

New Jersey Commissioner of Education
Final Decision

Vincenza Olsen-Faivre and Donna Perez,

Petitioners,

v.

Board of Education of the Carlstadt –
East Rutherford Regional School District,
Bergen County,

Respondent.

Synopsis

Petitioners – tenured secretaries in the respondent Board’s school district – challenged the Board’s decision to deny their salary increases, and to rescind petitioner Vincenza’s Olsen-Faivre’s stipend for serving as the district’s substitute coordinator, based upon an alleged act of fraud. Specifically, the Board contended that the petitioners conspired to fraudulently deceive the Board in order to receive salary increases.

The ALJ found, *inter alia*, that: petitioner Olsen-Faivre was and continues to be the confidential secretary to the district’s Superintendent of Schools; petitioner Perez was formerly employed as confidential payroll clerk and bookkeeper for the district; the allegations herein arose when the Board’s Business Administrator reviewed newly approved salary revisions for the 2014-2015 school year, and subsequently accused petitioners of conspiring to include Olsen-Faivre’s substitute coordinator stipend in her pensionable salary without obtaining Board approval; both the petitioners and the Board presented credible, competent witness testimony at hearing; based on the totality of the evidence presented, there is no basis to find that petitioners conspired against the Board; the evidence did not support the conclusion that petitioners committed fraud by intentionally disobeying a supervisor’s instruction or unilaterally altering Board documents without approval; on the contrary, the testimony showed that the Superintendent at the time of the incident supported the idea of Olsen-Faivre’s stipend becoming pensionable. The ALJ concluded that petitioners are entitled to the Board-approved salary increases they were denied in violation of their tenure rights. Accordingly, the ALJ reversed the Board’s decision denying said increases and rescinding Olsen-Faivre’s stipend.

Upon comprehensive review, the Commissioner concurred with the ALJ that petitioners did not conspire to fraudulently deceive the Board in order to receive salary increases; further, the Board’s decision to rescind their salary increases was a violation of their tenure rights. In so deciding, the Commissioner found no basis in the record to reject either the ALJ’s recitations of testimony or his determinations of witness credibility. Accordingly, the Commissioner determined that petitioners are entitled to their approved salaries for the 2014-15, 2015-16 and 2016-17 school years, but found that petitioner Olsen-Faivre is not entitled to reimbursement for the stipend she claimed as substitute coordinator because she never obtained tenure in that position.

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.

May 13, 2019

OAL Dkt. No. EDU 9612-15
Agency Dkt. No. 108-5/15

New Jersey Commissioner of Education

Final Decision

Vincenza Olsen-Faivre and Donna Perez,

Petitioners,

v.

Board of Education of the Carlstadt –
East Rutherford Regional School District,
Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The petitioners, tenured secretaries in the Carlstadt-East Rutherford Regional School District, are challenging the Board's decision to deny their salary increases, and to rescind petitioner Vincenza Olsen-Faivre's stipend for the substitute coordinator position, based upon an alleged act of fraud. Following three days of hearings at the OAL, the Administrative Law Judge (ALJ) found that the petitioners did not conspire to fraudulently deceive the Board in order to receive salary increases. The ALJ also found that the Board's decision to rescind their salary increases was a violation of their tenure rights. Therefore, the petitioners were entitled to their Board approved salaries for the 2014-15, 2015-16 and 2016-17 school years. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the petitioners did not conspire to fraudulently deceive the Board to

receive salary increases, and that the Board's decision to rescind their salary increases was a violation of their tenure rights.¹ Importantly, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. The ALJ found that the petitioners' testified credibly and that the evidence presented does not support the conclusions that a conspiracy was committed by the petitioners. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her and made findings of fact based upon their testimony. It is well established that the Commissioner must defer to the credibility findings of the ALJ unless these prove to be arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record. *N.J.S.A. 52:14B-10(c)*.

Accordingly, the petitioners are entitled to their approved salaries for the 2014-15, 2015-16 and 2016-17 school years.²

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: May 13, 2019

Date of Mailing: May 14, 2019

¹ The ALJ discussed various other potential issues in the Initial Decision, including the fact that the secretaries were given contracts for a three-year term. The facts in this case are extremely case specific and it is not necessary to posture on the length of the petitioners' contracts in order to resolve this matter. The Commissioner is, however, in accord with the ALJ's determination that *N.J.S.A. 18A:29-4.1* does not apply to the petitioners because they are not teaching staff members, nor do they hold any certificates.

² Petitioner Olsen-Faivre did not obtain tenure in the substitute coordinator position, and as such she is not entitled to reimbursement for the stipend amount.

