

IN THE MATTER OF THE SUSPENSION OF THE :  
 CERTIFICATE(S) OF CHAE HYUK IM, : COMMISSIONER OF EDUCATION  
 SCHOOL DISTRICT OF THE TOWNSHIP OF : DECISION  
 WAYNE, PASSAIC COUNTY. :

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### SYNOPSIS

Petitioning Board sought an order suspending respondent's teaching certificate for a period of one year pursuant to *N.J.S.A. 18A:28-8* for voluntarily leaving his tenured position as a high school chemistry teacher with less than a 60-day notice to pursue a career with the Federal Bureau of Investigation (FBI). The ALJ issued a Partial Order on Summary Decision in May 2016 finding the respondent guilty of unprofessional conduct, which Order was adopted by the Commissioner in a decision dated June 30, 2016. The matter herein involves a determination on the penalty for such conduct. Respondent contended that the Board denied his request for a leave of absence to complete his FBI training, and he therefore had no alternative but to resign immediately because he could not delay the start of training. Respondent argued that an unprofessional conduct finding and any resulting action suspending his certificate would have an adverse effect on his ability to carry out his duties as an FBI agent because the Department of Justice's stated policy of disclosure to prosecutors of potential impeachment information could preclude his future ability to function as a witness.

The ALJ found, *inter alia*, that: respondent is currently employed as a special agent by the FBI; initially, respondent had requested and been approved for a one year leave of absence for the 2014-2015 school year to enable him to pursue training as an FBI agent; however, respondent failed the required physical fitness test prior to the start of the school year and informed the Board that he would be starting the 2014-2015 school year as usual; subsequently, respondent was unexpectedly offered opportunities to enter later training classes, contingent on passing the fitness test; respondent opted to take the fitness test again in October 2014, passed it, and was accepted to begin FBI training on October 19, 2014; respondent again requested a one year leave of absence from the Board, which was denied because the school year was already in session and respondent was teaching four high school chemistry classes; respondent submitted a letter of resignation and informed fellow staff that he was leaving behind his teaching materials for use by whoever was assigned to take over his classes, and left his teaching assignment on incredibly short notice; respondent made his decision based on his own self-interest; the school district did not suffer financial harm due to respondent's departure, but the continuity of teaching was disrupted; and that disruption was somewhat mitigated by the fact that seasoned teachers in the Board's employ were able to take over many of respondent's responsibilities until a permanent replacement could be found. The ALJ concluded that, given the mitigating factors, a six-month suspension of respondent's certificate was warranted. Accordingly, the ALJ ordered Mr. Im's certificate suspended for a period of six months.

Upon review, the Commissioner found that the circumstances herein do not dictate a penalty less than the general imposition of a one-year suspension of respondent's teaching certificate. Accordingly, the Commissioner rejected the ALJ's conclusion that a lesser penalty is appropriate, and ordered the suspension of respondent's certificate for the period of one year from the date of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating same.

<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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April 6, 2017

IN THE MATTER OF THE SUSPENSION OF THE :  
CERTIFICATE(S) OF CHAE HYUK IM, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE TOWNSHIP OF : DECISION  
WAYNE, PASSAIC COUNTY. :

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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 the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent, Chae Hyuk Im, and the Wayne Board of Education's (Board) reply thereto. This matter involves a determination as to whether the respondent's certificates should be suspended pursuant to *N.J.S.A. 18A:28-8* for his failure to provide the Board with the requisite notice prior to resigning from his teaching position. The Administrative Law Judge (ALJ) issued a Partial Order on Summary Decision wherein she found that the respondent is guilty of unprofessional conduct for failing to provide the Board with the 60-day notice required under *N.J.S.A. 18A:28-8* when he voluntarily choose to pursue a career with the Federal Bureau of Investigation (FBI). The Commissioner adopted that decision on June 30, 2016.<sup>1</sup> Following a hearing at the OAL on the penalty determination, the ALJ found that the respondent's certificates should be suspended for six months instead of the customary one-year suspension based on the existence of mitigating factors.

Upon a comprehensive review of this matter, the Commissioner finds that circumstances in this matter do not dictate a penalty that is less than the general imposition of a one-year suspension of respondent's teaching certificates and, therefore, the ALJ's conclusion that a lesser penalty is appropriate is rejected. *N.J.S.A. 18A:28-8* establishes the notice requirement necessary when a tenured teaching staff member wishes to resign his position and authorizes the

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<sup>1</sup> *In the Matter of the Suspension of the Teaching Certificate of Chae Hyuk Im, School District of the Township of Wayne, Passaic County*, Commissioner Decision No. 234-16, decided June 30, 2016.

Commissioner to suspend the teaching staff member's certificate for a period of up to one year for failure to comply with its provisions.<sup>2</sup> It is well recognized that “[t]he obvious purpose of *N.J.S.A. 18A:26-10* [and *N.J.S.A. 18A:28-8*] is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students.” *Penns Grove-Carneys Point Board of Education v. Regina Leinen*, 94 *N.J.A.R. 2d* (EDU) 405, 407 (citations omitted). In the instant matter, it is undisputed that respondent resigned without providing the requisite notice to the Board. It is similarly uncontroverted that the Board refused to release respondent from his 60-day obligation.

The decision to suspend a teaching certificate pursuant to *N.J.S.A. 18A:28-8* is discretionary and the Commissioner has historically evaluated all attendant circumstances on a case-by-case basis. As a general rule, however, given the underlying purpose of the statute, teachers who have been found guilty of unprofessional conduct for failing to provide the requisite 60-day notice receive a one-year certificate suspension. The one year suspension is routinely issued where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self-interest above the interests of students and their professional obligation to provide adequate notice to the board. *See, e.g. East Amwell Township Board of Education v. Patricia Acken*, 1986 *S.L.D.* 2803; *In the Matter of the Suspension of the Teaching Certificate of Vincent Montalbano, School District of Ridgefield Park Township, Bergen County*, Commissioner Decision No. 186-01, decided June 11, 2001; *In the Matter of the Suspension of the Teaching Certificate of Mary Elizabeth Farran, School District of the Chathams, Morris County*, Commissioner Decision No. 308-05, decided March 29, 2005; *In the Matter of the Suspension of the Teaching Certificate of Mary Savino, Rahway Board of Education, Union County*, Commissioner Decision No. 305-05, decided August 30, 2005; *In the Matter of the Suspension of the Teaching Certificate of Maximilian Capshaw, Upper Freehold Regional School District, Monmouth County*, Commissioner Decision No. 225-07, decided June 12, 2007.

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<sup>2</sup> It is noted that *N.J.S.A. 18A:26-10* is a companion statute applicable to non-tenured teaching staff members.

