#315-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu08618-05_1.html)

IN THE MATTER OF THE TENURE HEARING OF BEVERLY JONES, TRENTON SCHOOL DISTRICT, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

In September 2005, petitioning school district certified tenure charges of insubordination and unbecoming conduct against respondent, a tenured history teacher. Respondent denied the charges, and the matter proceeded to hearing at the OAL in October and November 2006, at the conclusion of which counsel and the judge explored settlement possibilities and a framework for a possible settlement was established. On November 21, 2006, counsel for the Board drafted and sent to respondent a written settlement agreement, and requested – together with counsel for the respondent – adjournment of the additional scheduled hearing dates. Respondent's counsel advised counsel for the Board on November 27, 2006 that respondent accepted the settlement terms as memorialized. On the same date, the Board approved the settlement agreement as drafted. Board counsel notified the judge that an agreement had been reached, and that respondent's attorney had advised that his client had also approved the settlement. Over two weeks later, however, respondent's attorney advised Board counsel by letter that his client would not accept the proposed settlement as written.

The ALJ found that: New Jersey has a strong public policy in favor of settlements; it is not necessary that an agreement to settle litigation be in writing; in the instant matter, the respondent's attorney advised that respondent had approved the draft settlement agreement on November 27, 2006, the Board approved the settlement on November 27, 2006, and the terms of the negotiated and the written agreement were the same. The ALJ concluded that the terms of the draft agreement adopted by the Board on November 27, 2006 constitute the terms of the agreed upon settlement that binds both parties, subject to approval by the Commissioner.

The Commissioner concurred with the findings of the ALJ and adopted the Initial Decision as the final decision in this matter, noting, however, that petitioner's enforcement motion is denied in that it is not within the jurisdiction of the Commissioner to enforce settlements.

August 9, 2007

OAL DKT. NO. EDU 8618-05S
AGENCY DKT. NO. 290-10/05

IN THE MATTER OF THE TENURE HEARING OF BEVERLY JONES, TRENTON SCHOOL DISTRICT, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the "Draft" Settlement Agreement which stands at the heart of this controversy, the Initial Decision of the Office of Administrative Law (OAL), a partial transcript, and both the respondent's exceptions and petitioner's reply exceptions to the Initial Decision have been reviewed.[1] The Commissioner adopts the Initial Decision for the reasons set forth therein, and for the reasons that follow.

On the basis of the facts presented to him at the April 30, 2007 hearing on petitioner's motion to enforce a settlement that petitioner maintains exists concerning tenure charges brought against respondent, the Administrative Law Judge (ALJ) found that such a settlement does exist. More specifically, the ALJ recounted that at the conclusion of tenure proceedings on November 15, 2006, the parties, in his presence, explored settlement possibilities, and a "framework for a possible settlement was arrived at." (Initial Decision, p. 2) According to a January 11, 2007 certification by petitioner's counsel, Thomas W. Sumners, submitted in support of the motion to enforce the settlement, respondent's counsel, Arnold S. Cohen, had advised on November 15, 2006 that respondent would accept the terms of that settlement framework. (January 11, 2007, Certification of Thomas W. Sumners, Jr., #3)

[1] The transcript of the April 30, 2007 hearing states that the first of the two tapes provided to the transcriber was blank. The Commissioner notes that, pursuant to *In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987), any party seeking to challenge an Administrative Law Judge's fact-finding is required to provide relevant portions of the transcript to the agency head.

Sumners' Certification further stated that on November 21, 2006, after memorializing the settlement terms formulated on November 15, 2006, he emailed them to Cohen in the form of a draft settlement agreement. (Sumners Certification, #6) That proposed settlement agreement included a provision requiring respondent to retire effective June 30, 2007. (Sumners Certification, Exhibit B)

The next day, November 22, 2006, Michael T. Barrett, Esq. – an attorney representing respondent in a related proceeding before the New Jersey Public Employment Relations Commission (NJPERC) – wrote to NJPERC withdrawing respondent's charges against petitioner "as part of a global settlement between the parties." (Sumners Certification, Exhibit C) In addition, Sumners certified that on November 27, 2006, Cohen advised him that the terms of the draft settlement agreement emailed to him on November 21, 2006, were acceptable to respondent. (Sumners Certification, #8)