³ 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 09612-15

AGENCY REF. NO. 108-5/15

VINCENZA OLSEN-FAIVRE

AND DONNA PEREZ,

Petitioners,

v.

BOARD OF EDUCATION OF THE

CALRSTADT-EAST RUTHERFORD

REGIONAL SCHOOL DISTRICT,

BERGEN COUNTY,

Respondent.

Vincenza Olsen-Faivre and Donna Perez, appearing pro

Dennis McKeever, Esq., for Respondent (Sciarrillo, Cornell, Merlino, McKeever
& Osborne, LLC, attorneys)

Record Closed: February 15, 2019

Decided: February 19, 2019

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises from the denial of salary increases to Vincenza Olsen-Faivre (Olsen-Faivre or Faivre) and Donna Perez (Perez), Petitioner employees of the Board of Education of Carlstadt-East Rutherford (Respondent), and rescission of a stipend from Faivre due to an alleged act of fraud committed by Petitioners. Petitioners contend that Respondent violated the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 and the Teach-NJ Act, N.J.S.A. 18A:17-1.

On April 11, 2015, counsel to Petitioners filed a Petition of Appeal and supporting documents to the Director, Bureau of Controversies and Disputes (Bureau) of the New Jersey State Department of Education. This petition challenged the salary-increase rescission of Olsen-Faivre and Perez and loss of stipend to Olsen-Faivre.

On May 11, 2015, notarized verifications were sent by Petitioners to the Bureau. These verifications were received on May 12, 2015.

On June 30, 2015, Respondent filed a Motion to Dismiss in lieu of an Answer pursuant to N.J.A.C. 6A:3-1.5(g).

On July 2, 2015, this matter was transmitted to the Office of Administrative Law for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 13, 2015, Petitioners filed their letter brief opposing Respondent's Motion to Dismiss. On July 20, 2015, Respondent submitted its response to the Motion to Dismiss.

On October 1, 2015, this tribunal denied Respondent's Motion to Dismiss and held that Petitioners had a vested right to receive their salary increases due on December 10, 2014. This tribunal determined that rescission of the salary increases

was a prohibited compensation reduction which violated Petitioners' tenure rights pursuant to N.J.A.C. 18A:17.2.

Following a telephone prehearing conference, this tribunal issued an Order requiring Respondent to file its Answer on or before October 30, 2015. The Order specified that discovery be completed by February 1, 2016.

Respondent submitted its Answer on October 27, 2015.

On July 8, 2016, Petitioners filed a Motion for Partial Summary Decision. On July 29, 2016, Respondent filed a letter brief opposing Petitioners' Motion for Partial Summary Decision.

On September 23, 2016, this tribunal denied Petitioners' Motion for Partial Summary Decision because the parties disputed several material facts. These disputes include: 1) whether Petitioners, pursuant to N.J.S.A. 18A:29-4.1, are or were considered "full-time teaching staff members"; 2) whether Petitioners' terms of service expired before the three-year time period stipulated in their contracts; and 3) whether Petitioners are entitled to a salary increase for the first year or subsequent years.

A hearing scheduled for September 26, 2016, and September 27, 2016, was adjourned.

In December 2016, Respondent retained new counsel. On or about April 3, 2017, Petitioners submitted a Notice of Substitution of Attorney confirming that Petitioners would appear pro se and that former counsel withdrew its appearance.

On April 18, 2017, Respondent requested an adjournment of the hearings scheduled in late April. An in-person pre-hearing conference was held on April 24, 2017, and hearings were held on May 4, 2017, May 12, 2017, and June 16, 2017.

Petitioners filed their post-hearing brief and exhibits on September 8, 2017. Respondent filed its reply brief on September 25, 2017.

A copy of Exhibit P-12 was provided on February 15, 2019, in order to complete the record.

FACTUAL BACKGROUND

Petitioners are or were employed by Respondent Board of Education of Carlstadt-East Rutherford as tenured administrators employed as confidential secretaries. Perez formerly served as confidential payroll clerk and bookkeeper and Olsen-Faivre served as confidential secretary to the superintendent. Olsen-Faivre is, and Perez was employed under a three-year contract approved by the Board. Petitioners were not and are not union members nor members of an employment association. Therefore, terms and conditions of their employment contracts were not negotiated subject to a collective bargaining agreement. Salaries and employment terms were negotiated on an individual basis.