Despite the general rule of a one-year suspension, there are rare instances where the Commissioner has found justification for a lesser penalty in cases where compelling mitigating circumstances exist for the lack of the requisite notice. A common theme in many of those cases was the existence of a suitable alternative who was available to replace the resigning teacher, thereby minimizing the impact on the students. See *e.g. Board of Education of Black Horse Pike Regional School District v. Mooney*, 1984 *S.L.D.* 810 (The Board had a candidate to replace the respondent as of her requested release date, and the respondent made considerable efforts to assist the Board in ensuring a smooth transition for her replacement); *In the Matter of the Suspension of the Teaching Certificate of Burgess*, 1983 *S.L.D.* 183 (The Board failed to fulfill its promise to accelerate the replacement process, despite the almost immediate availability of a suitable replacement, and the respondent left detailed lesson plans for his successor and offered to meet with his replacement on his own time to ensure an orderly transition); and *In the Matter of the Suspension of the Teaching Certificate of Rogers*, 1989 *S.L.D.* 1962 (The non-tenured teacher of the handicapped resigned on short notice to take a position at a state facility, working with more severely and multiply handicapped children than those in his district and the Board was able to obtain a replacement for his position within one week). In another matter, the Commissioner issued a lesser suspension where the teacher's conduct was not motivated by personal gain, but rather a medical crisis. *In the Matter of the Suspension of the Teaching Certificate of Jacqueline Borden, School District of the Township of Edison, Middlesex County*, Commissioner Decision No. 247-15, decided July 29, 2015.

Unlike these cases – which have justified an exception to the customary one-year suspension – the facts in this matter are neither exceptional nor do they warrant the exercise of the Commissioner's discretion. Rather, in the instant matter, respondent's desire for the early release from his professional obligations was based solely on personal motives and his own convenience. See, *Savino, supra*. Notably, the Board originally granted the respondent a one-year leave of absence

in July 2014 to pursue a position with the FBI, however – because the respondent failed his physical fitness test in August – he could not start the FBI training that was scheduled for September 2014.

Shortly thereafter, and before the school year commenced, the respondent was offered a chance to begin a FBI training class in October 2014 – on the condition that he pass the September 2014 fitness test. This time, the respondent choose not to take the test for personal reasons and instead began teaching as usual at the beginning of the 2014-2015 school year. The respondent ultimately passed the fitness test in October 2014, at which point he again requested a one-year leave of absence; the Board denied this request on October 17, 2014. The respondent then submitted his resignation, dated October 15, 2014. All of respondent’s decisions in connection with his effort to secure a position with the FBI were made for the respondent’s own personal gain, and with his own best interests in mind – without consideration for his professional obligation to the Board and to his students.

The Commissioner recognizes the respondent’s goal of becoming an FBI agent and his concern that if he did not begin training in October 2014, he may have missed out on his opportunity. However, there is no question that respondent violated the statute, and his departure resulted in a disruption to his classes – which is the very consequence that the statute seeks to minimize when a teacher resigns from a school district. Nor should it be overlooked that the Board originally granted the respondent a one-year leave of absence when he made the request prior to the start of the 2014-2015 school year; it was only because of respondent’s own actions, *i.e.* failing the August 2014 physical fitness test and deciding not to take the test again in September 2014, that respondent declined the proffered leave of absence and began teaching at the beginning of the 2014-2015 school year. Further, the circumstances here are not analogous to several cases where a lesser penalty was imposed, because in this case there was not a replacement teacher available to ensure a smooth transition and to minimize the impact on students. *See, e.g. Mooney, supra;* *Rogers, supra,* and *Burgess, supra.* Additionally, resigning without providing the requisite notice to seek an

alternate career is not akin to resigning without the requisite notice because of a debilitating health issue. *See, Borden, supra.* Despite the fact that respondent provided teaching materials for his successor's use when he resigned, his untimely resignation had significant consequences: it left four high school chemistry classes without a permanent teacher until January 2015;<sup>3</sup> the Board had to scramble to find a suitable replacement on short notice; and the quick departure resulted in an increased workload for co-workers, who had to cover respondent's classes between October 2014 and January 2015.<sup>4</sup>

The respondent maintains that he should not receive a license suspension because it will significantly impact his ability to function as an FBI agent and that impact far exceeds anything allegedly suffered by the district.<sup>5</sup> The respondent stresses that the damage to his career as an FBI agent that would occur if his certificates are suspended is illustrated by the Department of Justice's stated policy of disclosure to prosecutors of potential impeachment information. The respondent maintains that the Giglio Policy requires the disclosure of all instances where an agent's reputation has been impugned; thus, any reputational defect – not just those related to veracity – must be disclosed and may lead to a preclusion of the agent's ability to function as a witness.<sup>6</sup> The Commissioner fully accepts the respondent's argument that he will have to disclose to the prosecutor in a case where he is a potential witness that he was found to be guilty of unprofessional conduct

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<sup>3</sup> Ironically, the teacher that the Board hired to replace the respondent was not able to start until January 2015 because he had to adhere to the 60 day-notice requirement before he could resign from his former school district.

<sup>4</sup> The chemistry students either had a substitute or a rotation of one of the other science teachers in the department for approximately three months.

<sup>5</sup> The parties' arguments were fully briefed below and summarized in the Initial Decision, and will not be repeated here.

<sup>6</sup> The parties made different arguments concerning the admissibility of the Giglio Policy and the weight that it should be given. The ALJ admitted the policy into evidence, finding that it falls within the hearsay exceptions for public records and it is self-authenticating, *N.J.R.E.* 803(6) and (8) and *N.J.R.E.* 902(e). The Commissioner finds no evidence in the record to disturb the ALJ's determination.

pursuant to *N.J.S.A.* 18A:28-8.<sup>7</sup> The fact that the respondent will likewise have to disclose that his certificates were suspended because of his unprofessional conduct is not a compelling mitigating circumstance, especially coupled with the fact that his unprofessional conduct was self-serving and adversely impacted his students. Therefore, the Commissioner is not compelled to exercise her discretion by ordering an exception to the customary one-year suspension.

Accordingly, pursuant to *N.J.S.A.* 18A:28-8, the respondent's teaching certificates are hereby suspended for a period of one year, effective upon the date of this decision. A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating this decision.

IT IS SO ORDERED.<sup>8</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 6, 2017

Date of Mailing: April 6, 2017

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<sup>7</sup> The finding of unprofessional conduct has already been ruled on by the Commissioner. As stated in the Decision dated June 30, 2016, the Commissioner does not have discretion to decide whether a teaching staff member is guilty of unprofessional conduct when it is undisputed that the employee did not provide the requisite notice under *N.J.S.A.* 18A:28-8. *In the Matter of the Suspension of the Teaching Certificate of Chae Hyuk Im, School District of the Township of Wayne, Passaic County*, Commissioner Decision No. 234-16, decided June 30, 2016.

<sup>8</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).



