

CARTERET EDUCATION :
ASSOCIATION, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF : DECISION
 THE BOROUGH OF CARTERET, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT, :
 :
 AND :
 :
 KEVIN W. AHEARN, :
 :
 INTERVENOR. :
 _____ :

SYNOPSIS

Petitioning education association (Association) challenged the respondent Board's refusal to certify tenure charges filed by the Association against the district Superintendent of Schools Kevin Ahearn. Two charges of unbecoming conduct and one charge of official misconduct were filed by the Association based upon allegations by a teaching staff member. The Board asserted that the tenure charges had been duly considered, and a determination was made that there was no probable cause to credit the evidence in support of the charges. The Superintendent intervened in opposition to the certification of tenure charges. Respondent filed a motion for summary decision, which was not answered by the Association.

The ALJ found that: the Board's consideration of the tenure charges was appropriate, and conclusions reached were not arbitrary, capricious or unreasonable; and the Board's decision that the evidence presented was not credible, and was based on assumptions, was reasonable. The ALJ concluded that the petition should be dismissed.

The Commissioner adopted the Initial Decision as the final decision in this matter, and dismissed the petition.

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.

OAL DKT. NO. EDU 2677-07
AGENCY DKT. NO. 65-3/07

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions from the petitioning Education Association (the Association) and separate replies by the Board of Education (Board) and the intervenor (Ahearn), all timely filed pursuant to *N.J.A.C.* 1:1-18.4.

In its exceptions, the Association asks that the decision of the Administrative Law Judge (ALJ) be rejected and remanded. The Association – citing extensively to *In Re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967) and *Manalapan-Englishtown Education Association v. Manalapan-Englishtown Board of Education*, 187 *N.J. Super.* 426 (App. Div. 1981) – reiterates the contention of its petition of appeal that the Board exceeded its authority by evaluating evidence and making credibility

determinations in reviewing the tenure charges filed against Carteret Superintendent of Schools Kevin Ahearn. (Petitioner’s Exceptions at 1-6) The Association also cites to *Bey v. Newark Board of Education*, 93 N.J.A.R.2d (EDU) 288, for the proposition that a plenary hearing is needed to decide whether the Board made its probable cause determination in a proper manner (*Id.* at 6) and to allow the Association to prove whether Ahearn’s responses to the tenure charges at the local level were “fact or fiction,” since there is no requirement that these responses be provided to anyone or any entity other than the board of education. (*Id.* at 2) Asserting that no case has defined “probable cause” in the more than forty years that the Tenure Employees Hearing Act has been in existence, the Association urges the Commissioner to adopt herein an adaptation of the applicable criminal standard, so as to liken a board of education to a grand jury which is not permitted to weigh evidence or make credibility findings. (*Id.* at 6-8)

In reply, the Board preliminarily objects to the form of the Association’s exceptions, asserting that they do not specify findings of fact or conclusions of law to which exception is taken, but rather “attempt to argue the case for the first time, having never submitted opposition to [the Board’s motion for summary decision] since filing the petition.” (Respondent’s Reply at 1) Nonetheless, the Board counters that the reasoning and factual findings of the Initial Decision are “soundly supported” by the evidential record – which consisted of facts deemed admitted due to the Association’s failure to dispute them at the OAL – and by the standard of review cited by the Association (*Bey, supra*, applied by the ALJ at 9-10). (*Id.* at 2) The Board further contends that *In Re Fulcomer, supra*, is not germane to the issue on appeal – other than to confirm that a board must perform a preliminary review of tenure charges – and that the Association

has misread *Manalapan-Englishtown, supra*, which was correctly found by the ALJ to require a board to make some assessment of the evidence in order to determine if probable cause exists to credit tenure charges – a conclusion which is also consistent with the criminal law precedent cited by the Association. (*Id.* at 2-3)

Similar arguments are proffered by Ahearn, who additionally reviews prior Commissioner and State Board of Education decisions in appeals of local board of education determinations not to certify tenure charges (*Ridgefield Park Education Association v. Ridgefield Park Board of Education, State Board Decision No. 71-84*, decided February 6, 1985, aff'd A-2859-84T7, App. Div., December 24, 1985, and *John A. Gringeri v. Board of Education of the Township of Wyckoff, Bergen County, 1990 S.L.D. 309*), and observes that “the existence and faithful exercise of [*Manalapan* requirements] becomes even more important as a protective measure to prevent boards from being forced to expend public money to thwart off charges with little or no validity” or charges that cannot reasonably result in dismissal or reduction of salary because they are *de minimis* even if true. (Intervenor’s Reply at 1-5, quotation at 5)

Upon review, the Commissioner is satisfied that – notwithstanding that the Board’s motion for summary decision was decided without input from the Association¹ – the ALJ did, in fact, consider and address the Association’s central contention as to the appropriate standard for the conduct of probable cause determinations in tenure matters, which was explicitly articulated in its initial pleadings and earlier communications with the Board as set forth by the ALJ at 2-3.

¹ See the Initial Decision’s procedural history at 1-2.

Moreover, the Commissioner concurs with the ALJ's specific assessment in this regard, namely that:

Manalapan makes it quite clear that as to the proposed charges [a board] must assess whether "(1) ...there is probable cause to credit the evidence in support of the charge and (2) [the] charge, if credited, [is] sufficient to warrant the dismissal of a tenured [staff member] or a reduction of his salary?" *Manalapan, supra, at 429*. This requirement means that the Board must make some assessment of the type and quality of the evidence in order to see if probable cause exists, for "evidence" of a charge that is specious, speculative, based upon rumor, without alleged first hand knowledge of the asserted facts, and the like, may not rise to the level of probable cause.²

(Initial Decision at 3, note ii)

And that:

[A board's action in making the decisions required by *Manalapan*], undertaken in conformity with the legal requirements imposed on [the board] by statute, is entitled to a presumption of correctness and is not subject to change unless the Commissioner determined that [the board] acted in an arbitrary, capricious or unreasonable manner.

(Initial Decision at 3, citing *Bey, supra, at 291*)

Finally – noting that the Association cannot now, at the conclusion of OAL proceedings, allege factual disputes and demand a plenary hearing after having failed to oppose a duly filed motion for summary decision – the Commissioner fully endorses the ALJ's application of the standards of *Manalapan, supra*, and *Bey, supra*, to the facts on record, as well as his conclusion that – based on those facts – the Board's actions in determining not to certify the Association's tenure charges against Ahearn were in no way arbitrary, capricious or unreasonable. *Ridgefield Park, supra; Gringeri, supra*.

² The ALJ further observed that the *Manalapan* court specifically declined to decide if the local board could engage in fact finding.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – upholding the action of the Board and dismissing the petition of appeal – is adopted as the final decision in this matter.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: March 31, 2008

Date of Mailing: April 1, 2008

³ 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.*