indictment was dismissed on November 6, 2000, after the State withdrew its opposition to respondent's motion to dismiss. Petitioner points out that the order dismissing the indictment was without prejudice; however, respondent maintains that a dismissal of the criminal charges with or without prejudice entitles him to indemnification. There are no details in the record about the civil litigation.

The ALJ in the present case agreed with petitioner that under *N.J.S.A.* 18A:6-14, it is entitled to deduct from salary paid to respondent -- while he was suspended -- any sums he received by way of pay or salary from any substituted employment assumed during the period of suspension. In so doing, the ALJ relied upon *Ernest E. Gilbert v. Board of Education of the Township of Willingboro, Burlington County,* 1982 *S.L.D.*, Vol. 1, p.674-686. The ALJ further determined that respondent's unexplained choice to decline disclosure of the amount of his outside earnings, created the adverse inference that the earnings equaled or exceeded the payments he received from petitioner during his suspension. (Initial Decision at 3)

As to respondent's claim for indemnification, the ALJ noted that even though the indictment against respondent had been dismissed, the tenure proceeding established that respondent engaged in sexual relations with a minor student. He opined that *dicta* in *Bower v.*

Board of Education of the City of East Orange, 149 *N.J.* 416 (1997) denotes that any proofs of wrongdoing, even findings in a tenure proceeding precipitated by the same facts upon which a criminal or civil proceeding is based, are cause for a fact-finder to deny indemnification for legal fees incurred in the defense of the criminal or civil action. He further cited *Nicholas A. Ciufi v. Board of Education of the Township of Irvington*, Docket No. EDU 7548-94, 96 *N.J.A.R.* 2d (EDU) 980 (Initial Decision), adopted by the Commissioner, May 15, 1998, for the same proposition. (*Id.* at 3-4)

Both petitioner's claim for recoupment of salary paid to the respondent during his suspension, and respondent's counterclaim for indemnification for legal fees incurred by respondent in defending against criminal charges, warrant discussion supplemental to the initial decision.

I. Recoupment of Salary Paid to Respondent During His Suspension

Nowhere in his exceptions does respondent refute petitioner's claim that *N.J.S.A.*18A:6-14 mandates petitioner's recoupment of remuneration paid to respondent during his period of suspension, up to the amount that respondent earned from employment outside of the school district. He contends only that he should not have to reimburse <u>all</u> of the $312,347.46 that petitioner paid him. More specifically, he argues that it was arbitrary and unreasonable for the ALJ to conclude that his failure to produce his W-2 forms created the inference that his outside earnings were at least equal to what petitioner paid him during the period of suspension. (Respondent's Exceptions at 8-9)

Respondent characterizes the situation as a "dispute of material fact between parties to a summary judgment motion" and, citing *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995), asserts that "the finder of fact is obliged to conduct a fact hearing in

order that the relevant facts may be found." (Respondent's Exceptions at 8) In addition, respondent maintains, citing *Ulman v. Hartford Fire Ins. Co.,* 87 *N.J. Super.* 409, 415 (App. Div. 1965), that

> [t]he production of tax returns should not be ordered unless it clearly appears that they are relevant to the subject matter of the action or to the issues raised thereunder, and further, that there is a compelling need therefore because the information contained therein is not otherwise readily obtainable.

Also, according to respondent, if the ALJ had wished to obtain respondent's tax records, he should have issued a subpoena for them. (*Id.* at 9)

The Commissioner rejects respondent's exceptions as meritless. As regards the appropriateness of requesting respondent's tax documents, the amount of respondent's "substituted" income was clearly relevant to the application of *N.J.S.A.* 18A:6-14 and was not independently ascertainable by petitioner or the ALJ. It appears that only respondent's W-2 forms were sought, and that they were the most reliable way of establishing the total outside income. Respondent's privacy was not unreasonably implicated. Further, the ALJ specifically requested the information from respondent via telephone conference, allowed the respondent ample time to produce it, and apparently received no objections about the production of the information prior to submission of his exceptions to the initial decision.

Nor does respondent's argument concerning summary judgment standards help him. To the extent that respondent contends that there is a dispute of fact, he is obliged to provide the basis for that contention. It is undisputed that he earned outside income. There is no "dispute" as to how much, because petitioner cannot access that information and respondent has refused to provide it. Petitioner has sustained its burden to show that there is substitute income to recoup, and that the salary paid to respondent during the period of suspension was

$312,347.46. Respondent has not met his burden to show that his substitute earnings were less than that amount.

Further, the failure to produce records warrants the inference that they are unfavorable to respondent's position. *Wild v. Roman*, 91 *N.J. Super* 410 (App. Div. 1966); *Hickman v. Pace*, 82 *N.J. Super* 483 (App. Div. 1964). The prerogative to draw such an inference is not limited to a jury; the trier of fact in a non-jury case may also do so. *Robinson v. Equitable Life Assur. Soc. of United States*, 126 *N.J. Eq*. 242 (E. & A. 1939); *Series Publishers v. Greene*, 9 *N.J. Super* 166 (App. Div. 1950). More generally, a [party] is not entitled to benefit from a strategic decision to withhold evidence. *See, e.g., State v. Drisco*, 355 *N.J. Super*. 283, 290-91, (App. Div. 2002), *certif. denied*, 178 *N.J.* 252 (2003).