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. EDU 01019-15

AGENCY DKT. NO. 357-12/14

**IN THE MATTER OF THE SUSPENSION OF THE  
TEACHING CERTIFICATE OF CHAE HYUK IM,  
SCHOOL DISTRICT OF THE TOWNSHIP  
OF WAYNE, PASSAIC COUNTY.**

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**Christine Bernacki Smith**, Esq., for petitioner Wayne Board of Education  
(Machado Law Group, attorneys)

**Louis P. Bucceri**, Esq., for respondent Chae Hyuk Im (Bucceri & Pincus, Esqs.,  
attorneys)

Record Closed: December 6, 2016

Decided: February 24, 2017

BEFORE **CAROL I. COHEN**, ALJ:

**STATEMENT OF THE CASE**

Petitioner, the Board of Education of the Township of Wayne (the Board), seeks an order suspending the respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Chae Hyuk Im, replies that he resigned because he was appointed as a

Federal Bureau of Investigation (FBI) agent and had to begin his training immediately. When he asked the Board for a leave of absence, it denied his request. He therefore had no alternative but to resign immediately.

### **PROCEDURAL HISTORY**

On December 1, 2014, at the request of the Board, the Commissioner of Education (the Commissioner) entered an Order directing Im to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:28-8. Im filed a pro se answer on December 29, 2014. On January 21, 2015, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On February 6, 2015, the matter was assigned to Judge Irene Jones. On August 13, 2015, the petitioner filed a motion for summary decision. On September 3, 2015, the respondent filed his responsive brief. On September 10, 2015, the petitioner filed a reply brief. On April 4, 2016, this matter was transferred to the undersigned. On May 11, 2016, I issued an oral decision from the bench granting partial summary decision to petitioner on the issue of unprofessional conduct. Questions of fact remained that required testimony on the issue of mitigation. On May 18, 2016, I issued a written Partial Summary Decision.

On May 17, 2016, Im filed a request for interlocutory review of the oral decision. On May 27, 2016, the Commissioner declined to hear an application for interlocutory review of the partial summary decision Order. On June 30, 2016, the Commissioner issued a decision in which he concurred with the administrative law judge that the respondent was guilty of unprofessional conduct pursuant to N.J.S.A. 18A:28-8. On July 15, 2016, Im filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division. On September 2, 2016, the Appellate Division declined to hear the interlocutory appeal. Testimony on the issue of penalty was heard at the OAL on November 17, 2016, and counsel submitted their summation briefs on December 6, 2016. The record closed that day.

## ISSUE

What penalty should be imposed for Im's failure to give sixty days' notice prior to his leaving his teaching position?

## TESTIMONY

### For the Board

Two witnesses testified for the Board, Mark Toback, the superintendent of schools, and Kenneth Palczewski, the principal of Wayne Valley High School, where Mr. Im had taught prior to his departure.

**Mark Toback** testified that he had become Superintendent in August 2014. He was aware that Mr. Im had made a request for leave prior to the Superintendent's arrival in the District. The request had been discussed at the committee level, but then was withdrawn. J-8 was the Board Committee report dated August 5, 2014. It stated that Mr. Im was requesting leave in order to go to the FBI, but he was not sure if he could successfully complete the program. Therefore, he wanted to take a leave of absence from his teaching position. The Report said that it was agreed that Mr. Im was an excellent teacher and it would be prudent to allow him the year to determine if he wanted to make the career change. The Superintendent said that he was aware of the prior request. Mr. Toback said that he had a meeting with Mr. Im in mid-October 2014, at which time respondent wanted to discuss requesting a leave in order to take a position with the FBI. Mr. Toback said that he advised Mr. Im of the sixty-day requirement under the statute, but Im said that he would be leaving the District under any circumstance. Mr. Im did not volunteer to find a replacement and he did not say that he was leaving materials for a replacement teacher, or that he would notify his fellow teachers that he was leaving. Also, Im did not discuss any student issues with

Mr. Toback. However, Mr. Toback said that these issues were usually dealt with by the school principal.

The superintendent said that the second leave request was discussed by the Board but denied because of concerns about finding a replacement for a chemistry teacher and the fact that they would be setting a pattern if other teachers sought leave in order to explore other career options. Superintendent Toback stated that it was especially difficult to find chemistry teachers because there was a lot of competition from private industry. It was even harder to find a quality replacement mid-year because a permanent position was uncertain and tenure could not accrue right away. When questioned why he had referred the matter to the Department of Education, he said that he was not sending a message of punishment, but rather was just following the law.

**Kenneth Palczewski** was the principal of Wayne Valley High School for four years. He said that prior to his October 2014 request for leave, Mr. Im had discussed the fact that he might have an opportunity to join the FBI, and if he got it, he would take it. Mr. Palczewski told Im that if he did leave, it would be the principal's responsibility to cover the classes,<sup>9</sup> and Mr. Im should follow the career path for which he had a passion. Mr. Palczewski said that he did not advertise for a replacement for Mr. Im in August, because the District did not advertise for positions until they were actually available. The principal said that after Mr. Im left he looked for opportunities to cover his classes. He used in-house staff and a substitute teacher, who was a retired science teacher, whom he knew.<sup>10</sup> Mr. Palczewski did not recall Mr. Im offering to find a replacement teacher for him. Nor did he recall Mr. Im telling him that he had left materials for the classes. He also did not think that Mr. Im talked to him about any concerns he had with any students. The District advertised for a replacement for Im in October and hired someone, who was a friend of another teacher, in November. However, this teacher

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<sup>9</sup> According to Mr. Palczewski, Mr. Im taught four classes, with approximately twenty to twenty-four students per class.

<sup>10</sup> He did not know if the substitute was specifically trained in chemistry.

could not begin teaching the chemistry classes until January, because he had to give his district sufficient notice.

Mr. Palczewski said that it is hard to find chemistry replacements because people trained in this field often work in non-educational settings. Also, it is hard to find substitute teachers who have the proper certification. When asked if there were any problems caused as a result of Mr. Im's leaving, he said that some parents complained that the level of instruction of the substitute teacher was not equal to that of the regular teachers, who took on extra classes to cover Mr. Im's classes. He said that he had to speak to the substitute teacher about the situation, and he made sure that the substitute spoke to other staff members to improve his teaching methods. In addition, Mr. Palczewski said that while they were able to cover all the classes with in-house staff and a substitute, because of the schedule conflicts for the chemistry labs, the students might have had three to four different teachers during the period from October through December 2014.

