

#546-10 (OAL Decision: Not yet available online)

JOSEPH GALEGO, :  
 :  
 PETITIONER, :  
 :  
 V. : COMMISSIONER OF EDUCATION  
 :  
 BOARD OF EDUCATION OF : DECISION  
 THE CITY OF ELIZABETH, :  
 UNION COUNTY, :  
 :  
 RESPONDENT. :

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### SYNOPSIS

Petitioner – a head security guard employed by respondent Board – sought indemnification in the amount of \$13,402.50 for counsel fees incurred in defending a civil action brought against him. Petitioner requests indemnification for the work of attorney Sanford R. Oxfeld (Oxfeld) at a rate of \$300/hour, and work performed by Oxfeld’s associate at a rate of \$250/hour. The Board contends that the counsel fees are unreasonable because they exceed the allowable reimbursement rate of \$125/hour set forth in its policy on employee indemnification. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact and the matter can be decided on summary decision; the record includes a letter dated March 26, 2007, wherein counsel for petitioner clearly stated that he was representing petitioner at the hourly rate of \$150; petitioner never paid nor was he expected to pay more than \$150/hour for Oxfeld’s legal services; and the respondent Board’s policy restricting attorney fees to hourly rates not exceeding \$125 violates the Board’s responsibility under *N.J.S.A. 18A:16-6* to defray all costs incurred by school employees in defending civil actions arising out of their employment. Accordingly, the ALJ concluded that petitioner is entitled to indemnification in this matter at the hourly rate of \$150, and ordered that the petitioner be indemnified for attorney’s fees in the sum of \$6,795, which represents 45.30 hours of legal services at the hourly rate of \$150.

Upon a thorough and independent review, the Commissioner concurred with the ALJ’s conclusion that *N.J.S.A. 18A:16-6* governs the indemnification of legal costs incurred by employees for the defense of civil actions arising out of the performance of the employees’ duties, and found that the March 26, 2007 letter from petitioner’s attorney clearly stating a fee of \$150/hour – and the lack of objection to that rate by the respondent – constitute facts supporting a contract implied-in-fact concerning the fee of \$150/hour. Accordingly, the Commissioner ordered that both parties should be bound by that rate, but noted that the associate in petitioner’s counsel’s firm who worked on the case should be compensated at a rate of \$125/hour based on facts in the record which show that the billing rate for the associate is \$25 less per hour than lead counsel’s rate.

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.
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December 20, 2010

OAL DKT. NO. EDU 3818-10  
AGENCY DKT. NO. 63-4/10

JOSEPH GALEGO, :  
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At issue in this controversy is the hourly rate which may be used by petitioner’s counsel to calculate the amount of attorney fees payable to him for services he rendered defending petitioner in a civil lawsuit brought against both parties. Respondent neither contests the petitioner’s entitlement to indemnification for the legal fees nor disputes the number of hours itemized in the invoice provided by petitioner’s counsel. Rather, respondent contends that the rate for the indemnified legal services should be \$125/hour, the maximum rate allowed in a policy which respondent approved on June 25, 2009 – over two years after petitioner’s counsel had begun representing petitioner. Petitioner, on the other hand, maintains that his counsel should be paid \$300/per hour because that is a reasonable rate for an experienced attorney.

In her Initial Decision, the Administrative Law Judge (ALJ) correctly found that *N.J.S.A. 18A:16-6* governs the indemnification of legal costs incurred by employees of boards of education for the defense of civil actions arising out of the performance of the employees’ duties. *N.J.S.A. 18A:16-6* provides, in pertinent part, that

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.)