On the evening of November 27, 2006, petitioner voted to accept the terms set forth in the draft settlement agreement. (Sumners Certification, #9) Sumners conveyed the acceptance to Cohen by telephone on the following day, November 28, 2006. (Sumners Certification, #10) The OAL was also advised by telephone and by letter, faxed to the OAL and emailed to Cohen. (Sumners Certification, #11 and Exhibit D)

On December 15, 2006, two and one half weeks after Cohen conveyed respondent's acceptance of the settlement terms and petitioner approved them, Cohen wrote to Sumners stating that his client – the respondent – would not execute the settlement. In the letter, Cohen acknowledged that he had told Sumners that the terms in the settlement agreement approved by the petitioning board of education were acceptable to respondent. (Sumners Certification, Exhibit E)

None of the foregoing facts were disputed by respondent. She agreed, in a January 29, 2007 certification, that she had authorized Cohen to enter into settlement discussions. (Certification of Beverly Jones, #2) However, she stated in the certification that it was her understanding that she "could reject the settlement at any time prior to actually executing the Settlement Agreement." (*Ibid.)* She acknowledged that she "had 'tentatively' agreed to the terms of the agreement." (Jones Certification, #3) However, she related that "after speaking with friends, relatives and clergy, [she] decided not to accept the agreement as written." (*Ibid.*)

At the April 30 hearing, respondent admitted that she had seen the written settlement agreement. (T31) Cohen conceded that before petitioner had voted to ratify the settlement agreement, he had communicated to Sumners that the terms in the written agreement were acceptable to his client. (T12-13)[2] Accordingly, petitioner justifiably relied upon that communication in accepting the terms by formal vote. *See, e.g., Davidson v. Davidson*, 194 *N.J. Super*. 547, 552 (Ch. Div. 1984) ([I]t is the clear policy of our courts to recognize acts by attorneys of the court as valid and presumptively authorized and, unless the contrary appears, it will be presumed that a stipulation was duly authorized, *citing Bernstein & Loubet, Inc. v. Minkin*, 118 *N.J.L*. 203 (E&A 1937)).

Respondent argued at the hearing that since the settlement document was marked 'draft' it was not real. (T44)[3] She stated that her refusal to sign the settlement agreement flowed, among other things, from a reluctance to retire on June 30, and from concerns about protection from retaliation. (T31-32) She suggested that she had articulated those concerns to Cohen, but neither respondent nor Cohen could remember <u>when</u> it was that

[2] The Commissioner notes that Cohen's testimony was not given under oath.
[3] Respondent's testimony was also not given under oath.

respondent had first advised Cohen that she did not wish to settle the case on the terms set forth in the Settlement Agreement. *See, e.g.,* T34; T49-50.

Respondent does not dispute that settlements are favored in New Jersey. However, she argues in her exceptions that her refusal to sign the written settlement agreement was proof of the lack of a meeting of the minds that is necessary to establish an oral contract. While acknowledging that generally, under New Jersey case law, the lack of a formal signed document is not a bar to a conclusion that a contract exists, respondent urges that two facts in this case demonstrate the absence of respondent's consent to the settlement terms.

First, respondent points to Cohen's hearing testimony that he may have said the following to Sumners: 'knowing Beverly, things could change until the agreement is signed.' Sumners recalled no such caution, and no writing containing such language was submitted to the OAL. Respondent relies upon this purported remark as proof that the parties never entered into an agreement. The Commissioner agrees with the ALJ, however, that if, in fact, Cohen made such a remark, it was not a specific message that his client was unhappy with any of the settlement terms proposed in this case, but rather a general 'musing' about respondent's past behavior. Such a musing cannot serve as the basis for concluding that there was no meeting of the minds about the settlement of respondent's tenure charges.

Second, respondent contends – as she did at the hearing – that because the written settlement agreement had the word 'draft' printed at the top and had not yet been approved by petitioner, it was not a final agreement; it could not signify intent to enter into a binding agreement. The Commissioner concludes that to accept such an argument would be to ignore well established precedent.

The 'draft' agreement contained the same terms that the parties had agreed to during their November 15, 2006 negotiations. No material term was changed between the time that Cohen was given the draft agreement and conveyed his client's acceptance of same, and the time that petitioner voted to accept it. And no objections were voiced by respondent or Cohen on November 28, 2006, when Sumners wrote to the ALJ and Cohen advising that petitioner had approved the settlement. Indeed, no objections were raised during the two weeks thereafter.

