

DANIEL MC HARRIS, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF : DECISION
 NORTH BRUNSWICK TOWNSHIP, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner, formerly employed by the respondent Board as an In-School Suspension supervisor, claims entitlement to indemnification pursuant to N.J.S.A. 18A:16-6.1 for defense of criminal charges of official misconduct and sexual harassment relating to four North Brunswick High School students, for which he was acquitted. Petitioner submitted itemization of fees totaling \$310,818.50.

The ALJ found, *inter alia*, that: the alleged acts arose out of and in the course of the performance of petitioner's duties; a second chair at trial was reasonable under the circumstances of this case to assure appropriate trial preparation; petitioner is entitled to reimbursement of reasonable legal fees directly related to his defense against criminal charges; petitioner's itemization of fees incorporated legal fees for other matters not associated with the criminal charges; certain itemized administrative expenses are not subject to indemnification; certain itemized billing entries related to legal research performed by lead counsel or second chair for the petitioner are deemed unreasonable and therefore not subject to indemnification, or are subject to indemnification at the lower hourly rate of a law clerk. Based on the foregoing, the ALJ adjusted the total amount of petitioner's itemized fees to reflect reasonable fees directly related to his defense against criminal charges, and issued an Initial Decision awarding petitioner \$174,593.00 in legal fees and \$9,103.05 in costs.

Upon an independent and comprehensive review of the record in this matter, the Commissioner adopts the Initial Decision as the final decision in this matter, and directs the respondent Board to pay petitioner criminal charge defense indemnification of \$174,593.00 in legal fees and \$9,103.05 in costs.

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| <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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March 7, 2006

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner requested and was granted an extension of time within which to file exceptions to the Initial Decision. Primary and reply exceptions of both parties were timely filed within the intendment of *N.J.A.C. 1:1-18.4*, and all submissions were fully considered by the Commissioner in reaching her determination herein and are presented, in relevant part, below.

The Board first excepts to the Administrative Law Judge's determination that the two-prong test outlined in *Bower, et al. v. Board of Education of the City of East Orange*, 149 *N.J.* 416 (1997) was satisfied, thereby entitling petitioner to indemnification for fees incurred in defense of the criminal charges against him. Although conceding satisfaction of one prong, that the underlying criminal action resulted in a favorable disposition or dismissal, it vigorously argues that petitioner has not met the second equally important prong, *i.e.*, that the acts or omissions which form the basis of the criminal charges arose out of or occurred during the course of his performance of his duties and responsibilities. This assertion is apparently based on the fact that because two of the alleged victims, A.D. and L.L., were not assigned to In-School Suspension (ISS) and were not, therefore, students of petitioner, the majority of the underlying acts which gave rise to the criminal

charges cannot be viewed as arising from his employment duties and responsibilities. (Board's Exceptions at 1-2)

In reply, petitioner points out that in *Bower, supra*, the Supreme Court found that dismissal of an indictment necessitates the assumption that the employee committed no acts other than to perform the duties of his employment. The Court further concluded that "where the record in the criminal proceeding reveals no evidence of any conduct other than the employee's performance of his lawful duties, the factual basis for the indictment becomes inextricably linked with the employee's duties as a teacher. *Id.* at 431. (Petitioner's Reply Exceptions at 14) Here, petitioner avers, the criminal charges were tried to conclusion, petitioner testified under oath denying that the alleged acts had occurred and the result was an acquittal on each and every charge. Petitioner further posits that trial testimony establishes that all alleged acts supposedly took place in the ISS classroom during school hours. Consequently, he argues, the evidence is more than sufficient to establish the requisite nexus between the charges and his employment. (*Id.* at 14-15)

The Board next objects to the ALJ determination that the \$265 "blended rate" billed by petitioner's counsel was reasonable. It advances that, while in no way denigrating the skills and professionalism of associate Mr. Montenegro – given that he was wholly inexperienced in criminal actions conducted in Superior Court – the billing of his time at a rate of \$265 an hour was "grossly inappropriate". (Board's Exceptions at 4)