Acknowledging the statute's mandate that boards shall defray all reasonable legal defense costs incurred by employees, the ALJ reasoned that the respondent board could not defeat same by imposing a low ceiling on legal fees.<sup>1</sup>

Further, the record contains a letter dated March 26, 2007, from petitioner's counsel providing notice to respondent's counsel that he would be representing petitioner at the rate of \$150/hour. There is no evidence that respondent objected to the rate, and petitioner's counsel proceeded to render his services. Under these circumstances petitioner and his counsel could justifiably expect indemnification at the designated rate. *See, e.g. Starkey, Kelly, Blaney & White, v. Estate of Nancy Nicolaysen, Lisa Gelburd and Sigurd Nicolaysen, Jr.*, 172 N.J. 60, 68 and 69, (2002) *citing Restatement (Third) of the Law Governing Lawyers § 39 comment b(i)* (1998):

Quantum meruit is a form of quasi-contractual recovery and rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Courts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust. Quantum meruit recovery then provides compensation in circumstances in which it would be contrary to the parties' expectation to deprive the lawyer of all compensation.

Petitioner's arguments in favor of the hourly counsel fee of \$300 focused on the language in *N.J.S.A. 18A:16-6* that directs boards of education to indemnify their employees for reasonable counsel fees and expenses. Relying on *Rendine v. Pantzer*, 142 N.J. 292 (1995),

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<sup>1</sup> The ALJ's conclusion would appear to be especially appropriate in the present case, where the policy to cap legal fees was instituted by respondent over two years after petitioner's counsel had begun representing him.

certain Merit System Board regulations concerning representation fees in disciplinary hearings, and a certification by a fellow attorney, petitioner argued that \$300/hour is a reasonable fee for his attorney, who is experienced and a name partner in a firm.

The ALJ correctly determined, however, that the reasonability of the fee must be evaluated within the four corners of the case at hand. While petitioner's counsel may enjoy the stature to charge \$300/hour in today's market, there is no evidence that petitioner entered into a fee agreement binding him to pay that rate, or that petitioner made any payments to his counsel at that rate. To the contrary, the record contains the above-referenced March 26, 2007 letter from petitioner's counsel informing respondent's counsel that he would be representing petitioner at the rate of \$150/hour.<sup>2</sup> While the letter itself did not constitute an express contract, the law provides alternative theories of contract.

**Contracts** are traditionally classified as express, **implied-in-fact** or **implied-in-law**. As explained in *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford*, 144 N.J. 564, 574 (1996):

The contract is express if the agreement is manifested by written or spoken words, and **implied-in-fact** if the agreement is manifested by other conduct. Thus, contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings. Courts often find and enforce implied promises by interpretation of a promisor's word and conduct in light of the surrounding circumstances. See Restatement (Second) of Contracts § 4 comment a (1979); *id.* at § 5 comment a ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct.").

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<sup>2</sup> Apparently, the first appearance of a \$200/hour rate was in a bill from petitioner's counsel issued on January 14, 2010 – three years after the letter establishing \$150/hour as the representation rate. In consequence of respondent's resistance to paying \$200/hour, the instant petition was filed – on March 31, 2010 – demanding indemnification of counsel fees at the rate of \$300/hour.

The Commissioner finds that the March 26, 2007 letter from petitioner's counsel's to respondent's counsel – reliance upon which should have been reasonably foreseen by petitioner's counsel – and the lack of objection thereto by respondent during the following two years of counsel's representation of petitioner, constitute facts supporting a contract implied-in-fact concerning the fee of \$150/hour. Consequently, the Commissioner concludes that both parties should be bound by that rate.

In sum, upon review of the record and Initial Decision, and after consideration of the arguments in the parties' exceptions, the Commissioner grants summary disposition with the following modification to the relief requested in petitioner's summary disposition motion: the Commissioner adopts the conclusion of the ALJ that the proper fee for petitioner's counsel's work time is \$150/hour. In light of the facts in the record which show that the billing rate for the associate in petitioner's counsel's firm is \$25 less per hour than lead counsel's rate, the Commissioner finds that the appropriate proportional fee for the associate's work time is \$125/hour.

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

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 20, 2010

Date of Mailing: December 20, 2010

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<sup>3</sup> This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (N.J.S.A. 18A:6-9.1).