### **For Im**

**Chae Hyuk Im** testified that he always wanted to help people. In college he looked into a number of science-oriented courses and then decided to become a teacher. He worked in the Wayne school system and became tenured. In 2011 a college friend said he had applied for a position at the FBI, and Im began thinking about pursuing a new career. He described a rigorous FBI application process, which he was initially able to pass. He stated that he had informed his immediate supervisors and the local union president of the progress of the application process. However, in 2011 he suffered two herniated discs that sidelined him from taking the physical-fitness portion of his testing. Then, as a result of government sequestration, there was a freeze on all job hiring. This remained in effect until 2014, when his application was reactivated. Mr. Im was informed that he would be considered for the July 2014 entry class. It was at that time that he submitted his leave request. He stated that he asked for leave because he did not know if the career change would suit him and if he would complete the training process. He wanted to leave his options open. In August 2014 he was informed that he

had failed the physical portion of the job requirement. That is when he told the Board of Education that he would not be taking a leave. The next physical test was scheduled for September 11, 2014. However, he decided not to take that test, because he did not think that his body would be in the proper condition to pass the test. If he did not pass, he would have had to wait one full year to take another physical exam. Then, in September 2014 he was informed that another physical-fitness exam would be conducted in October. Mr. Im explained the situation to the building principal, the science supervisor, and someone in Human Resources (HR). He said that they wished him good luck and asked that he keep them abreast of the situation. Mr. Im took the physical and was told that he had passed on October 9, 2014. He was told that he had to arrive for training at Quantico on October 19, 2014. He said that on October 9 he informed the principal, someone from HR, and the science vice principal of the results of the test and that he would be leaving to start training. He said that he asked how his classes would be handled, and that Mr. Palczewski wished him good luck and told him that he should not worry, because it was the principal's job to find a teacher replacement, and that he should get his personal life in order. He got the same reaction from HR and the science vice principal. Mr. Im's last day of teaching was October 17, 2014. Mr. Im was informed by either the HR person or his union president that his leave request was denied by the Board.

Mr. Im said that he spoke to his FBI mentor to question him about whether he could wait to start at the Academy. His mentor said that he should not decline the appointment because there was no guarantee that he would get another entry date, and that his failure to begin the Academy at once could be taken as a sign of lack of dedication.

Mr. Im testified as to how he felt he had mitigated the harm done to the students by his leaving early. He said that it was the practice of the Chemistry Department to have weekly meetings. The people in the department knew how to proceed if an emergency developed. The teachers would take over for each other. He said that over the course of his teaching career he had compiled worksheets for his students and had teacher notes. In 2008 he put these notes into binders. During the weekly meetings he

would discuss the information in the binders. Since he did not have a classroom of his own, he would bring the binders to the different rooms he taught in. Therefore, the other chemistry teachers were aware of the binders. He explained that the CD of his notes for class (J-15) was organized by chapter. Mr. Im left all of his teaching notes. Presumably he would not need them because he would be following a different career path. Before he left he spoke to Linda Wills, who had been his in-class support teacher, about these notes.<sup>11</sup> He said that sometime before he left, he mentioned to Ms. Potts, a biology teacher, that he had left chemistry binders in the office for use by the teachers. He also talked to Diane Marturano, a primary chemistry teacher, about the notes. However, neither Ms. Wills nor Ms. Potts was teaching the same chemistry courses as Mr. Im was teaching at the time of his departure. Mr. Im stated that he did not know who was going to be replacing him when he left. However, he knew that three of the teachers who filled in for him had many years of experience and had taught the same or different levels of the classes that he had been teaching, and the substitute teacher was a retired science teacher. He stated on cross-examination that he had proposed a potential replacement teacher, but she was not hired.<sup>12</sup>

Mr. Im stated that he did have contact with some of the students after he left because they had asked him to write letters of recommendation for college, which he did provide.

Mr. Im testified that in his present position as a special agent for the FBI, he earned \$55,000 during his first year of employment. Now that he is working in the New York area, there has been a salary adjustment and he earns \$62,000 per year. Before he joined the FBI he was a tenured teacher in Wayne and earned about the same as what he is earning now. However, the salary at the school district included health benefits, which were not included at the FBI.

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<sup>11</sup> At the time of Im's departure, Ms. Wills was teaching lower-level chemistry courses.

<sup>12</sup> It was pointed out that prior to this testimony, Mr. Im had never mentioned in discovery that he had proposed a potential replacement.

Mr. Im said that he informed the FBI that charges had been filed against him by the District. They said that he should keep them informed, and that if the ruling of unprofessional conduct were sustained, then any time he was working on a case that went to trial he would have to notify the assistant U.S. attorney, so that they could disclose the information to the defense. Mr. Im said that the people he spoke to at the FBI did not know of the specific unprofessional conduct, but if he were unable to testify as a criminal investigator, then he would be switched to an analyst role as a special agent. Mr. Im said that the people he spoke to at the FBI referred him to the policy announced in Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

**Diane Marturano** was a longtime chemistry teacher in the District. She said that she knew Mr. Im since 2005. She stated that chemistry teachers were a close-knit group, who met at least one time per week to discuss issues and curriculum. They gave common mid-terms and finals. The teachers agreed on the same labs that would be done by each of the classes. She said that she learned a few days before his departure that Mr. Im would be leaving. Mr. Im was teaching high-level chemistry classes that year, and she was also teaching high-level and AP chemistry. She said she knew that all of Mr. Im's notes had always been kept and were available in the chemistry office. She did not use his materials because she had been a teacher for a long time and actually had given him some of her materials. She recalled telling the other teachers that Mr. Im had left his binders in the chemistry office. She stated that Mr. Im's leaving was not a problem because there was a common curriculum for chemistry and the teachers had access to Mr. Im's materials. When the new teacher came in to replace Mr. Im in January, she did not hear any complaints that the children from Mr. Im's class were behind. She was the senior teacher, and no one came to her with concerns about the students or their learning after Mr. Im left. When asked whether she felt that it was disruptive to have a teacher leave mid-term, she said that there are adjustments when there is a new relationship, but if you spend a day or two and have the students express their concerns and reassure them that even though there is a different teacher they will get the same education, this will allay their fears and they can move on. She felt that, in fact, it would have been more difficult for the

students if Mr. Im had waited the sixty days and then left, because they would have established a stronger relationship with him.

### **FINDINGS OF FACT**

The parties stipulated to the following **FACTS**:

1. Im was employed by the Board from September 2005 into October 2014 as a chemistry teacher. He has standard teaching certifications in physical science and biological science. (J-1.) He was recommended for tenure as a teacher (J-2) and became tenured in September 2008. His individual contracts for 2006–07, 2007–08 and 2008–09 are attached as J-3, J-4 and J-5.

2. Im is currently employed as a special agent by the FBI.

3. Im is a naturalized citizen who has resided in this country since the age of three. His application to the FBI was first submitted in 2011. The application was inactive for several years during a period of federal hiring freezes. On May 15, 2014, Im received a letter from the Board stating his salary for the 2014–15 school year. In that letter he was also informed that if he should have reason to believe he would be unable to serve for the 2014–15 school year he should inform the District immediately. (J-6.)

4. Part of the FBI application process involved a background investigation and a physical fitness test (PFT). Around May 2014, agents of the FBI contacted both his high school (Wayne Valley High School) and the District (Wayne Board of Education) as part of his background investigation. The administration at building level and district level were aware of the application process at that time. At that time there was a different superintendent of schools. The new superintendent, Dr. Mark Toback, took over on or about August 11, 2014.

5. In July 2014 Im was informed that he was listed for a September 2014 training start date—the last such date in the federal fiscal year (October–September).

In anticipation of entering the Academy he wrote a letter to the Board on July 23, 2014, requesting a one-year leave of absence. (J-7.) The Board and superintendent agreed to grant the leave, if it was needed. (J-8.)