Accordingly, it was entirely reasonable for the ALJ to conclude that petitioner was entitled to recoup the entirety of what it paid respondent during the period of suspension. Because the Commissioner adopts the ALJ's conclusion that petitioner is entitled to recoup the full amount that it paid respondent, the issues of recoupment of increments and recoupment of remuneration paid to respondent while he was under indictment are moot.

II. Indemnification for Legal Fees.

In his exceptions, respondent challenges the ALJ's determination that respondent is not entitled to indemnification for the expenses of defending criminal charges and a civil suit. He does not dispute that the controversy turns on an analysis of *N.J.S.A.*18A:16-6 and *N.J.S.A.* 18A:16-6.1, and related case law, but disagrees with the ALJ's application of that law to the facts of this case.

N.J.S.A. 18A:16-6 states in pertinent part:

Indemnity of officers and employees against civil actions

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education . . . , for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment . . . , the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom . . . . (Emphasis added.)

Similarly, *N.J.S.A.* 18A:16-6.1 states in pertinent part:

> **Indemnity of officers and employees in certain criminal actions**
>
> 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. (Emphasis added.)

Although *N.J.S.A.* 18A:16-6.1 does not expressly refer to acts and omissions arising out of and in the course of the performance of the duties of [a school employee's] office, position or employment, the phrase "any such act or omission" is interpreted to refer back to the above underlined language set forth in *N.J.S.A.* 18A:16-6. In other words, respondent may not be indemnified for his criminal defense expenses unless the criminal charges related to acts or omissions arising out of and during the course of the performance of his duties. *See, e.g., Scirrotto v. Warren Hills Bd. of Educ.,* 272 *N.J. Super.* 391 (App. Div. 1994).

In his exceptions, respondent contends that the ALJ erred in finding that his actions did not arise from the performance of his duties. He argues that the charges "arose in the course of respondent's employment and within the period of time and at the place where he was an employee of the board of education, where he was expected to be fulfilling his duties and responsibilities." (Respondent's Exceptions at 1-2)

Respondent maintains that the criminal charges were dismissed for lack of evidence, that there is consequently no evidence in the criminal record of any conduct other than respondent's presence in the school and performance of his lawful duties, and that petitioner is therefore obliged to indemnify him for his criminal defense. Addressing *dictum* from *Bower v. Board of Educ. of the City of East Orange*, 149 *N.J.* 416, 43 1-33 (1997) -- upon which the ALJ relied to conclude that fact-finding from a tenure hearing can be used to bar an employee's claim for indemnification of criminal defense expenses -- respondent argues that since there was no evidence of wrongdoing in the criminal proceeding, he should be indemnified regardless of the existence of proofs of his wrongdoing brought to light in other proceedings. (*Ibid.)*

Respondent concedes that there is precedent for adverse fact findings in administrative proceedings, such as tenure hearings, to serve as bars to indemnification of defense expenses in related criminal matters. However, he urges that the order of disposition of criminal and administrative proceedings arising from the same conduct can be determinative of whether fact-finding in the administrative proceeding can be used to defeat an indemnification claim for defense costs in the criminal action. Thus, respondent distinguishes *Ciufi v. Board of Education of the Township of Irvington*, *supra*, in which the Commissioner found that fact-finding in a tenure hearing precluded indemnification of defense expenses that the respondent in that case incurred during a criminal trial based on the same conduct that was addressed in the tenure proceeding. Respondent suggests that the administrative fact-finding in *Ciufi* could defeat the respondent's claim because the tenure hearing in that case preceded the criminal proceeding, but that the administrative fact-finding in this case may not defeat respondent's indemnification claim because the tenure hearing succeeded the criminal proceeding. (*Id.* at 3)

*N.J.S.A.*18A:16-6.1 and related case law articulate two conditions that a school employee seeking indemnification must satisfy. First, the charges against the employee must be dismissed or otherwise result in a favorable disposition. Second, and additionally, the charges must be triggered by acts or omissions arising out of and in the course of the performance of the employee's duties.

In its reply exceptions, petitioner argues that the first condition is not satisfied by respondent's dismissal without prejudice. *Ciufi v. Board of Education of the Township of Irvington, supra,* is instructive in this regard. In that case, in which the Commissioner adopted both the ALJ's findings of fact and his conclusions of law, the ALJ discussed the significance of a "dismissal without prejudice" of an indictment:

> Since a second grand jury is free to return a new indictment, the Board argues that Ciufi has not been "determined innocent, or exonerated" of the criminal charge made against him.
>
> . . . .
>
> [However,] currently there are no charges pending against Ciufi.
>
> . . . .
>
> Often the failure to obtain an indictment is a reflection of the weakness of the State's case. In a somewhat different context, the Appellate Division held that an administrative dismissal of a criminal complaint constitutes "a favorable termination of a criminal proceeding for purposes of a malicious prosecution action." *Rubin v. Nowak,* 248 *N.J. Super.* 80, 84 (App. Div. 1991). Speaking in terms of "a presumption of favorable termination," the court found nothing in the [criminal] record to suggest that the prosecutor acted for any reason other than a careful determination of plaintiff's innocence.
>
> *Ciufi, supra,* at 5-6.