Responding, petitioner urges that the ALJ's conclusion in this regard was wholly appropriate. He explains that – pursuant to a retainer agreement with Wilbert, Montenegro & Thompson – petitioner was billed at a flat "blended rate" of \$265 an hour for the services of senior partner Wilbert, a criminal defense expert, and associate Montenegro, an education law specialist. Such rate was calculated by averaging the hourly rates of each of these individuals, \$330 and \$200, respectively. Petitioner avers that the record substantiates that this billing method was utilized because of the interplay of criminal and educational law issues, necessitating collaborative work

between these two attorneys. Petitioner points to hearing testimony elicited from attorney “experts” which, he contends, confirms the reasonableness of such an arrangement under the circumstances. Moreover, he proposes, the use of this “blended rate,” in light of the billed hours disallowed in the Initial Decision, operates to reduce the Board’s indemnification obligation. Such is the case because the majority of disallowed hours were education law related, performed by the associate, while the bulk of the allowed hours were performed by senior partner Wilbert. (Petitioner’s Reply Exceptions at 17-19)

Petitioner objects to the ALJ’s summary denial of his claim for reimbursement of counsel costs and fees related to the prosecution of the instant indemnification action. Such denial, he asserts, was improperly based on *N.J.S.A. 18A:16-6(a)*, which prohibits reimbursement for the defense or appeal of disciplinary actions against Board employees. The instant action, petitioner submits, can in no way be deemed a disciplinary action or appeal thereof. In support of his entitlement to these costs, petitioner cites to a number of Civil Rights cases which, he contends, stand for the proposition that when an award of counsel fees is statutorily authorized, the reasonable costs associated with prosecuting the claim should be included in the award. Furthermore, he argues, denial of these costs would operate to “encourage public entities to refuse to comply with their obligations pursuant to *N.J.S.A. 18A:16-6.1* by utilizing the costs and time associated with prosecuting an indemnification claim to thwart a Petitioner’s right pursuant to the statute.” (Petitioner’s Exceptions at 1-3)

The Board advances that petitioner’s claim in this regard is supported by no education law authority. The Civil Rights cases cited by petitioner in support of his entitlement to recovery here are of no precedential benefit to him. Counsel fees are a stated element of damages to the victim pursuant to the statutes involved in Civil Rights actions. Such statutes, it professes, are “remedial in nature and intended to compensate an injured party in all aspects of loss including compensatory, punitive damages and counsel fees incurred.” In contrast, *N.J.S.A. 18A:16:6.1*, on its

face, specifically enumerates that an individual be reimbursed for “reasonable counsel fees and expenses of the original hearing or trial and all appeals,” and provides no authorization whatsoever for any other consequential costs which may be incurred. Neither has petitioner cited to any Rule of Court or case law interpreting this particular provision which would support his position. As such, the Board argues, “[i]n the absence of a rule, statute or common law right to reimbursement, the counsel fees incurred in pursuing the claim for indemnification are clearly not reimbursable.” (Board’s Reply Exceptions at 1-2)

Petitioner next charges that in awarding him legal fees and costs on Page 13 of her decision, the ALJ neglected to award him interest. He contends that his June 23, 2001 Petition of Appeal filed in this matter requested such an award and, now that he has successfully established his entitlement to indemnification, he “should be awarded by the Commissioner prejudgment interest inasmuch as the Board’s denial of the Petitioner’s monetary claim for almost five years was taken in deliberate violation of *N.J.S.A. 18A:16-6.1* ***as well as an award of postjudgment interest if payment is not made within 60 days of December 9, 2005.” (Petitioner’s Exceptions at 4-5)

The Board submits in reply that this case is not one which warrants the imposition of interest. Prejudgment interest should only be awarded in circumstances where failure to pay a monetary claim is done in “bad faith” or found to be in “direct violation of a statute or rule.” Here, there can be no credible assertion made that the Board acted inappropriately in compelling petitioner to substantiate his claim for reimbursement prior to compensating him. As to post-judgment interest, the Board proffers that such an award is premature since the exact amount of any award will not be known until the Commissioner of Education rules on this matter. (Board’s Reply Exceptions 2-3)

Upon an independent and comprehensive review of the record – which includes transcripts of the hearing conducted at the OAL¹, as well as the full transcripts of the criminal trial²,

¹ OAL hearing in this matter was conducted on January 15 and 29, 2003, July 18, 2003, October 1, 2003 and December 9, 2003.

along with the parties' exception submissions and all exhibits – the Commissioner adopts the findings and conclusions of the Initial Decision.

