

CITY OF NORTH WILDWOOD,	:	
CAPE MAY COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE CITY OF	:	
WILDWOOD, CAPE MAY COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

The City of North Wildwood (North Wildwood) filed a petition in June 2014 seeking removal of pre-kindergarten and kindergarten school programs run by the Wildwood Board of Education (Wildwood BOE) within the jurisdictional limits of the City of North Wildwood, claiming that Wildwood BOE lacks authority to engage in such action outside of its own district boundaries. Wildwood BOE has leased space for early childhood school programs from St. Simeon’s Episcopal Church – which is located one block from the Wildwood city line, within the municipal limits of North Wildwood – for about thirteen years. Petitioner pursued its case against Wildwood BOE for more than a year before submitting a letter in July 2015 requesting to withdraw the petition, stating that it intended to seek the same relief in Superior Court. Wildwood BOE subsequently filed a motion seeking to have the case dismissed with prejudice. On August 21, 2015, North Wildwood filed a complaint against Wildwood BOE in Superior Court; the petitioner seeks the same or similar relief that it sought in the appeal it had just withdrawn from the Commissioner and Office of Administrative Law (OAL).

The ALJ found, *inter alia*, that: this matter is governed by *N.J.A.C. 1.1-19.2*, which is silent on whether a voluntary withdrawal is with or without prejudice; the parallel Superior Court rule directs that an action may be dismissed by the plaintiff “without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment”; pursuant to *Shulas v. Estabrook*, 385 *N.J. Super.* 91, 97 (App. Div. 2006), the determination of whether to dismiss with or without prejudice, as well as whether to impose terms that are fair under the circumstances, lies within the court’s discretion; in the instant case, Wildwood BOE went through the expense of hiring counsel, filing responsive pleadings, holding public hearings, participating in settlement conferences, and submitting a motion for summary decision, only to have North Wildwood abruptly withdraw the matter one day before oral argument involving dispositive motions was to begin; such withdrawal and re-filing with the Superior Court under the *Declaratory Judgment Act, N.J.S.A. 2A:16-50 et seq.*, was strategic, tactical in nature, and jurisdictionally improper; the Commissioner of Education has primary jurisdiction over education matters. The ALJ granted Wildwood BOE’s motion to dismiss the petition with prejudice. In so doing, he emphasized that, while North Wildwood’s remedies now rest exclusively with the Superior Court, the fact that the matter has been dismissed “with prejudice” at the administrative level is not intended to create or manufacture a basis for the Superior Court to assert jurisdiction over matters it would ordinarily not take.

The Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter, but declined to make any finding as to the merits of the petitioner’s pending Superior Court action. The Commissioner stated that petitioner can elect to pursue its claim elsewhere, but may not leave the door open to duplicative future litigation before the Commissioner. Accordingly, the petition was dismissed with prejudice.

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 11718-15
(EDU 8018-14 ON REMAND)
AGENCY DKT. NO. 146-6/14

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The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), petitioner’s exceptions, and respondent’s reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – have been reviewed. Upon full consideration of the record and the parties’ submissions, the Commissioner concurs with the Administrative Law Judge (ALJ) that the instant petition is appropriately dismissed with prejudice.

Petitioner’s exceptions, which substantially reiterate the arguments it presented to the ALJ, are unpersuasive. Although petitioner faults the ALJ for failing to discuss the unpublished decisions it cited, those decisions are neither controlling nor precedential – and contain facts and circumstances which are wholly distinguishable from the present matter.¹ The Commissioner finds that the ALJ applied the relevant law to the facts and circumstances of this case – as discussed within his comprehensive Initial

¹ *D&P Liquor Corp. v. Hillside Twp. Alcohol Beverage Control Bd.*, OAL Dkt. No. ABC 17603-13, Initial Decision (August 21, 2014) (withdrawal without prejudice following commencement of OAL hearing after testimony from petitioner’s expert witness was excluded due to petitioner’s failure to serve expert report upon respondent); *J.G. o/b/o J.G. v. Bd. of Educ.*, OAL Dkt. No. EDS 9178-03, Initial Decision (February 26, 2004) (petitioning parent in special education case permitted to withdraw request contesting child’s change in placement without prejudice); *DeBose v. Prozy’s Army and Navy*, OAL Dkt. No. CRT 5856-97, DCR Dkt. No. EB23WB38230-E, Administrative Decision (June 20, 2011) (*pro se* petitioner permitted to withdraw without prejudice prior to matter proceedings on its merits, where record contained “no evidentiary material” regarding the claims, “no legal argument addressing substantive issues of law, or certifications of undisputed facts which might support a summary decision the merits without a hearing.”).

Decision – and that the ALJ’s determination to dismiss the petition with prejudice was not an abuse of discretion.

In short, this matter proceeded for over a year – with its merits having been fully briefed in connection with the parties’ respective motions for summary decision. The day before oral argument was to occur on those dispositive motions, petitioner requested withdrawal of its petition and expressed intent to pursue its claim for relief in Superior Court. In addition to the preparation of its motion for summary decision and supporting brief, respondent spent time and money preparing answers to petitioner’s discovery requests, participating in settlement conferences, and telephone pre-hearing conferences with the ALJ. Based upon the present record, it cannot be disputed that this case was nearing its conclusion; therefore, the Commissioner disagrees with petitioner’s contention that this matter was somehow in its early stages, and that a withdrawal without prejudice is appropriate.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons stated therein – with one caveat: the Commissioner makes no findings as to the merits of petitioner’s pending Superior Court action. Certainly, the petitioner can elect to pursue its claim elsewhere at this juncture – but not while leaving the door open to duplicative future litigation before the Commissioner. Given this late stage, and the well-documented efforts already expended by respondent to defend against and resolve this action, petitioner should be precluded from returning to the Commissioner with the same claim. Consequently, respondent’s motion is granted and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: January 4, 2016

Date of Mailing: January 5, 2016

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.