Considering the foregoing, the Commissioner is reluctant to find that a dismissal without prejudice cannot be regarded as a favorable disposition. However, this issue need not be reached, because the Commissioner agrees with the ALJ and petitioner that the facts of this case

do not satisfy the second condition precedent to indemnification for respondent's costs of defending against criminal charges and a civil lawsuit. More specifically, respondent has failed to show that the conduct which precipitated the criminal and civil proceedings arose from the duties of his employment.

Much of the conduct that precipitated the criminal and tenure charges may have taken place on the school premises, and some of it may have taken place within normal school hours, or during hours that were supposed to be devoted to school-sponsored clubs and organizations for which respondent served as advisor or manager. That does not, however, qualify the conduct as the performance of the duties of respondent's employment and, consequently, does not qualify the criminal action against respondent as an action brought "for any act or omission arising out of or in the course of the performance of the duties of" his employment. Clearly, engaging in sexual relations with a minor cannot be characterized as conduct related to respondent's teaching duties. Respondent's behavior was not a reaction to a pedagogical event or situation; was driven purely by personal motives unrelated to his job; and, in fact, was antithetical to the goals of education.

Further, as regards indemnification claims, there is school law precedent that conduct that has been substantiated as unbecoming in a tenure hearing does not qualify as conduct which arises out of a school employee's duties, for purposes of the indemnification statute. In *Bower v. Board of Educ. of the City of East Orange, supra,* the Supreme Court stated: "Had the local board seen fit to institute [] dismissal proceedings, we assume that any evidence adduced at the hearing addressing those charges would have been material to the proceeding instituted by Bower for indemnification of his legal expenses [defending criminal charges that were dismissed]." *Bower, supra,* at 433.

Subsequent to *Bower*, in *Ciufi, supra,* the Commissioner adopted the ALJ's determination that that case presented the precise situation alluded to in the *Bower dictum* set forth above. In *Ciufi,* the Irvington Board filed tenure charges and, after a trial-type hearing, including full opportunity for discovery, cross-examination and subpoena of witnesses, the Commissioner made findings that Ciufi sexually assaulted a student. A criminal proceeding precipitated by the same conduct that triggered the tenure hearing was eventually dismissed. Ciufi brought a subsequent proceeding to obtain indemnification. In this latter proceeding the ALJ concluded (and the Commissioner concurred) that "to sustain the tenure charges, the Commissioner must necessarily have determined that Ciufi's improper conduct occurred outside the regular course of his teaching duties." *Ciufi, supra*, at 6. Thus,

> [i]t would clearly be incongruous for the Commissioner to uphold the board's dismissal of Ciufi for unbecoming conduct, while ordering the board to pay his counsel fees for defense of criminal charges arising out of the same transaction. Rather, as the Supreme Court anticipated, the evidence adduced at the tenure hearing must be regarded as "material" to the indemnification proceeding. *Bower*, at 433. Accordingly, the Commissioner's prior determination that Ciufi committed a sexual assault against his student is binding on the parties and dispositive of Ciufi's claim for indemnification of counsel fees.
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> *Ciufi, supra,* at 7. [1]

For purposes of an indemnification determination, there is no significant difference between *Ciufi, Yatauro,* and the present case. The Commissioner found in the tenure proceeding that respondent had sexual relations with his student, a minor. This is clearly not in his job description. It is irrelevant that the disposition of the tenure matter came after the

[1] In *Board of Education of the Township of Lacey v. Brian Yatauro*, EDU 00793-99, the ALJ similarly determined, and the Commissioner concurred, that "where a tenured employee seeks to recover salary which was withheld after an indictment from which the employee has obtained a favorable disposition, but where the employee has subsequently been proven in a tenure proceeding to have committed the same misconduct which was the essential subject of the criminal charges, the employee may not recover salary withheld during the pendency of the indictment."

dismissal of the criminal charges; the Commissioner is now asked to order indemnification, in a case where it has been established that respondent was acting outside the duties of his employment. To grant respondent's counterclaim would be to contravene statutory and common law, and defy common sense.

Accordingly, the Initial Decision of the OAL, as supplemented herein, is adopted as the final decision in this matter. Respondent's counter-claim is dismissed and respondent is ordered to pay petitioner $312,347.46 as reimbursement for salary and payments in lieu of benefits that petitioner paid him during his period of suspension from employment.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 9, 2006

Date of Mailing: February 9, 2006

[2] This decision 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.*