6. On August 7, 2014, Im had his pre-training PFT. If he had passed, he would have begun to serve in September 2014, the September FBI class training date.

7. Im did not pass the PFT, and was removed from the September training start date.

8. As a result of the test failure, Im advised the Board's administration that he would be starting the 2014–15 school year as usual.

9. Later in August 2014, Im was informed that he was unexpectedly added to the roster for the first training class of the new fiscal year (October 2014), but this was contingent on retaking and passing the PFT.

10. Failing the PFT a second time requires a mandatory one-year wait time before a new application can be processed. (J-9.) Im decided not to take the September PFT and to wait for the October PFT because he did not have time to train sufficiently to pass the September fitness test. (J-10; J-11.)

11. In or about September 2014 Im informed his building administrators and the HR department of the District that there was a new possibility of his entering the FBI Academy for training in October 2014. He approached the superintendent about seeking a one-year leave because he wanted to preserve the opportunity to return to Wayne Valley High School in 2015–16 if he failed to qualify for the FBI. The new superintendent said that it would not be likely that a one-year leave would be granted since the school year had already started.

12. On October 9, 2014, Im again took the pre-training PFT and was told that day that he had passed. This was later confirmed in writing under date of October 10,

2014. (J-12.) On the afternoon of October 9 Im drove from the PFT to Wayne Valley High School and the Wayne Board office to inform them that, with the passing of the PFT, he was expected at the Academy on October 19. Mr. Im was given a “Rice” notice on October 9, 2014, stating that the terms of his employment might be discussed in executive session at the Board meeting on October 16, 2014. (J-13.) The Board of Education had its meeting on October 16, 2014.

13. Mr. Im learned the next day, October 17, 2014, that he was definitively denied a one-year leave by the Board. Im submitted his letter of resignation, which he had prepared and signed on October 15, 2014. (J-14.)

14. At the time of his resignation Im was teaching four sections of high-school chemistry.

15. As part of his teaching process throughout his employment at Wayne Valley High School he had been compiling binders of documents which included class-procedure lists, chemistry worksheets and handouts for student use, quizzes linked to textbook chapters, lab-equipment sign-out sheets, and other materials. These items had been collected and supplemented and updated by Im, with contributions from other teachers, continuously since approximately 2006. (J-15.)

16. At the time of his departure from the District on October 17, 2014, Im was not aware of which teachers would take over his classes. He advised Diane Marturano of the fact that his materials in the binders and on a thumb drive would be left behind for use by whoever was assigned.

17. The classes taught by Im were taken over by currently employed staff members in the Wayne School District’s science department, namely, Diane Marturano, Katherine Cofer, Katie Poremba, and Fred Vafaie, who were paid a contractually specified stipend for accepting an extra period in addition to their current class schedule. Al Ruffini, a per-diem substitute, was also hired to cover Mr. Im’s classes.

This form of coverage continued until a replacement teacher, Thomas Villa, began teaching in January 2015. (J-16.)

18. Due to their work covering Mr. Im's classes, Katherine Cofer was paid \$456.08; Diane Marturano was paid \$2,280.32; Katie Poremba was paid \$2,487.89; and Fred Vafaie was paid \$310.95. Al Ruffini was paid \$100.00 per day to teach one of respondent's classes. For forty days of coverage, the cost of the per-diem substitute was \$4,000.00 before taxes.

19. Had Mr. Im given the District sixty days' notice prior to his resignation, that notice period would have expired on December 20, 2014. The costs expended by the Board to replace him during the sixty-day period were less than the amount the Board would have expended in providing salary and benefits to Mr. Im if he had worked during that same period.

20. At the next Board meeting, November 13, 2014, Mr. Im's resignation was formally accepted for the effective date of October 17, 2014. The teachers covering his classes were also approved for their additional stipend with an effective date of October 20, 2014. Further, at that meeting, Mr. Im's replacement, Thomas Villa, was approved for hire, with a start date of January 19, 2015, or sooner. (J-17.)

21. Attached are true copies of Im's annual teaching evaluations from the Wayne School District from 2007–08 through 2012–13, and two 2013 observations. (J-18 through J-23; J-24; J-25.)

22. Attached is a true copy of Wayne District Policy #3141, "Resignation." (J-26.)

## LEGAL ARGUMENTS

### Arguments of the Board

Wayne argued that Mr. Im should receive a penalty of a full year's suspension. It cited the decision in In re Teaching Certificate of Capshaw, [EDU 12318-06](#), Comm'r (June 12, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>, in which the Commissioner stated:

the Commissioner has historically evaluated all attendant circumstances specific to each case. As a general rule, however, given the underlying purpose of the statute, this evaluation—with *rare* exception—has resulted in suspension of any and all certificates for the maximum one-year period, particularly where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self interest above the interests of students and their professional obligation to provide adequate notice to the Board.

The District pointed out that Im had been looking for other employment since 2011, but had not given the Board notice until 2014. It argued that to decide that certain jobs are more worthy of exemption from the statute (*i.e.*, FBI agent) than others is a slippery slope. Not to impose a suspension would remove any power or security of the District to maintain teaching operations and would render the statute on sixty days' notice meaningless. It would eviscerate any ability of the Board to ensure that teachers give the requisite notice. The statute was designed to protect students from unnecessary disruption caused by an abrupt resignation and departure. Wayne pointed out that in In re Certificate of Montalbano, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>, a one-year suspension was imposed on a teacher who left after twelve days' notice to become a police officer. The teacher tried to make a schedule of coverage and discussed classroom duties with the replacement teachers; he completed the marking-period grades; and he sent notice of an opening to surrounding colleges. Still, the

Commissioner saw fit to impose the full penalty. This was based on the disruption to the students caused by his departure.

The Board distinguished Board of Education of Clinton v. Burgess, 1983 S.L.D. 183, by pointing out that in that matter, the board failed to fulfill its promise to hire an immediate replacement when there was one available. It also distinguished Board of Education of Black Horse Pike Regional v. Mooney, 1984 S.L.D. 810, where the Board had secured a replacement at the time of the respondent's departure from the district.

The District asserted that it was the District, rather than the respondent, who mitigated the damages. The respondent chose to start the school year because he failed the FBI physical. Mr. Im chose to wait until October to retake the physical, rather than September, because he thought he would be more physically ready to pass. The assertion that he left his teaching materials was of no moment, since he had no need for them, having left the profession. He did not find a replacement for himself, nor is it clear that he talked to the replacement teachers before he left. His assertion that the Board was on notice because of his prior request for leave was of no consequence, since he did not leave at that time. The District argued that it was the District that mitigated the damages by having the remaining teachers teach an extra course and hiring a retired substitute teacher to teach one of the chemistry sections. It was the high-school principal who managed to find a replacement for Mr. Im. However, because of the sixty-day requirement, he could not begin until January. As a result of Mr. Im's departure, the students had three to four different teachers during the period from October to January. Even the respondent's witness, Ms. Marturano, conceded that the departure of a teacher always has an impact on students.