Thus, on November 27, 2006, there was a meeting of the minds. The holding in *Weichert Co. Realtors v. Ryan*, 128 *N.J.* 427, 435 (1992), upon which respondent relies – *i.e.* that the lack of agreement on essential terms of a contract and lack of intent by all parties to be bound by the agreement terms precludes the establishment of a contract – is inapposite to the present controversy. In *Weichert*, it was found that a contract for a real estate broker's fee did not exist because one of the defendant buyers had made multiple objections to the proposed commission percentage. As a result of those clear objections to an essential term, no contract was formed.[4]

By way of contrast, there was no indication in the present controversy of respondent's discomfort with the retirement provision of the settlement until after the settlement contract was established. The Commissioner refers to the ALJ's recognition that "[a]t the hearing neither Ms. Jones nor Mr. Cohen could recall exactly on what date she had first advised Mr. Cohen that she was not willing to settle the case on the terms that were contained in the written agreement" that she had reviewed. (Initial Decision, p. 4) The only item in the record that sheds light on that issue is the above referenced December 15, 2006 letter from Cohen to Sumners.[5]

[4] The plaintiff broker, however, ultimately received relief based upon the doctrine of quantum meruit.

[5] Respondent's citation to *Dunn v. Elizabeth Board of Education, 96 N.J.A.R.* 2d (EDU) 279, does not help her. In that decision, no facts were presented describing the settlement communications, or lack thereof, between the parties. It was simply disclosed by the ALJ that the Elizabeth Board of Education had voted to approve some

Even where there is no writing in the nature of the document that Sumners prepared, but the parties agree upon the essential terms of a settlement – with the expectation that the mechanics will be "fleshed out" in a writing to be thereafter executed – the settlement will be enforced, notwithstanding the fact that a document fails to materialize due to a party's subsequent repudiation. *Lahue v. Pio Costa, III, et al.*, 263 *N.J. Super*. 575, 596 (App. Div.), *certif. denied,* 134 *N.J.* 477 (1993*). See, also, Williams v. Vito, et al*., 365 *N.J. Super.* 225, 232 (Law Div. 2003) (The manifestation of assent may be made wholly or partly by spoken words, and the existence of an enforceable contract is not negated by the fact that subsequent writings are contemplated.)

In the present case, a writing which included all essential terms did exist, was reviewed by respondent and, according to respondent's counsel, was approved. To reject that written settlement, simply because the word "draft" appears on the pages, when an oral agreement would have sufficed to establish a contract, would require the Commissioner to elevate form over substance. The Commissioner declines to do so.

Nor does the Commissioner agree with respondent's contention that *N.J.A.C.* 1:1-19.1 requires anything more for a viable settlement than what was done in this case. *N.J.A.C.* 1:1-19.1(a) obliges the parties to disclose to the ALJ the full settlement terms in writing or "orally, by the parties or their representatives." There is no dispute that the ALJ was apprised of the settlement terms formulated in his chambers on November 15, 2006, committed to writing on November 21, 2006, approved (according to Cohen) by respondent before November 27, 2006, and approved by petitioner on the evening of November 27, 2006.

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settlement terms, and that there was no writing memorializing a settlement agreement. Thus, no parallels can be drawn between Dunn's conduct or intent regarding the formulation *vel non* of a settlement contract, and respondent's conduct in the present case.

N.J.A.C. 1:1-19.1(b) states, in pertinent part, that

> if the judge determines from the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the judge shall issue an initial decision, incorporating the full terms and approving the settlement.
>
> (Emphasis added.)

The ALJ determined from the certifications, documentary evidence and representations at the April 30, 2007 hearing that the settlement was voluntary at the time it was consummated, and that – as stated in respondent's January 29, 2007 certification – it was after respondent spoke with "friends, relatives and clergy" that she changed her mind. *N.J.A.C.* 1:1-19.1 does not require that respondent specifically state under oath that the settlement was voluntary. The ALJ may determine from the entirety of the sworn testimony (including certifications) of all the parties whether a voluntary settlement exists.

In consequence of the foregoing, the Commissioner adopts the determination of the OAL that a settlement was reached on November 27, 2006, consisting of the terms memorialized in the document attached as Exhibit B to the January 11, 2007 Sumners Certification. However, because it is not within the jurisdiction of the Commissioner of Education to enforce settlements, petitioner's enforcement motion is denied.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: August 9, 2007

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[6] 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.*