In so determining, the Commissioner initially concurs with the ALJ that petitioner has satisfied the requisite criteria pursuant to *N.J.S.A.* 18A:16-6.1, read in conjunction with *N.J.S.A.* 18A:16-6, and the N. J. Supreme Court's interpretation of these provisions in *Bower, supra*, so as to entitle him to indemnification for legal fees and costs incurred in connection with the criminal charges brought against him. Specifically, the statutory provisions and this case law require 1) that the alleged criminal actions involved acts or omissions arising out of and in the course of the performance of petitioner's duties as an ISS supervisor, and 2) that petitioner received a favorable disposition on the charges. Notwithstanding that it is without question that petitioner received a favorable outcome on adjudication of the criminal charges, the Board challenges petitioner's satisfaction of the prong which requires that such charges arose in the course of petitioner's duties as an ISS supervisor. The Commissioner determines that the record here clearly establishes that there is no evidence – from the criminal charges, which resulted in a full acquittal; the tenure proceedings, which concluded in settlement rather than proceeding to adjudication; nor the instant indemnification action – of any conduct, other than petitioner's presence in the classroom at school performing his classroom duties, which formed the basis of the charges against him. It is noted that the Supreme Court in *Bower, supra*, finding that:

[t]he only 'conduct forming the basis of the charge' that is undisputed is that the alleged events took place in the school during school hours, and while Bower was required to be engaged in performing his duties as a teacher. (at 432)

thus concluded:

[t]here being proof of no underlying act other than Bower's presence in the school and performance of his classroom duties, the indictment

² The criminal trial was conducted on April 4, 5, 9, 10, 11, and 12, 2001.

and its dismissal – unrebutted by any other evidence – clearly satisfied Bower’s burden of proof under the statute.
Bower, supra, at 434.

The Commissioner, therefore, finds that the necessary requirements entitling petitioner to indemnification for the costs of defending the criminal charges against him have been satisfied.

Next, full review of testimony and the specific circumstances existing in this matter persuades the Commissioner that the ALJ correctly concluded that petitioner has met his burden of proof with respect to the “reasonableness” of the use of a blended billing rate and the necessity of a second chair at trial.

With respect to petitioner’s request for counsel fees related to the prosecution of the within indemnification action, as was properly pointed out in the Board’s reply exceptions, while *N.J.S.A. 18A:16-6.1* provides reimbursement for “reasonable counsel fees and expenses of the original hearing or trial and all appeals,” unlike the statutes involved in Civil Rights matters, this education provision provides no authorization for any other consequential costs which may be incurred. Absent express statutory, court rule or contractual authorization for such costs, they are not recoverable. *See State Dept. of Environ Protect. v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983), *Also See Balsley v. North Hunterdon Bd of Educ.*, 117 *N.J.* 434, 442, 443 (1990). Additionally, notwithstanding petitioner’s attempt to categorize work accomplished during the course of the tenure proceedings and appearances in family court as “criminal defense representation,” the Commissioner finds, as did the ALJ, that petitioner’s advances in this regard are unpersuasive. Rather, indemnification for fees and costs of the tenure proceedings is precluded by *N.J.S.A. 18A:16-6*, and the family court appearances are “collateral and unrelated to the criminal charges and not contemplated nor provided for pursuant to *N.J.S.A. 18A:16-6.1*.” (Initial Decision at 5-6)

Finally, the Commissioner declines to grant petitioner’s request for interest in this matter. With respect to pre-judgment interest, the Commissioner concludes that the record before her does not support a finding that the Board’s actions were taken in bad faith or in deliberate violation

of the law (*N.J.A.C.* 6A:3-1.17(c)(1)). As to post-judgment interest, such a request is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders her decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)(2)).

Accordingly, the Initial Decision of the OAL, as expounded on above, is adopted as the final decision in this matter for the reasons articulated therein. The North Brunswick Board of Education is hereby directed to pay petitioner criminal charge defense indemnification of \$174,593.00 in legal fees and \$9,103.05 in costs.³

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2006

Date of Mailing: March 7, 2006

³ The Commissioner's thorough review persuades her that each deduction/reduction made by the ALJ on pages 8-13 of the Initial Decision must be sustained for the reasons clearly explained therein.

⁴ 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.*