During the 2013-2014 school year, Perez's contractual salary as payroll clerk and bookkeeper was \$79,032 plus additional compensation for longevity. Olsen-Faivre's contractual salary as confidential secretary was \$56,787 with additional compensation for longevity plus a stipend for her job duties as substitute coordinator.

Petitioners' contracts expired on June 30, 2014. Contracts for the upcoming years had not yet been fully negotiated by the commencement of the 2014-2015 school year. As such, Petitioners' continued employment in their positions was subject to the contractual terms set forth in the expired employment contract while contract negotiations continued.

The respective salaries of Petitioners remained the same at the start of the 2014-2015 school year as they were during the 2013-2014 school year. The salaries were

approved for Petitioners at the Board's meeting of May 7, 2014. Olsen-Faivre's total salary was \$60,912 including a base salary of \$56,787, plus \$1,425 for longevity, and a \$2,700 stipend for her substitute coordinator position. The primary function of Olsen-Faivre's job position was to contact substitutes to ensure that the district's classrooms would have adequate personnel coverage. Perez's total salary was \$79,507 including a base salary of \$79,032, plus \$475 for longevity.

The contract negotiations between the Becton Educational Association (BEA) and the Board concluded with the Board meeting of December 10, 2014, and salaries and appointments for faculty and support staff were approved. At the December 10, 2014, meeting, the salaries for its confidential secretaries for the 2014-2015, 2015-2016, and 2016-2017 academic years were approved by Respondent, subject to individual employment contracts for each employee. For the 2014-2015 academic year, Olsen-Faivre's salary was set to be raised to \$61,487, plus longevity, and Perez's salary was set to be raised to \$81,032 plus longevity.

After this process concluded, District Business Administrator Nicholas Annitti (Annitti) reviewed the Board's payroll records and determined that Olsen-Faivre and Perez had conspired to include Olsen-Faivre's substitute coordinator stipend in her pensionable salary. Annitti determined specifically that Olsen-Faivre and Perez logged into the district's payroll system using Perez's system access as payroll clerk to include Olsen-Faivre's stipend in her base salary as a district confidential secretary. He determined that this occurred despite the fact that Olsen-Faivre's employment contract did not include the amount in her base salary and neither Respondent nor any district administrator authorized this action.

Following Annitti's determination, Respondent held a special meeting on January 21, 2015. At the meeting, Respondent voted to rescind the salary increases granted to Petitioners for the 2014-2015 school year. Additionally, Respondent directed the Superintendent of Schools to issue letters of reprimand to the Petitioners for their actions. Respondent also directed the administration to advertise the substitute

coordinator position in which Olsen-Faivre had been employed and for which she received a stipend.

Letters of reprimand were issued on January 26, 2015. The District Superintendent issued a letter to Olsen-Faivre for her actions, and Annitti as District Business Administrator/Board Secretary issued a letter to Perez. They were reprimanded for an alleged conspiracy to roll Olsen-Faivre's stipend into her base salary for pension benefits without obtaining Board approval.

Petitioners appealed Respondent's action.

TESTIMONY

Nicholas Annitti

Nicholas Annitti testified that he was the School Business Administrative Board Secretary of the Carlstadt-East Rutherford Regional Board of Education. During his nineteen years employed by Respondent, his job duties were largely financial. Annitti testified that Perez's position as secretary was not a tenured position, but her position as bookkeeper was a tenured position. Olsen-Faivre's position was a tenured position. Annitti further agreed that, as non-union members, Olsen-Faivre and Perez did not negotiate their contracts subject to a collective-bargaining agreement. Perez and Olsen-Faivre therefore negotiated directly with the Board to create their contract. Annitti outlined the work duties of the substitute coordinator as someone who arranged for substitute teachers when a regular teacher was absent. Annitti did not believe this position to be a "tenure-able" position. Olsen-Faivre held the duty of substitute coordinator as a stipend position.

Annitti further testified that, at the Board meeting in which the three-year contracts for Confidential Secretary was agreed upon, the stipend was not included as part of a pensionable salary.

Annitti outlined the typical procedure taken when a salary is coordinated and calculated by the Superintendent's Office and then sent to the Payroll Department. The Payroll Department then cross-checks the adjustment made and puts the salary adjustment onto the Board agenda. Annitti further testified that the Payroll Department does not change salaries without prior authorization from the Superintendent, and the Superintendent never changes salaries without a resolution passed by the Board of Education.