As to the admissibility of the computer printout from the U.S. Department of Justice website that Im has sought to introduce into evidence, "9-5.100—Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('Giglio Policy')," the District puts forth several arguments. The District asserts that introduction of the printout would cause undue prejudice and confusion, as it is entirely irrelevant to the issue of mitigation,

which is the subject of the hearing. Further, Wayne asserts that the “[r]espondent had two years to produce a case, a witness, testimony, anything to support the allegation that an adverse finding would impact his potential ability to testify on behalf of the FBI,” but all it has done is to produce this printout, which is pure hearsay and irrelevant to the issue of penalty. The District distinguished Giglio v. United States, *supra*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104, which was relied upon by the respondent. It pointed out that Giglio dealt with a criminal matter in which it was determined that the credibility of a witness was in question. The Government’s case depended entirely on the co-conspirator’s testimony and, therefore, his credibility was at issue. The printout cited by respondent states that a Government witness would have to reveal, for possible impeachment purposes:

- (a) specific instances of conduct of a witness for the purpose of attacking the witness’ credibility or character for truthfulness;
- (b) evidence in the form of opinion or reputation as to a witness’ character for truthfulness;
- (c) prior inconsistent statements; and
- (d) information that may be used to suggest that a witness is biased.

The printout also states, “[t]his policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741[, 99 S. Ct. 1465, 59 L. Ed. 2d 733] (1979).”

The District argues that the only effect of the statement in the printout is that the respondent would have to disclose to the prosecutor in a case that he had failed to give appropriate notice to his prior employer when he joined the FBI. It would be pure speculation to deduce from this document that revelation of his failure to give sixty days’ notice would affect Mr. Im’s ability to testify.

Further, the District argued that the document should be excluded under the residuum rule. Under N.J.A.C. 1:1-15.5(b), hearsay is admissible only if there is some legally competent evidence to support each ultimate finding of fact. According to the District, the respondent has provided absolutely nothing to support his allegation that imposing a penalty on him will have any impact on his ability to perform his job as an FBI agent.

### **Arguments of the Respondent**

The respondent countered the District's argument on the admissibility of the website printout by saying that its objection to admissibility on hearsay grounds was completely baseless. According to the respondent, the residuum rule has nothing to do with the admissibility of evidence. Rather, it relates to the circumstances under which admitted evidence can support an ultimate finding of fact. N.J.A.C. 1:1-15.5(a) gives the judge the right to exclude hearsay evidence, it does not authorize exclusion of hearsay evidence pursuant to the residuum rule, N.J.A.C. 1:1-15.5(b). Instead a judge may exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time, or create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15-1(c). The respondent argued that since neither of these circumstances exists, the document is admissible. In addition, since the respondent testified as to the existence of the "Giglio Policy" and its impact on his ability to function in his job, the testimony serves to satisfy the residuum rule.

Further, Mr. Im argued that the policy sought to be admitted is publicly published on the Justice Department's website. As such, it would be admissible in a Superior Court proceeding because it falls within an exception to the hearsay rule. N.J.R.E. 803(c)(8) "prevents the exclusion of public records from evidence based on the Hearsay Rule." There can be no argument that the document generated from the website is not a public record. In addition, the respondent argued that the exhibit qualifies as a business record under N.J.R.E. 803(c)(6) and 801(d) and is therefore admissible under those rules as well.

Mr. Im made a number of arguments to demonstrate that it would be inappropriate to impose a penalty on him. The respondent asserted that

the issue before this agency is NOT whether Mr. Im's mid-year departure can be shown to have caused some harm which cannot be mitigated by the circumstances of his leaving. The only issue is whether his leaving **with less than 60 days' notice** caused more harm than if he had left after 60 days, and if so, whether that harm is mitigated by the circumstances of his leaving.

Mr. Im pointed out that, contrary to the District's initial position, Wayne did not lose any money as a result of Im's departure. In fact, if one compared the cost of paying Mr. Im his salary and benefits versus paying the permanent teachers for one additional class per day and hiring one substitute, the District suffered no financial loss.

Further, the students did not suffer any detriment by the respondent leaving before sixty days, as opposed to his staying until the statutory deadline. Mr. Im asserted that there was only one complaint from a parent, and that student would have suffered more had he developed a stronger bond with the resigning teacher. Mr. Im pointed out that he left all of his teaching materials in good order, and in fact almost all the teachers did not even need the materials, since they were using their own materials to teach the chemistry courses.

As for Mr. Im, he actually lost financially by taking the position with the FBI. He also pointed out that the administrators at the school and fellow teachers supported his decision to join the FBI. The respondent questioned the superintendent's position that it was necessary to enforce the sixty-day rule because of his concern that other teachers might also leave early if there were no consequences. He asserted that leaving by teachers mid-year is rare, and that the decision to pursue charges was an unreasonable punishment by a new superintendent bent on intimidation.

Im cited Burgess, supra, 1983 S.L.D. 183, and Mooney, supra, 1984 S.L.D. 810, to support his position that sanctions should not be imposed. In Burgess no penalty was imposed even though Burgess left his teaching position to earn more money in private industry. The only distinction was that Mr. Im, because he was at Quantico, could not be available to consult with the teachers who took over for him. Im sought to distinguish Montalbano, supra, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>, by saying that Montalbano could have waited until another position at the police department became available, rather than leaving without proper notice. Here, Mr. Im argued, he would have jeopardized his chance of entering any future class at the FBI training center, or sequestration could have occurred again before he got an opportunity to begin his training.

### **LEGAL ANALYSIS**

The evidentiary rules applicable to hearings before the Office of Administrative Law are outlined at N.J.A.C. 1:1-15.1 to -15.12. N.J.A.C. 1:1-15.1, entitled "General rules," provides in pertinent part:

(b) Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.

(c) Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:

1. Necessitate undue consumption of time; or
2. Create substantial danger of undue prejudice or confusion.

N.J.A.C. 1:1-15.5, entitled “Hearsay evidence; residuum rule” provides:

a. Subject to the judge’s discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

b. Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

Therefore, the initial criterion for the admission of evidence before the Office of Administrative Law is a determination of the relevancy of the proposed evidence. Relevant evidence is defined in the rules as meaning “evidence having any tendency in reason to prove any material fact.” N.J.A.C. 1:1-2.1. “To determine relevancy, a judge must focus ‘on the logical connection between the proffered evidence and a fact in issue. If the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by a rule of law.’” State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010) (citation omitted). However, although all relevant evidence is admissible, relevant evidence may be excluded if its probative value is substantially outweighed by the risk that its admission will either (1) necessitate undue consumption of time or (2) create the danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1(c). Moreover, although hearsay evidence is admissible before the Office of Administrative Law, there must be some legally competent evidence to support each ultimate finding of fact. N.J.A.C. 1:1-15.5(b); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80 (App. Div. 2001). The underlying rationale of the rule is that an administrative determination should “not rest upon evidence which the unsuccessful party was *incapable* of impeaching or rebutting.” In re Application of Howard Sav. Bank, 143 N.J. Super. 1, 8–9 (App. Div. 1976).