Annitti further testified that Perez was an efficient employee that knew payroll policies and had a strong knowledge of which compensation was pensionable and which was non-pensionable. Annitti continued that he only experienced a stipend being rolled into an annual salary on one prior occasion. In that instance, a Confidential

Secretary's stipend was added to her pensionable salary after she requested that the stipend be added. Following the request, the Board rescinded the Motion which paid her a stipend, withdrew the stipend, and rolled it into her salary.

The increase to Olsen-Faivre's salary was not discovered until after the contract negotiations of the confidential employees had concluded. Annitti discovered the salary increase, and immediately asked Olsen-Faivre about the increase. His recollection was that Olsen-Faivre replied that the Board had negotiated and approved the stipend to be added to her salary, and that Board member, Raymond Muszynski had approved the action. Annitti reported that Perez also stated that the Board approved of adding the stipend to Olsen-Faivre's salary. Having no recollection of the Board negotiations and action, Annitti questioned his colleagues and brought up the salary increase for discussion at the next Board meeting. None of the other Board members recalled approving or even discussing the salary increase. Annitti stated that after the meeting, Perez was defensive and told Annitti, "You'll be hearing from my attorney."

Raymond Muszynski

Raymond Muszynski testified that he has served on the Board of the Carlstadt-East Rutherford Board of Education for ten years. Muszynski testified that he did not recall the Board discussing Olsen-Faivre's stipend rolling into her pensionable salary at the Board's May 2014 meeting. Muszynski testified that he believed he was the Chairperson of the Negotiations Committee on the date of the Board meeting in question. As the individual that handled negotiations at that time, all compensation issues were brought before him.

Renee Engelhardt

Renee Engelhardt testified that she was employed by the Carlstadt-East Rutherford Regional Board of Education as a Confidential Secretary to the Business Administrator, a position which she held for fifteen years. Engelhardt testified that she was not a member of a collective bargaining unit, and as such, that she was usually

subject to three-year contracts. When discussing her duties, Engelhardt stated that she prepares exhibits for Board meetings. When asked about the procedure regarding approval of stipend positions, Engelhardt stated, based upon her recollection, that stipend positions are approved under separate Resolutions. Her job duties included attending all Board meetings and did not recall discussion of Olsen-Faivre's stipend being rolled into her pensionable salary. Engelhardt further testified that the meeting in question was extremely tumultuous.

Engelhardt testified that during her time as an employee with the Board of Education, she received a stipend for attending Board of Education meetings. She stated that her stipend was made pensionable by the Board of Education by rolling her stipend into her salary. This occurred in November of 2011, when a new contract was negotiated.

Vincenza Olsen-Faivre

Olsen-Faivre testified that she is currently employed as the Superintendent's Secretary for the Carlstadt-East Rutherford Regional Board of Education. She has been employed by the Board since 1997. Olsen-Faivre testified that she worked under a three-year employment contract beginning July 1, 2014. Olsen-Faivre testified that she essentially "took on" the role of substitute coordinator in 2008. As a substitute coordinator, Olsen-Faivre worked outside the Superintendent's office with the Principal's secretary. She called substitute teachers, as a previous outside vendor had done.

Olsen-Faivre testified that she had a discussion with previous Superintendent James Jencarelli, wherein he stated that she would receive payment for coordinating substitute teachers at some point prior to 2008. Olsen-Faivre began performing these duties when the outside vendor stopped performing this function. Olsen-Faivre testified that she wrote a memo to him in which she requested payment for the role of substitute coordinator, and he presented that memo to the Board of Education. She testified that the Board agreed via a resolution to pay a stipend of \$2,350 for coordinating the substitutes. She testified that she additionally gave Superintendent Gary Bowen a

memo to present to the Board in April of 2014 regarding the stipend. Neither party produced a copy of the memo. She testified that when she handed the memo to Dr. Bowen, he told her to put the stipend in her "pensionable wages" column in the salary resolution chart for the 2014-2015 school year, to be presented to the Board for discussion. Additionally, her role should be changed in her job description for the Board proposal. Olsen-Faivre testified that she does not recall seeing any Board minute meetings that discussed the stipend. She was removed from the position of substitute coordinator following the allegations that are the subject of this hearing.

Olsen-Faivre testified that the allegations that are the subject of this hearing relate to a formal reprimand she received for directing another employee to add a \$2,700 stipend to her base salary, making the amount pensionable, without the knowledge of Business Administrator Annitti. She testified that the increase from \$2,350 to \$2,700 reflected a conversation with a Mr. Mango, Interim Superintendent, about an increase in the stipend. She testified that she did not direct any employee to commit fraud. She testified that since the Board members did not question anything that she put into the resolution, she had no reason to think that her conduct was wrong.

On cross-examination, Olsen-Faivre testified that she did not carbon copy Mr. Annitti or the Board of Education in the memo requesting that her stipend be pensionable. She testified that she has access to the personnel files that the memo was kept in. She testified that Donna Perez implemented the accounting change to make the stipend pensionable. She testified that after the meeting, she did not talk about the stipend being pensionable with any of her superiors. She did not sign a paper that included an altered job description reflecting the new position, which is sometimes the practice of the Board, after the Board meeting.

Donna Perez

Donna Perez testified that she is currently employed by the Hoboken Board of Education. She worked for the Carlstadt-East Rutherford school district for eleven years in the Payroll Department, as a bookkeeper, and in accounts payable. She

testified that her supervisor was Nicholas Annitti. Further, that after the Board approved salaries, she would take the approved agenda and put them into the payroll files. If there were changes to be made for longevity, or to a teacher's salary, she would make changes in the payroll accordingly. She also kept track of Board approval of bills. She testified that she was in Mr. Annitti's office when Olsen-Faivre asked him about including her stipend in her base salary so that it would be pensionable prior to the Board of Education meeting. She testified that she did not conspire with Olsen-Faivre to include the stipend in her pensionable salary. Perez testified that she acted in accordance with her duties when she adjusted Ms. Olsen-Faivre's salary, as the increase was approved in Board Minutes.

On cross-examination, Perez testified that she received a stipend for her role as Treasurer for Student Activities and Athletics. However, the stipend did not become pensionable because the school revoked the stipend on January 21, 2015, for disciplinary reasons related to this hearing. When asked if there was typically a signed contract presented to her before making modifications to salaries, she stated that there were plenty of instances that signed contracts were unavailable. In those instances, once the salaries were approved on the agenda, she would look at the Minutes and implement the changes. She testified that since Mr. Annitti, was supposed to review salaries before the agenda was passed on to her, she would have no reason to question the salaries in the Minutes.

Mary Vaccaro

Mary Vaccaro (Vaccaro) testified that she is the school Library Media Specialist, Technology Facilitator, the Virtual High School Site Coordinator, and a Virtual High School Teacher. She receives a pensionable stipend for her role as Technology Facilitator. As a Technology Facilitator, she helps teachers or other employees with technology issues. Vaccaro testified that in April of 2014, she assisted Olsen-Faivre with a memo. She testified she helped create this memo addressed to Dr. Bowen requesting that Olsen-Faivre's stipend be pensionable. She testified that she did not save the memo but printed it.

On cross-examination, Vaccaro testified that she has no knowledge of the Board deliberations or any other discussions regarding stipend positions. She does not know what happened to the memo once she handed it to Olsen-Faivre.

Louise Clarke

Louise Clarke (Clarke) has been the Superintendent of schools since July 1, 2014 and has her office in Becton Regional High School in the Carlstadt-East Rutherford School District. She testified that she has not had a personal conversation with Olsen-Faivre regarding her stipend. Clarke testified that she had a conversation with the prior Superintendent, Dr. Bowen, regarding the stipend. She along with Dr. Bowen and Olsen-Faivre were in Bowen's office at the time of the conversation. Bowen told Clarke that in order to put a stipend into an employee's pension or to roll it into a pension, the best way is to change the job description on a Salary Exhibit for presentation to the Board. Clarke testified that typically, when a Salary Exhibit is created, both the Superintendent and the Business Administrator review them. Once the Business Administrator signs off on the Exhibit, the agendas are sent out in packages to the Board members through his office. Clarke testified that she had a conversation with Dr. Bowen regarding Ms. Olsen-Faivre's pensionable salary, and he did not remember whether he ever discussed it with the Board.

On cross-examination, Clarke testified that according to the letter of reprimand regarding Olsen-Faivre, there was no authority given to put the stipend into the base salary. She testified that she was present at the Board of Education action session on May 7, 2014 and does not recall any discussion regarding Olsen-Faivre's substitute teacher coordinator position. She testified that subsequent to the discovery of the stipend being a part of Olsen-Faivre's salary, she did not have a conversation with Olsen-Faivre or Annitti about resolving the terms of the investigation against Olsen-Faivre. She also testified that the reprimand letter that she passed down to Olsen-Faivre was by Board directive, and she wrote the letter using information received from Mr. Annitti.