Petitioner objects to the admission of the Giglio Policy (R-1) into evidence because it avers that its admission would cause undue prejudice and confusion, as it is entirely irrelevant to the issues of mitigation, and because it contends that the document has no foundation and is completely speculative. Respondent, on the other hand, avers that the petitioner's objection to the admissibility of the Giglio Policy on hearsay grounds is completely baseless. Respondent argues that admitting the Giglio Policy would not result in any undue consumption of time and there is nothing prejudicial or confusing about it. Respondent seeks its admission as evidence of the impact that an adverse sanction ruling would have on his duties as an FBI agent. Respondent also avers that the Giglio Policy is a policy of the Justice Department that is publicly published on its website. As such, respondent argues that the document falls within the accepted public-records exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6) and (8).

Initially, it is important to recognize that the question of relevancy must be distinguished from that of sufficiency and weight. Evidence, though weak, may be relevant if it tends to prove the issue. The purpose of the hearing is to give the respondent a full opportunity to present evidence of mitigation to determine whether a certificate suspension is appropriate. Respondent asserts that the Giglio Policy should be admitted and relied upon (together with other evidence, such as his testimony) as evidence of the impact that an adverse sanction ruling will have on his duties as an FBI agent. Petitioner objects to its admission based upon its claim that the Giglio Policy is irrelevant on the issue of mitigation. Petitioner's position fails to recognize that the impact a disciplinary action has on a teacher's career has been held to be a valid consideration in determining the proper penalty to be imposed when disciplining teachers. Although it concerned a tenured teacher that was appealing his dismissal for conduct unbecoming a teacher, the Appellate Division's admonition to the Commissioner regarding the penalty warranted by the teacher's actions in In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), is germane to the present matter. The court stated:

We hold no brief for the teacher's conduct in this case. . . .

Although such conduct [restraining a student] certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. . . . **However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State . . . .**

. . . We observe that the local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges, and he had consistently received pay raises each year.

The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.

[Fulcomer, 93 N.J. Super. at 421–22 (citation omitted) (emphasis added).]

Therefore, the issue presented by respondent's attempt to introduce the Giglio Policy into evidence is not one of relevance, but instead one of the sufficiency and weight to be accorded the policy. This issue is related to petitioner's objection to the admission of the Giglio Policy based upon its claim that it is hearsay. Respondent argues that petitioner's objection on hearsay grounds is completely baseless. He argues that the document falls within the accepted public-records exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6) and (8).

As defined by the New Jersey Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted.” N.J.R.E. 801. Respondent argues that the Giglio Policy should be admitted as evidence of the impact that an adverse sanction ruling will have on his duties as an FBI agent.

N.J.R.E. 803(c)(6) provides that the following statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness:

**Records of regularly conducted activity.** --A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

And N.J.R.E. 803(c)(8) provides that the following statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness:

**Public records, reports, and findings.** --Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official’s duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official’s duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

The Giglio Policy was adopted by the Justice Department in the regular course of its business. The Rules of Evidence provide that a “business includes activities of governmental agencies.” N.J.R.E. 801(d). Both N.J.R.E. 803(c)(6) and (8) are “intended to cover admissibility of documents that are objectively reliable, were not prepared for a specific defendant, and have a sufficient guarantee of trustworthiness.

State v. Hix, No. A-4616-05 (App. Div. May 29, 2009), <<https://njlw.rutgers.edu/collections/courts/>>. Under both N.J.R.E. 803(6) and (8), any objection to the admissibility of a business or public record must be supported by some evidence that the record is not trustworthy. Ibid. Petitioner contends that the document has no foundation. However, pursuant to N.J.R.E. 902, extrinsic evidence of authenticity as a condition precedent to admissibility is not required of official publications, books, pamphlets, or other publications “purporting to be issued by public authority.” N.J.R.E. 902(e). Because the Giglio Policy was adopted by the Justice Department in the regular course of its business and within the scope of its duties; it was not prepared for a specific defendant; it is publicly published on its website; and petitioner is not challenging its accuracy, the Giglio Policy falls within the hearsay exceptions for public records. N.J.R.E. 803(6) and (8). And it is self-authenticating. N.J.R.E. 902(e).

### **CONCLUSIONS OF LAW**

Respondent seeks to have the FBI policy admitted as evidence of the impact an adverse sanction ruling would have on his duties as an FBI agent. In Fulcomer, supra, 93 N.J. Super. 404, the impact a penalty would have on a teacher’s career was recognized as being a valid consideration in determining the appropriate sanction. Therefore, respondent should have the opportunity to introduce the Giglio Policy on the issue of what sanction should be imposed. However, it will be accorded little weight, because respondent failed to introduce any additional evidence to buttress his assertion that the imposition of a one-year penalty will have any different effect on his ability to testify or perform his job than a shorter suspension period. The Certification of Eric Parisi, besides being hearsay, does not mention the Giglio Policy. All it states with regard to the effect that a penalty would have on Im’s ability to perform his duties as an FBI agent is:

I am advised that the suspension of Special Agent Im’s teaching license would require a finding of “unprofessional” conduct. It would appear that such a consequence should

be avoided in the absence of overwhelming proof of the alleged existence of truly unprofessional conduct.<sup>13</sup>

Mr. Im's testimony did nothing to shed light on the effect that a lesser penalty, or no penalty at all, would have on his ability to testify or to keep his job as a criminal investigator. Im testified that he was advised that under Giglio, if he had to testify in a criminal trial he would have to disclose to the government attorney that he had been found to have acted unprofessionally by leaving his job without proper notice.<sup>14</sup> Why a finding of "unprofessional conduct" would require him to disclose under Giglio is questionable, since it has nothing to do with credibility. But even if his testimony were to be believed, there is absolutely no evidence that a lesser penalty would impact his ability to testify or to retain his job as a criminal investigator. Therefore, there is no credible evidence to substantiate the assertion that the imposition of a lesser penalty or no penalty at all would affect his ability to remain an FBI criminal investigator.

The Commissioner has discretion pursuant to N.J.S.A. 18A:28-8 to impose an appropriate sanction of up to a one-year suspension of a teacher's teaching certificate for unprofessional conduct in resigning their position without giving the required sixty days' notice.

It was clear from the testimony of the District's witnesses that, while the disruption to Mr. Im's students was not catastrophic, there were definitely consequences to his leaving early. While permanent teachers took on all but one of Mr. Im's classes, because of scheduling difficulty for labs, each student had three to four teachers from September until January. While it is true, as the respondent argued, that there would have been a disruption no matter when Im left, the District would have had more time to try to find a replacement for Im and some of the disruption could have been alleviated had he waited the sixty days. In addition, at least one parent complained that the quality of the teaching of the substitute teacher was not up to the standards of the permanent teachers, and the principal had to talk to the substitute about the quality of

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<sup>13</sup> The respondent did not call Agent Parisi to the stand to be questioned as to what he meant by his statement.