Kevin Felten

Kevin Felten testified that he is employed by the Borough of East Rutherford as a police officer, and he began serving as a Trustee to the Board of Education in January of 2016. He testified that for employee stipends, the Superintendent recommends the stipend and Board members vote. Stipends are usually approved once a year. Felten stated that a Settlement, a payment to petitioner, was presented to the Board following the accusations against Olsen-Faivre. He voted “no” to the Settlement because he was concerned about possible fraud and pension fraud. Felten testified that Mr. Zitomer, the school board attorney, went to the Prosecutor’s Office concerning Olsen-Faivre’s actions and the Office did not prosecute the case. He testified that to the best of his knowledge, stipends are not pensionable, and they do not receive tenure. He does not know of any stipend in the past that has been pensionable for employees. He testified that he would be surprised if that had happened in the school district.

On cross-examination, Felten testified that he was not a Board member at the time that Dr. Bowen was Superintendent. He was not included on any agenda reviews during Dr. Bowen’s time as Superintendent. He testified that he was not aware that Engelhardt’s stipend became pensionable.

Jeffrey C. Bliss

Jeffrey Bliss testified that he is a partner with Lurch, Vinci, and Higgins, a CPA firm that specializes in governmental and non-profit accounting. He has served as an auditor for the Carlstadt-East Rutherford Board of Education for five years. As an auditor for the district, he is responsible for auditing their financial statements, books, and records. He also reports on compliance with government accounting standards and Department of Education compliance requirements. He testified that he received a phone call from Business Administrator Annitti regarding Olsen-Faivre’s case. Upon review, he told Annitti that Olsen-Faivre’s stipend had been included as part of her

pensionable base wage salary. He testified that in New Jersey, stipends are usually pensionable if the duties concerning the stipend are performed as part of the regular work period, and if the role is part of the employee's normal job duties. If the job is outside the normal duties of the position, it is not pensionable. He testified that to his understanding, the Board approved the substitute coordinator position as a non-pensionable stipend, as the duties were performed outside the normal workday hours of her normal position. Bliss testified that unlike a "salary increase," a stipend does not increase year after year. Rather, it is usually for a term of a contract.

LEGAL DISCUSSION

I. Credibility

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). There is no mechanical formula for determining the truth, to the extent it can be discerned, and many factors may be considered and weighed. These include the demeanor of the witness and the manner of testifying, the interest a witness may have in the outcome, and the reasonableness and coherence of the testimony. Dawson v. R.W. Vogel, CRT 4501-00, Initial Decision (April 25, 2002), adopted as modified, Dir., Division on Civil Rights (Aug. 28, 2002), <<http://njlaw.rutgers.edu/collections/oal/>>.

"Credible testimony" must proceed from the mouth of a credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see also Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). The determination of

credibility must be made based upon the totality of the evidence, including an assessment of the witnesses by the trial judge who has had the opportunity to see and hear the witnesses at hearing. See, e.g., In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002).

In the present matter, both the petitioners and respondent have presented credible, competent witnesses. Based on the totality of the evidence presented before this Court, there is no basis to find that petitioners conspired against the Board to make Olsen-Faivre's stipend pensionable without approval. Perez, who is responsible for changing employees' salaries once the Board approves, had worked for the Board of Education of Carlstadt-East Rutherford for eleven years without any disciplinary action before this incident. Olsen-Faivre was also highly experienced at her position, having been designated the substitute coordinator when the vendor hired by the school backed out. Notably, as of the date of the hearing Olsen-Faivre was still employed by the Board. The evidence does not support the conclusion that Olsen-Faivre committed fraud by intentionally disobeying her supervisor's instruction or unilaterally altered Board Documents without approval. On the contrary, testimony shows that Dr. Bowen, the Superintendent at the time of the incident, supported the idea of Olsen-Faivre's stipend becoming pensionable.

Mary Vaccaro testified that she helped Olsen-Faivre create a memo addressed to Dr. Bowen to present to the Board, requesting that Olsen-Faivre's pension be pensionable. This evinces Olsen-Faivre's efforts to follow proper protocol, although it may not have been the "best" way to have her concerns addressed. Notably, Kevin Felten testified that the Prosecutor's Office did not find evidence of fraud by petitioners sufficient to pursue a case against them.

Witnesses testified that the Board meeting in question was hectic because of a conflagration that occurred during the meeting. No one can recall, whether or not Olsen-Faivre's pensionable stipend was actually discussed. Perez testified that there were numerous occasions that signed contracts were unavailable when making modifications to salaries. In those instances, once the salaries were approved on the

agenda, she would look at the meeting Minutes and implement the changes so employees were paid according to the changes. She testified that since Business Administrator Annitti was supposed to review salaries before the agenda was passed on to her, she would have no reason to question the salaries in the Minutes following the meeting. Ms. Perez was doing her job the same as she had for the past eleven years, and I **FIND** that there is no evidence of misconduct.

The Board cannot be permitted to hold petitioners accountable for a possible error that resulted from a failure in the checks and balances of the system; particularly where multiple people were responsible for ensuring that appropriate protocols were followed. Ms. Clarke testified that once the Business Administrator signs off on an exhibit, agendas are sent out in packages to the Board members through his office. Annitti, the Superintendent, and the Board members had ample opportunity to discover a “mistake,” “error,” or “fraud” in the salary proposals presented. Instead, the proposed salary changes were approved. Accordingly, I **FIND**, that the evidence presented does not support the conclusion that a conspiracy was committed by Olsen-Faivre and Perez.

II. Enforcement of the Contracts

The gravamen of respondent’s argument involves petitioners’ attempts to enforce their respective three-year-employment contracts approved by the Board on December 10, 2014. Respondent argues that permitting these contracts to be enforced would improperly bind future boards. Multi-year salaries of full-time “teaching staff members” of a Board of Education are governed by N.J.S.A. 18A:29-4.1:

A board of education of any district may adopt a one, two, three, four, or five year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. The policy schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two, three, four, or five years from the effective date of the policy but shall not prohibit the payment of salaries higher than those required by the policy or schedules nor the

subsequent adoption of policies or schedules providing for higher salaries, increments, or adjustments.

Furthermore, N.J.S.A. 18A:1-1 defines a teaching staff member as:

. . . a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position, or employment, require him to hold a valid and effective standard, provisional, or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

Teachers and principals are among the several positions that require certification. N.J.S.A. 18A:1-1. The record indicates that Petitioner Perez was previously employed by the Board as the confidential payroll clerk/bookkeeper. Petitioner Olsen-Faivre is currently employed by the Board as the confidential secretary to the District's Superintendent. No evidence was presented to demonstrate that petitioners are teaching staff members or hold State-issued certificates.

Petitioners argue that past practice has been to enforce three-year contracts for non-certified staff. However, the "past practice" doctrine provides that where "contract terms are unambiguous or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties." Hall v. Bd. of Educ. of Jefferson, 125 N.J. 299, 301 (1991). The contracts in question are not vague, as they were explicitly for a three-year period.

Since petitioners are not "teaching staff members" as defined by N.J.S.A. 18A:29-4.1, common law rule governs the validity of the contracts. "The common-law rule is that a public body empowered to appoint a public officer 'may not forestall the rights and obligations of [its] successor by making an appointment' where the term of the appointee will not take effect until after the expiration of the term of the appointing [body]." Georgia v. Suruda, 154 N.J. Super. 439, 448 (Law Div. 1977). The Court's analysis of this principal was determined in Gonzalez v. Board of Education of Elizabeth

School District, Union County, 325 N.J. Super. 244, 252 (App. Div. 1999). In Gonzalez, the main issue before the Court was whether appellee, a local school board, had the power to appoint a superintendent whose term would begin during the term of office of the succeeding board. Ibid. In its analysis, the Court reasoned that a board of education is a “non-continuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute.” Id. at 253; see also Skladzien v. Board of Educ., 12 N.J. Misc. 602, 604-05 (Sup. Ct. 1934). Since Appellant appointee’s term would not take effect until after the expiration of the term of the Board of Education, the appointment was void. Gonzalez, 325 N.J. Super. at 252.

Notwithstanding the above cases, the doctrine of equitable estoppel is relevant to whether the Board may rescind the approved three-year employment contracts for petitioners. Equitable estoppel embodies the doctrine that “one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has detrimentally relied thereon.” Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 348 (App. Div. 1976) (citing NJ Suburban Water Co. v. Harrison, 122 N.J.L. 189, 194 (E. & A. 1939)). The test for equitable estoppel requires that the petitioner “show that the alleged conduct was done, or representations made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment.” Miller v. Miller, 97 N.J. 154, 163 (1984). Indeed, equitable estoppel is applied “only in very compelling circumstances.” Timber Properties v. Chester Twp., 205 N.J. Super. 273, 278 (Law Div. 1984). Furthermore, in those instances when it is invoked, equitable estoppel is not applied against the State to the same extent that it is applied against private individuals. Garcia v. Snedeker, 199 N.J. Super. 254, 264 (App. Div. 1985) (citing Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)). The policy reason behind this is that allowing equitable estoppel against the State may be detrimental to the public interest and could interfere with the performance of essential government functions. O’Malley v. Dep’t of Energy, 109 N.J. 309, 317 (1987).