<sup>14</sup> Besides being hearsay, Mr. Im's testimony on this issue is completely self-serving.

his teaching. Mr. Im argued that he left all of his materials for the replacement teachers, and therefore credit should be given for his efforts. It appears that Mr. Im was a very capable and organized teacher. However, there was testimony that Mr. Im did not tell either the principal of the school or the replacement teachers, except for Ms. Marturano that he had left the materials for them. While there was testimony that Mr. Im's materials were available to all the chemistry teachers, this was not due to any special effort on his part to help the teachers at the time of his precipitous departure. Rather, it was a result of his organization throughout the years. As far as his communicating with the students prior to his departure, Mr. Im said that he kept contact with some of the students because he wrote college letters of recommendation for a few of them. There was no testimony that he spoke to his classes before his departure to explain what was happening. The principal of the school, Mr. Palczewski, who was sympathetic toward Im, acknowledged that Im did not find a replacement for himself, nor did he recall Im offering to do so. A replacement was found because a newly hired teacher had a friend who decided to apply for the opening.<sup>15</sup> Mr. Palczewski also testified that at the time Im left, he was not aware that the respondent had left his materials for the replacement teachers. Nor did Im talk to the principal about the students and any special needs.

Mr. Im argued that the standard to decide whether there should be mitigation of the penalty is whether Im's leaving before the expiration of the sixty days caused more harm than if he had left after sixty days. Financially, the District did not suffer additional expenses, in fact there was somewhat of a savings. On his side, Mr. Im did not get a financial windfall by changing jobs. Mr. Im left his worksheets, and whether the teachers chose to avail themselves of the materials, they were available to them. The superintendent's argument that granting leave to Im would set a bad precedent was fallacious, because leaving on short notice was rare in the District and the principal of the school supported his decision to leave when he did. Further, the referral of this matter to the Department of Education was unreasonable punishment by a new superintendent who was seeking to intimidate the teaching staff.

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<sup>15</sup> The students either had a substitute teacher or a regular teacher who took on additional classes. Also, because of scheduling, different teachers had to fill in for the labs.

N.J.S.A. 18A:26-10 provides that “[a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.” See also N.J.A.C. 6A:9-17.9. The Commissioner has held that the central purpose of N.J.S.A. 18A:26-10 is “to provide notice to the school so that a suitable replacement can be hired without adversely impacting students.” Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to an individual case. As a general rule, however, with rare exception, the Commissioner has imposed suspensions for the one-year maximum period. Mooney, supra, 1984 S.L.D. at 821; In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm’r (June 12, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>; East Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803. In this matter, there are factors that weigh on both sides of the ledger. While the District had had prior notice of the possibility of Mr. Im’s leaving, those notices were vitiated by his subsequent disclosure that he had failed the physical and therefore would not be leaving. As the principal pointed out, the District could not advertise to fill a position until it was actually available. While the respondent’s argument that the superintendent brought the charges out of vindictiveness or an attempt to assert his own power as the new administrator may have some validity, the fact is that the statute permits the bringing of charges in situations like this one. Mr. Im left on incredibly short notice, leaving the District to scramble for replacements. While Mr. Im was free to do so, that did not mean that there were not consequences to his actions. Mr. Im could have chosen to retake the physical in September and not begin the school year. However, he chose to wait, for his own benefit, until he felt that he would be more likely to pass. He also could have chosen to wait until the following year to take the physical. It is true that another freeze could have been instituted and he might not have been able to get the FBI job. He made the decisions he made based on

his own self-interest. While it is true that the District did not suffer financial harm due to Mr. Im's departure and Mr. Im did not receive a windfall from his new job, the impact on the students also has to be considered. The purpose of the statute was to protect the students from unnecessary disruption caused by the precipitous departure of a teacher. Here, while the disruption was somewhat mitigated by the fact that seasoned teachers, who were teaching the same curriculum as Mr. Im, took his place in all but one section, there was still disruption, as Mr. Im's own witness testified. Ms. Marturano testified that she thought the disruption would have been greater for the students if Mr. Im stayed the sixty days because the students would have developed a bond with him. On the other hand, if he had stayed sixty days, it could have given the District time to make a smooth transition to a new teacher.

Mr. Im has relied on Burgess, supra, 1983 S.L.D. 183, and Mooney, supra, 1984 S.L.D. 810, for the proposition that sanctions should not be imposed. However, as the District pointed out, these cases can be distinguished from the present matter. In Burgess the school district failed to fulfill its promise to hire an immediate replacement when one was available. Similarly, in Mooney the Board had a candidate for replacement of the respondent on his anticipated release date. This case more closely mirrors Montalbano, supra, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>, where a tenured teacher accepted a position with the Ridgefield Police Department and gave twelve days' notice. The respondent tried to distinguish Montalbano by saying that Montalbano could have waited sixty days and sought a position at that time. In fact, we do not know if the position would have been available for Montalbano in sixty days. Likewise, while Mr. Im might have worried that another sequestration might have arisen, there is nothing in the record to demonstrate that a sequestration was contemplated by the agency.

Weighing all of the mitigating factors, I **CONCLUDE** that a six-month suspension of the respondent's teaching certificate is warranted at this time.

**ORDER**

Based on the above findings of fact and conclusions of law, I **ORDER** that the respondent's teaching certificate be suspended for a period of six months.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 24, 2017



\_\_\_\_\_  
DATE

\_\_\_\_\_  
**CAROL I. COHEN, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

db

## APPENDIX

### List of Witnesses

#### For Petitioner:

Mark Toback

Kenneth Palczewski

#### For Respondent:

Chae Im

Diane Marturano

### Joint Stipulation of Facts and Exhibits

- J-1 Teaching Certification of Chae Hyuk Im
- J-2 Tenure Recommendation memos
- J-3 2006-07 Employment contract of Im
- J-4 2007-08 Employment contract of Im
- J-5 2008-09 Employment contract of Im
- J-6 May 15, 2014 salary notice
- J-7 July 23, 2016 leave request
- J-8 August 5, 2014 Board Committee report
- J-9 Certification of Eric A. Parisi
- J-10 August 15, 2014 email as to fitness testing
- J-11 October 6, 2014 email regarding October fitness test
- J-12 October 10, 2014 FBI acceptance letter
- J-13 October 9, 2014 Notice of Board Meeting
- J-14 October 15, 2014 resignation letter
- J-15 Teaching materials on disk
- J-16 Certification of Claudia Olivo
- J-17 November 13, 2014 Wayne Board of Education Agenda

- J-18 2007-08 annual teaching evaluation of Im
- J-19 2008-09 annual teaching evaluation of Im
- J-20 2009-10 annual teaching evaluation of Im
- J-21 2010-11 annual teaching evaluation of Im
- J-22 2011-12 annual teaching evaluation of Im
- J-23 2012-13 annual teaching evaluation of Im
- J-24 November 24, 2013 classroom observation of Im
- J-25 December 11, 2013 classroom observation of Im
- J-26 Wayne District policy 3141

For Petitioner:

None

For Respondent

R-1 Giglio Policy