Parties asserting equitable estoppel against the State are, therefore, required to satisfy a higher burden. Thus, in analyzing equitable estoppel claims against the State, “New Jersey state courts [] require a showing of intentional misrepresentation or other intentional misconduct—or at least a negligent disregard as to the consequences (detrimental reliance) of the acts—by the government in order for a claimant to be able to assert equitable estoppel against the government.” Kane v. Bd. of Tr., Teachers’ Pension and Annuity Fund, 96 N.J.A.R.2d (TYP) 25, 29. A party seeking to invoke estoppel against a government entity has the burden of establishing that “an officer of the state, conscious of the State’s true interest and the private [party]’s misapprehension, stood by while the private [party] acted in detrimental reliance.” Newark v. Nat’l Resource Council, 82 N.J. 530, 545 (1990). Accordingly, the focus is on *intent*.

In the present case, respondent approved three-year-employment contracts for both petitioners. The contracts included a salary increase for each of the three years. The unambiguous three-year duration of contracts for confidential employee’s conflicts with N.J.S.A. 18A:29-4.1 and the principles established in Gonzalez and Skladzien. The Board’s successors would be bound to a decision to increase salaries, which would “usurp and limit” their authority. Petitioners’ three-year contracts went beyond the term of the Board itself that created them.

The Board argues in its brief, that the three-year contracts that it awarded to petitioners were void ab initio. As such, they acted in bad faith and their conduct might rise to the level of a blatant misrepresentation or conduct beyond the scope of its authority. In either case, respondent’s action to award three-year contracts that it believed were void ab initio was an affront to all notions of fundamental fairness. Although there may not have been a clearly defined “detriment” immediately flowing from its actions, equity dictates in favor of petitioners in this case.

Accordingly, I **CONCLUDE**, that respondent should be estopped from denying petitioners’ salary increases for their employment during the three-year contract period.

I further **CONCLUDE** that petitioners are entitled to the Board-approved salaries for the 2014-2015, 2015-2016, and 2016-2017 school years, or portion thereof.

CONCLUSION

Based on the totality of the circumstances and voluminous testimony, I **CONCLUDE** that petitioners did not conspire to fraudulently deceive the Board to receive salary increases. Further, since petitioners are not employees requiring certification, like teaching staff, the Board should not have entered into a three-year contract with petitioners. However, past practice appears to have been to the contrary and respondent may have awarded three-year contracts to employees who were not statutorily entitled to contracts of such duration. I am not persuaded by respondent to now deny petitioners compensation that they had reason to believe they were under contract to receive. Respondent's bad faith should not go unrequited.

ORDER

It is hereby **ORDERED** that respondent's decision to deny salary increases for petitioners and to rescind a stipend from Olsen-Faivre due to an alleged act of fraud is hereby **REVERSED**.

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, P.O. 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 19, 2019

DATE



LELAND S. MCGEE, ALJ

Date Received at Agency:

February 19, 2019

Date Mailed to Parties:

February 19, 2019

lr

APPENDIX

WITNESSES

For Petitioners:

Raymond Muszynski
Vincenza Olsen-Faivre
Donna Perez
Loise Clarke
Mary Vaccaro

For Respondent:

Nicholas Annitti
Rene Engelhardt
Kevin Felten
Jeffrey C. Bliss

EXHIBITS

For Petitioners:

P-1 Opening Statement – Olsen-Faivre
P-8 Job Description for Confidential Secretary
P-12 Executive Session Minutes of 1/21/15
P-19 Paycheck for pay period ending 6/15
P-20 District Policy: Discipline

For Respondent:

R-1 Job Description – Confidential Secretary in Superintendent's Office
R-2 6/1/11, Work Session Agenda
R-3 Not admitted
R-4 7/13/11, Work Action Session Minutes
R-5 Olsen-Faivre Contract for period from 7/11-6/30/14

- R-6 11/9/1,1 Work Action Session Minutes
- R-7 5/7/14, Work Action Session Minutes
- R-10 4/4/12, Work Action Session Minutes
- R-11 5/8/13, Regular Action Session Minutes
- R-12 5/7/14, Work Session Minutes
- R-13 2014 PERS Pension Report
- R-14 12/10/14, Work Action Session Minutes
- R-15 1/21/15, Special Action Minutes
- R-16 Olsen-Faivre's Letter of Reprimand
- R-17 Perez's Letter of Reprimand
- R-18 Not admitted
- R-19 6/9/10, Executive Session Minutes